IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 23, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-13-07 E.A.Groupp.c.

2006-SC-000711-WC

SIDNEY COAL COMPANY, INC. — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2005-CA-001750-WC
AND
2005-CA-002228-WC
WORKERS' COMPENSATION NO. 01-78170

NORMAN CHARLES;
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined: 1.) that the claimant was not entitled to future medical benefits because his work-related injury caused a 0% permanent impairment rating; 2.) that temporary total disability (TTD) ceased because he began to work for another employer; and 3.) that he must reimburse his employer for subsequent TTD benefits. Although the Workers' Compensation Board (Board) affirmed the denial of future medical benefits under KRS 342.020(1), it reversed and remanded with regard to the reimbursement of TTD, relying on Triangle Insulation and Sheet Metal Company v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990). The Court of Appeals reversed and remanded concerning the denial of future medical benefits but found the Board's decision concerning TTD to be consistent with the principles

expressed in Double L Construction, Inc. v. Mitchell, 182 S.W.3d 509 (Ky. 2005), and affirmed in that regard. We affirm on both issues.

The claimant was born in 1967; had a ninth-grade education with grades of C-F; some training in internet technical service; and had worked previously as a belt boss and as a customer service representative for a computer business. At the time of his injury, he worked as a scoop operator for the defendant-employer's coal company, earning an average weekly wage of $795.00. On August 9 and 10, 2001, he injured his left shoulder while working. After receiving emergency room treatment, he missed about two weeks and then returned to light-duty work. He underwent shoulder reconstructive surgery by Dr. Shockey in January, 2002. On February 23, 2002, his employer laid him off and instituted voluntary TTD benefits at the rate of $530.07 per week.

The claimant returned to work as a computer customer service representative for a previous employer in about October, 2002, earning $260.00 per week. He worked in that capacity through March, 2003. From April, 2003, through October, 2003, he worked repossessing four wheelers, during which time he also underwent a second shoulder surgery by Dr. Kibler. The defendant-employer terminated TTD benefits on October 31, 2003. In November, 2003, the claimant began working as a general laborer at a car lot He continued to do so when the claim was heard and earned $6.50 per hour, working approximately 40 hours per week (i.e., he earned approximately $260.00 per week).

The claimant acknowledged that he did not report his return to work to the employer and testified that he did not know he was supposed to do so. He pointed out

that he earned a significantly lower wage and that the work was less strenuous than his work for the defendant. He also testified that the second surgery gave him a little more movement in the left shoulder but that it remained numb and painful; that he experienced numbness, tingling, and swelling, in his left arm and hand; and that he had to be careful not to pop his shoulder when working.

Dr. Shockey evaluated the claimant in September, 2001, on referral from his family physician, Dr. King. After waiting for an apparent axillary nerve injury to heal, he performed a left shoulder reconstruction on January 31, 2002, and ordered physical therapy late in March, 2002. In November, 2002, he referred the claimant to Dr. Kibler for a second opinion. After diagnostic testing, Dr. Kibler performed an anterior shoulder repair in July, 2003. Dr. King's notes from December 10, 2003, indicated that Dr. Kibler found the claimant to be at maximum medical improvement (MMI). They indicate that in April, 2004, he continued to have shoulder pain, crepitus, and paresthesias and that he felt a crunching sensation when extending the shoulder to reach.

Dr. Nadar evaluated the claimant in April, 2004. Finding him to be at MMI, Dr. Nadar assigned a 7% permanent impairment rating and work restrictions. In his opinion, the claimant would continue to require periodic treatment with analgesic and anti-inflammatory medications.

Dr. Wagner evaluated the claimant twice, in May, 2003, and in May, 2004. In the first evaluation, he noted that a CT arthrogram revealed a SLAP lesion involving the superior portion of the labrum, anterior to posterior and that the claimant was to see Dr. Kibler regarding a possible surgical repair. He thought that if the lesion was repaired, the claimant would probably be able to return to work as a scoop operator with no

restrictions or permanent impairment.

In the second evaluation, Dr. Wagner noted the claimant's complaints but also noted that his shoulder was stable and that he had a full range of motion. Finding him to be at MMI, Dr. Wagner assigned a 0% permanent impairment rating with no work restrictions. He characterized the claimant's job at the auto dealership as being an ideal occupation following his particular injury and surgery because it gave him a full, active range of motion with low-impact aerobic exercise. Nonetheless, he also stated that the claimant retained the physical capacity to return to work as a scoop operator.

Finding the opinions of Dr. Wagner to be most persuasive, the ALJ determined that the claimant retained no permanent disability from his injuries and, therefore, was not entitled to permanent income benefits or future medical benefits. The ALJ found no evidence of wrongdoing in the claimant's failure to inform the defendant-employer of his return to other work such as would invoke the provisions of KRS 342.355 and KRS 342.990. As amended on reconsideration, the award and order stated that the claimant was entitled to TTD benefits from February 23, 2002, through September 22, 2002; that he was not entitled to TTD from September 23, 2002, through October 31, 2003, due to his work for other employers; and that he must reimburse the defendant-employer for approximately $30,744.06 in benefits that it had paid for the latter period. Although the second surgery occurred in July, 2003, which was during the period for which reimbursement was ordered, the decision did not mention a related period of TTD.

FUTURE MEDICAL BENEFITS

The Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides), page 2, defines the term impairment as being "a

loss, loss of use, or derangement of any body part, organ system, or organ function." In FEI Installation, Inc. v. Williams, 214 S.W.3d 313, 318-19 (Ky. 2007), we relied on the definition and observed that all impairments did not rise to a level that warranted a permanent impairment rating. Noting the relationship between impairment and disability under the post-1996 Act, we determined that "disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that warrants a permanent impairment rating, permanent disability rating, or permanent income benefits."

All of the medical experts noted that the claimant's left shoulder continued to be symptomatic. The most recent reports from Drs. King, Nadar, and Kibler indicated that the shoulder would require periodic medication and other medical treatment, and nothing in Dr. Wagner's report indicated that future treatment would be unwarranted. Thus, the claimant was entitled to future benefits for reasonable and necessary medical expenses.

TEMPORARY TOTAL DISABILITY

The court observed in Stratemeyer, supra at 629-30, that permitting a credit for voluntary overpayments of benefits involves a balancing of workers' and employers' interests. The interests at stake included the employer's interest in receiving a credit for voluntary overpayments and the worker's interest in receiving future periodic payments. The court observed that to permit a credit where possible ultimately benefits injured workers because it encourages voluntary, pre-award payments. Balancing those interests, the court permitted voluntary overpayments of TTD to be credited against past due permanent income benefits but prohibited them from being credited against

future benefits.

The claimant's award included no past-due or future income benefits. Other than KRS 342.990(11), which authorizes the restitution of benefits secured through conduct proscribed by Chapter 342, no statute authorizes an employer to recoup a voluntary overpayment of benefits. In any event, the ALJ found that claimant did not commit such conduct.

Although KRS 342.730(7) requires a worker who receives benefits for permanent total disability to notify the employer of a return to work, it imposes no such requirement on a worker who receives TTD. Thus, as occurred in the present case, an employer may be unaware that its injured employee has returned to other employment and continue to pay TTD voluntarily. Under KRS 342.0011(11)(a), "temporary total disability" refers to "the condition of an employee who has not reached maximum medical improvement and has not reached a level of improvement that would permit a return to employment." The courts have construed this language several times.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the ALJ terminated TTD benefits upon Wise's return to other work. He did not reach MMI until sometime later. Appealing, the employer asserted that TTD should have been terminated earlier, upon his release to return to work with a five-pound lifting restriction. The court noted, however, that KRS 342.0011(11)(a) does not require an "inability to perform any type of work," such as is required for permanent total disability, and held that it would be unreasonable to require TTD to be terminated upon a release to perform minimal work rather than the individual's customary work or the type of work performed at the time of injury.

The court explained subsequently in Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004), that KRS 342.0011(11)(a) imposes two requirements. First, it requires the worker not to have reached MMI. Second, it requires the worker not to have improved sufficiently to return to customary work. Thus, an individual who had reached MMI was not entitled to TTD.

Double L Construction, Inc. v. Mitchell, supra, concerned a worker who injured his eye while performing construction carpentry. Although he reached MMI a number of months later, he was not released to return to construction carpentry until sometime later. Emphasizing that he performed his concurrent job as a janitor, without interruption, the employer ignored MMI and made the "all or nothing" argument that the janitorial work precluded a TTD award. Rejecting the argument, the court relied on Wise, supra, for the principle that TTD is not based on an inability to perform any type of work and noted that a temporary loss of the ability to perform the job in which an injury occurs does not necessarily affect the ability to perform a concurrent job. When it does not, KRS 342.140(5) is inapplicable and TTD is based solely on wages in the job in which the injury occurred. In other words, an employer is not relieved from paying TTD benefits to a worker not released to perform to the type of work performed at the time of the injury simply because the individual is able to perform a concurrent job.

The principles stated in Mitchell and Wise apply to a return to minimal work that occurs after a layoff and prior to reaching MMI. Those decisions pointed out that entitlement to TTD is not based on an inability to perform any type of work. One of the primary goals of Chapter 342 is to encourage injured workers to return to work. This reduces their economic hardship as well as their employers' liability. Consistent with

that goal, income benefits compensate a worker only for a portion of the wages lost due to injury and are subject to a cap. Also consistent with that goal, employers often provide suitable light-duty work until an injured worker reaches MMI or is able to return to regular duty. This keeps the worker in the habit of working for income and helps the employer to show that any permanent disability is not total. It is counterproductive to require a worker whose employer does not provide or ceases to provide suitable work in such circumstances to forego any other work in order to avoid forfeiting TTD. Not only does it discourage a return to work, it also imposes a greater financial hardship than is necessary.

The claimant earned $795.00 per week when he was injured. He returned to light duty, underwent the first surgery, and was laid off, at which time his employer initiated voluntary TTD benefits. It terminated them on October 31, 2003. The earliest mention of MMI in the record appears to be Dr. King's note of December 10, 2003. Not until May, 2004, did Dr. Wagner state that the claimant could presently return to work as a scoop operator and had no permanent impairment rating. From September 23, 2002, through October 31, 2003, he earned about $260.00 per 40-hour week, performing less strenuous work, but he received no windfall because his TTD benefits and post-injury wages totaled less than his wages at the time of the injury. Because he had not reached MMI and no physician had released him to return to work as a scoop operator, he was entitled to the benefits that he received.

The decision of the Court of Appeals is affirmed.

All sitting. Lambert, C.J., and Cunningham, Minton, Noble, Schroder and Scott, JJ., concur.

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