

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2010-SC-000746-WC

PEABODY HOLDING, INC.,
N/K/A PATRIOT COAL COMPANY

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000684-WC
WORKERS' COMPENSATION NO. 07-75229

GREGORY MCGUIRE;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Court of Appeals affirmed a decision by the Workers' Compensation Board to vacate a finding that the claimant's injury produced a 9% permanent impairment rating. The Board remanded the claim, directing the Administrative Law Judge (ALJ) to determine whether the rating was assigned under the Fifth Edition of the *AMA Guides to the Evaluation of Permanent Impairment (Guides)* and to proceed accordingly. Appealing, the employer asserts that the claimant must rely on the 9% rating, which he submitted, and that the Board erred by directing the ALJ to interpret the *Guides*, a matter that requires medical expertise.

We affirm. Dr. Johnson assigned a 9% "disability." The Board did not direct the ALJ to interpret the *Guides* but to "ensure the appropriate guideline was used." KRS 342.730(1)(b) and the medical evidence required the ALJ to base the claimant's award of income benefits on a "permanent impairment rating" determined in accordance with the section of the Fifth Edition of the *Guides* that pertains to total hip replacement.

The claimant sustained a work-related injury to his head, back, left side, and left leg on September 24, 2007. He missed several weeks' work and then returned to work until September 28, 2008. He had total hip replacement surgery on November 18, 2008. His condition improved after the surgery, but he alleged when claiming workers' compensation benefits that he lacked the physical capacity to continue to work as an underground coal miner.

Dr. Johnson, the treating orthopedic surgeon, testified when deposed in June 2009 that the claimant had not reached maximum medical improvement (MMI) and remained temporarily totally disabled. He did not state when he last saw the claimant but did testify that they had an appointment scheduled in August 2009, "probably for a final check on his hip." He anticipated that the claimant would have a good recovery and that he would assign a 15% whole-body impairment rating at that time, using Table 15-33 on page 546 of the Fifth Edition of the *Guides*. He thought it more probable that the claimant would not be able to return to coal mining than that he would be able to do so.

Dr. Johnson's treatment note from August 13, 2009 stated that the claimant could not return to underground mining but failed to mention whether he had reached MMI. The claimant submitted into evidence a letter from Dr. Johnson, dated October 7, 2009, which stated that the claimant reached MMI with a 9% "disability." Dr. Johnson also assigned restrictions.

Dr. Loeb performed a peer review in October 2008 based on medical records; evaluated the claimant in May 2009; and testified by deposition in August 2009. Having received a history of the September 2007 accident and the subsequent return to work for 11 months, Dr. Loeb reported in October 2008 that the accident would have caused no more than an aggravation of his pre-existing dormant arthritic condition and produced some transient left hip pain. He attributed the current complaints to the natural progression of the arthritis in the claimant's left hip and knee.

Dr. Loeb reported in May 2009 that the claimant's left hip discomfort had improved since his hip replacement surgery. Noting that the initial emergency room notes recorded no complaints of immediate hip pain after the accident, he continued to attribute the need for hip replacement surgery to a natural progression of his arthritic condition. Noting that the surgery achieved a good result, he assigned a 15% whole-person impairment rating using Table 15-33 from page 546 of the Fifth Edition of the *Guides*. He also assigned various work restrictions.

The ALJ found that the claimant lacked the physical capacity to return to mining and would be unable to earn the same or a greater wage indefinitely

although he had done so for a time after his injury. Rejecting the claimant's assertion that the injury left him permanently and totally disabled, however, the ALJ relied on the October 2009 letter from Dr. Johnson to find that he sustained a 9% permanent impairment rating for the purpose of awarding permanent partial disability benefits.

The claimant appealed following the denial of his petition for reconsideration. He asserted among other things that the ALJ erred by relying on the 9% figure stated in Dr. Johnson's letter rather than the 15% figure to which he testified when deposed and with which Dr. Loeb agreed.

Noting that Dr. Johnson's letter referred to "disability" rather than "impairment" and that the ALJ failed to determine whether the 9% figure was assigned in accordance with the Fifth Edition of the *Guides*, the Board vacated the decision and remanded the claim for additional consideration. The Court of Appeals affirmed, convinced that an ALJ is not only authorized but required to determine whether an impairment rating is based upon the *Guides*.

The employer argues that the claimant should not be permitted to challenge the 9% rating assigned by Dr. Johnson because he was the party who offered the October 2009 letter as evidence. Relying on *Kentucky River Enterprises, Inc. v. Elkins*¹ for the principle that the proper interpretation of the *Guides* is a medical question, the employer also argues that the Board erred by directing the ALJ to interpret the *Guides* on remand. We disagree with both arguments.

¹ 107 S.W.3d 206, 210 (Ky. 2003).

Dr. Johnson's August 2009 treatment note failed to address MMI. His subsequent letter stated the claimant had reached MMI and assigned a 9% "disability." The employer cites no authority for the proposition that the claimant must rely on the letter with respect to his permanent impairment rating.

Contrary to the employer's assertion, the Board did not direct the ALJ to interpret the *Guides* but to "ensure the appropriate guideline was used." KRS 342.730(1)(b) and KRS 342.0011(35) require an ALJ to base an award of income benefits on a whole-body permanent impairment rating that is determined in accordance with the latest edition of the *Guides*. Drs. Johnson and Loeb agreed that the appropriate table to use when assigning a permanent impairment rating following total hip replacement surgery is Table 15-33, found on page 546 of the Fifth Edition of the *Guides*.

A review of Table 15-33 does not require medical expertise.² The table clearly does not authorize a 9% impairment rating for total hip replacement. It authorizes a 15% rating based on good results, a 20% rating based on fair results, or a 30% rating based on poor results. The ALJ must render an award on remand that is based on a permanent impairment rating determined under Table 15-33.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

² See *Caldwell Tanks v. Roark*, 104 S.W.3d 753 (Ky. 2003).

COUNSEL FOR APPELLANT,
PEABODY HOLDING, INC.,
N/K/A PATRIOT COAL COMPANY:

Peter J. Glauber
Boehl Stopher & Graves, LLP
2300 Aegon Center
400 West Market Street
Louisville, KY 40202

COUNSEL FOR APPELLEE,
GREGORY MCGUIRE:

Jerry P. Rhoads
Rhoads & Rhoads, PSC
9 East Center Street
P.O. Box 1705
Madisonville, KY 42431