

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: APRIL 23, 2009
NOT TO BE PUBLISHED
AS CORRECTED: APRIL 24, 2009

Supreme Court of Kentucky

2008-SC-000685-WC

FINAL

DATE 5/14/09 Kelly Klaber D.C.

GERALDINE HALL

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000456-WC
WORKERS' COMPENSATION BOARD NO. 03-66747

APPALACHIAN REGIONAL HEALTHCARE, INC.;
HONORABLE LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

When ruling on the claimant's petition for reconsideration, the Administrative Law Judge (ALJ) rescinded a finding of partial disability, held the claim for permanent disability in abeyance, and awarded temporary total disability (TTD) from the date her employment was terminated until such time as she recovered from a proposed surgery. The Workers' Compensation Board reversed, holding that the decision exceeded the ALJ's authority under KRS 342.281. The Court of Appeals affirmed, and we affirm. The order on reconsideration did not address a patent error in the initial award, a failure to make necessary findings, or an unresolved contested issue.

The claimant was born in 1944 and obtained specialized training as a registered nurse. She worked for the defendant-employer as a home health nurse, visiting patients in their homes. She twisted her left knee on November 8, 2003, while stepping from her vehicle onto a gravel road.

Dr. D'Angelo performed arthroscopic knee surgery in March 2004. He found the claimant to be at maximum medical improvement (MMI) on July 1, 2004, but noted that she "had quite a bit of damage" and might continue to experience occasional symptoms. On July 29, 2004, Dr. D'Angelo released her to full-duty work. He assigned a 3% permanent impairment rating.

The claimant filed an application for benefits in November 2005 and obtained a permanent impairment rating from Dr. Rapier in December 2005. When deposed by the employer in January 2006, she testified that Dr. D'Angelo had mentioned that she might require total knee replacement surgery sometime in the future. Dr. Sheridan evaluated her for the employer shortly thereafter and assigned a permanent impairment rating. In his opinion, the knee required no further treatment and the mild degenerative changes did not warrant total knee replacement. Moreover, if indicated, the surgery would be based on age-related degeneration rather than the injury.

At the initial benefit review conference, the ALJ placed the claim in abeyance because the knee had become symptomatic. Dr. D'Angelo placed the claimant on light duty shortly thereafter and recommended surgery. Contesting the procedure, the employer relied on a utilization review report

that related the present symptoms to pre-existing degenerative changes. Dr. Lester then evaluated the claimant, assigned a permanent impairment rating, and reported that she could return to work as a registered nurse. He opined that the degenerative changes did not result from the injury and that surgery was neither reasonable nor necessary for its effects.

The claimant filed a motion to reinstate TTD in September 2006, alleging that her employer would no longer accommodate her restrictions and had terminated her employment. Objecting, the employer asserted that she had reached MMI and that the termination was irrelevant to her entitlement to TTD.

Dr. D'Angelo testified in October 2006 that the purpose of the proposed surgery was to address pain due to the effects of the injury. He considered the procedure to be reasonable and necessary treatment and noted that it might change the claimant's permanent impairment rating.

In February 2007 the parties agreed to limit the contested issues to the compensability of total knee replacement surgery, the extent and duration of disability, and the claimant's physical capacity to return to her previous work. They listed the same contested issues again at the hearing.

The claimant testified at the hearing that she returned to work in July 2004, that her knee became symptomatic again in March 2006, and that she performed light-duty work from April 2006 until her employer terminated her in late August 2006. She stated that even the light-duty work became more difficult over time and that her symptoms and limitations prevented her from

performing any type of work on a regular and sustained basis. She argued subsequently in her brief that her symptoms rendered her permanently and totally disabled as defined in KRS 342.0011(11)(c).¹ The employer argued that she could return to her previous employment and that the proposed surgery was for age-related degeneration rather than the work-related injury.

The ALJ rejected the claimant's argument and found that she was only partially disabled. Relying on Dr. D'Angelo, the ALJ found that she had a 3% permanent impairment rating and did not retain the physical capacity to return to her former work. Also relying on Dr. D'Angelo, the ALJ found the proposed surgery to be reasonable, necessary, and directly related to the injury. The claimant's award consisted of multiple periods of TTD followed by triple partial disability benefits for 425 weeks from July 2, 2004.

Contrary to the argument in her brief to this court, the claimant's petition for reconsideration asserted that a disability determination was premature until after she reached MMI following knee replacement surgery. Pointing to the September 2006 motion, which remained dormant, she also asserted that the ALJ erred by failing to reinstate TTD benefits until such time as she reached MMI following surgery. Granting the petition over the employer's objection, the ALJ withdrew the finding regarding permanent disability, placed the claim for permanent income benefits in abeyance pending

¹ Under KRS 342.0011(11)(c), (34), (35), and(36) a worker who is permanently and totally disabled has a permanent impairment rating and a complete and permanent inability to perform any type of service for remuneration on a regular and sustained basis in a competitive economy.

MMI, and directed the employer to pay TTD from the date that the claimant last worked until such time as she reached MMI following surgery.

The employer filed a petition for reconsideration of the order in which it conceded that the claimant would be entitled to TTD from the date of surgery until she reached MMI. It argued, however, that she failed to include in the list of contested issues a request for TTD from the date she was terminated and also failed to request an order holding the claim for permanent disability in abeyance pending MMI after the surgery. Objecting, the claimant noted the September 2006 motion. The employer responded that she failed to preserve the issue of pre-surgery TTD as being contested or raise it in her brief.

Nonetheless, the ALJ denied the petition, reasoning as follows:

The reason for the order [granting the claimant's petition] was that in the previous order and award, I decided the issue of reasonableness and necessity of medical treatment in favor of the plaintiff without placing the claim in abeyance and without determining interlocutory benefits post surgery while the plaintiff was in recovery. Having determined that the plaintiff should be allowed the surgery that her treating physician had ordered, it was a patent error to then proceed deciding the case in total disregard for the impact of that medical treatment.

Appealing, the employer asserted that the ALJ violated KRS 342.281 by granting the claimant's petition and modifying the decision on the merits. Reiterating its argument that the order on reconsideration did not address unresolved issues, the employer argued that the ALJ erred by considering issues that the claimant failed to preserve. The employer noted that her

motion requested TTD on the ground that her employment had been terminated but did not mention the proposed surgery. Moreover, she failed to prove her entitlement to TTD until the surgery. The Board agreed and the Court of Appeals affirmed the decision.

Appealing, the claimant asserts that the ALJ granted her petition properly because the initial award contained a patent error and did not resolve her motion requesting TTD. She argues that the ALJ failed to consider in the initial decision that she was no longer at MMI because the knee had deteriorated and the surgery had yet to be performed. Thus, KRS 342.281 permitted the ALJ to correct the obvious error by withdrawing the finding regarding permanent disability and awarding TTD benefits from the date that the employer terminated her employment until such time as she reached MMI following surgery. We disagree.

KRS 342.275 and the regulations give an ALJ broad but not unlimited authority to resolve disputed claims. 803 KAR 25:010, § 13(14) requires parties to raise issues in a timely manner and prohibits issues that are not listed as being contested from being the subject of further proceedings. KRS 342.281 limits an ALJ's authority when deciding a petition for reconsideration to correcting "errors patently appearing on the face of the award." It permits an ALJ to correct clerical or mathematical errors, misstatements, and other patent errors. It also permits an ALJ to make additional findings and resolve unresolved issues, but it does not permit an ALJ to reconsider the merits of

issues already decided.² The ALJ violated KRS 342.281 in the present case by withdrawing the finding concerning permanent partial disability and by making findings regarding the claimant's entitlement to TTD based on the termination of her employment, findings that also violated 803 KAR 25:010, § 13(14).

The ALJ did not commit a patent error in the initial award, fail to make all necessary findings, or leave a contested issue unresolved. The claimant presented evidence that she reached MMI in July 2004, received permanent impairment ratings, and returned to work for more than a year and a half before her condition began to worsen. Although she moved to reinstate TTD benefits during the pendency of the claim, she later abandoned the request. Not only did she fail twice to list the unresolved motion as being a contested issue, she made an "all-or-nothing" argument for permanent total disability in her brief to the ALJ.³ At no time did she request an order holding the permanent disability claim in abeyance if the surgery were found to be compensable so that her disability could be determined after she recovered and reached MMI. The ALJ lacked authority when ruling on her petition for

² Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007); Wells v. Ford, 714 S.W.2d 481 (Ky. 1986); Eaton Axle v. Nally, 688 S.W.2d 334 (Ky. 1985); Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329, 330 (Ky. 1971); Wells v. Beth-Elkhorn Corp., 708 S.W.2d 104 (Ky. App. 1985); Francis v. Glenmore Distilleries, 718 S.W.2d 953 (Ky. App. 1986).

³ Sidney Coal Co. v. Huffman, 233 S.W.3d 710 (Ky. 2007), explains that the question of extent and duration of disability encompasses both temporary and permanent disability. Although the claimant failed to raise the unresolved motion as a contested issue, the parties' unqualified stipulation to "extent and duration" would have permitted the ALJ to consider her entitlement to TTD as of September 2006 had she raised the issue in her brief.

reconsideration to withdraw the partial disability award, hold the claim for permanent income benefits in abeyance, and decide an issue that she had abandoned.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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ORDER

On the Court's own motion, page 1 of the above-styled opinion is hereby corrected to rectify a typographical error. A copy of page 1 that reflects the correction is attached hereto.

ENTERED: APRIL 24, 2009

A handwritten signature in black ink, appearing to read "John Allentrip", written over a horizontal line.

CHIEF JUSTICE