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**NOT TO BE PUBLISHED OPINION**

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ACTION.

# Supreme Court of Kentucky

2012-SC-000586-WC

ROCK DRILLING, INC.

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2012-CA-000490-WC  
WORKERS' COMPENSATION NO. 06-86699

CHRISTOPHER R. HOWELL;  
HONORABLE GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Rock Drilling, Inc., appeals from a decision of the Court of Appeals which affirmed the award of workers' compensation benefits granted to Appellee, Christopher R. Howell, as a result of his motion to reopen. Rock Drilling presents the following two issues on appeal: 1) whether the Administrative Law Judge ("ALJ") erred in holding that the statutory triple multiplier provided under KRS 342.730(1)(c)1 could be awarded on a reopening of Howell's claim; and 2) whether the ALJ erred when he determined that the impairment rating assigned to Howell in the original settlement agreement could not be used as the impairment rating on reopening. For the reasons set forth herein, we affirm.

In May 2006, Howell suffered a work-related injury to his right knee while employed by Rock Drilling. As a result, Howell underwent surgery to repair a torn meniscus and was off work for approximately two months. After recovering, Howell returned to his original job at Rock Drilling. Howell filed for workers' compensation.

Howell settled his workers' compensation claim in September 2007. The Form 110 from this settlement indicated that Dr. David Changaris assigned Howell an 11% impairment rating to the body as a whole, while Dr. Navin Kilambi assigned a 1% impairment rating to the body as a whole. The claim was settled on a compromise impairment rating of 6%, entitling Howell to be paid \$24.14 per week for 425 weeks. No multiplier was applied to his award.

After the settlement, Howell was fired by Rock Drilling. He then accepted a job with a construction company, only to be forced to quit due to increased right knee pain. Howell returned to the care of Dr. Kilambi. Dr. Kilambi diagnosed Howell with a small re-tear of the lateral meniscus in his right knee. This tear was repaired by surgery in October 2008. Howell underwent physical therapy and was cleared to return to work.

Despite the surgery and therapy, Howell continued to have problems with his right knee. In September 2009, Howell fell off of a ladder at his house because he said his right knee locked up. The fall caused Howell to tear his left knee meniscus, leading to another surgery.

Howell filed a motion to reopen his workers' compensation claim on January 12, 2010. He sought an increase in his permanent partial disability

benefits due to additional impairment caused by the additional surgeries on his right knee. He also argued that the injury to his left knee arose from complications caused by the work-related injury to his right knee.

Following the taking of proof, the ALJ entered an opinion, order, and award in Howell's favor on October 3, 2011. The ALJ made the following finding regarding Howell's impairment rating at the time of his original settlement:

Because the original litigation was resolved by settlement rather than an opinion and award, it must first be determined what [Howell's] impairment was at the time of his 2007 settlement. In reviewing the available evidence on the issue, it is noted the only impairment ratings at that time in the current record are a 1% [assigned by Dr. Kilambi] and an 11% [assigned by Dr. Changaris]. Given that no physician even now assigns an 11% rating, and that plaintiff was able to return to his same job after that injury, the [ALJ] is persuaded the 1% rating for the right knee was the most credible as of the time of his 2007 settlement.

The ALJ did not consider the 6% impairment rating that the parties agreed to in the settlement as an option to choose on reopening, because it was not assigned to Howell based on the *AMA Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition*. He then assigned Howell an 8% impairment rating for his current condition, based on a medical analysis performed by Dr. Bilkey, and concluded that Howell's condition had worsened since his settlement.

After finding that Howell was entitled to increased income benefits, the ALJ made the following calculations. First, he determined that based on the 1% impairment rating he assigned to Howell for his original injury, Howell would have been entitled to \$3.08 per week. He then calculated what income benefits Howell is entitled to currently based on the 8% impairment rating.

The ALJ applied the triple multiplier in KRS 342.730(1)(c)1 because he found Howell could not return to the type of work he performed at the time of his injury, and determined that Howell was entitled to \$96.58 per week. The ALJ then subtracted the \$3.08 per week amount from the \$96.58 per week to provide a credit to the employer as of the date of the motion to reopen. Had the ALJ used the 6% impairment as the rating for Howell's initial injury, Rock Drilling would have paid Howell less because it would have received a greater credit against his current award. The ALJ subsequently ordered that Rock Drilling pay Howell \$93.50 per week for the duration of the 425 week period.

Rock Drilling filed a petition for reconsideration arguing that the ALJ erred by applying the triple multiplier provided in KRS 342.730(1)(c)1 on reopening, and that the ALJ erred by assigning Howell the 1% impairment rating. The petition was overruled except the ALJ did allow Rock Drilling a credit of \$24.14 per week, the amount it paid as a result of the settlement agreement, against past due benefits only. The Workers' Compensation Board and Court of Appeals affirmed. This appeal followed.

**I. THE ALJ DID NOT ERR BY APPLYING THE TRIPLE MULTIPLIER ON THE REOPENING OF HOWELL'S CLAIM**

Rock Drilling first argues that the ALJ erred by applying the triple multiplier to Howell's award on reopening. Rock Drilling contends that KRS 342.125 and KRS 342.730 specifically limit the grounds upon which an award can be reopened and that KRS 342.730(1)(c)1 is not one of those grounds. It cites to three unpublished opinions to support this position. *See Phillips Tree*

*Experts, Inc. v. Travis*, 2006-SC-000633-WC (Ky. 2007); *Pepsi Cola General Bottlers, Inc. v. Murrell*, 2009-CA-002044-WC (Ky. App. 2010); *Shaw v. Jane Todd Crawford Hospital*, 2007-CA-000981-WC (Ky. App. 2007).

But whether KRS 342.730(1)(c)1 provides grounds to reopen a workers' compensation claim is irrelevant to this matter. Howell's claim was not reopened for the sole purpose of applying the triple multiplier. Instead, he alleged and proved that he had suffered increased disability since his original settlement. The ALJ then determined that Howell no longer maintained the physical capacity to return to the job he held when injured and applied KRS 342.730(1)(c)1. In holding that the triple multiplier may be applied on reopening, we stated in *James T. English Trucking v. Beeler*, 375 S.W.3d 67, 71 (Ky. 2012) that:

[w]orkers' compensation is a statutory creation. When a claim is reopened, the combined effects of the impairment present at the time of the initial award and the additional impairment present at reopening entitle the injured worker to income benefits based on the whole of his disability from the date of the motion to reopen through the end of the compensable period. KRS 342.730(1)(c)1 authorizes a triple income benefit based on a finding that the work-related injury causes the worker to lack the physical capacity to perform the type of work performed at the time of the injury. Moreover, nothing in Chapter 342 restricts the statute's application to the portion of the worker's income benefit that is attributable to the increased impairment rating present at reopening.

Thus, Beeler was entitled to "receive from the date of his motion to reopen through the end of the compensable period a triple partial benefit that was based on all of the impairment resulting from his [original] injury." *Id.* In this matter, the ALJ's determination that Howell is entitled to the triple multiplier is

supported by substantial evidence, and he did not err by applying KRS 342.730(1)(c)1. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984).

## **II. THE ALJ USED THE PROPER PROCEDURE TO DETERMINE HOWELL'S IMPAIRMENT RATING FROM HIS ORIGINAL INJURY ON REOPENING**

Rock Drilling's other argument is that the ALJ committed error by not considering the impairment rating agreed to by the parties in Howell's original settlement as the impairment rating to be used on reopening. In the original settlement, Howell and Rock Drilling agreed on using a 6% impairment rating to calculate his award. This was a compromise between the two AMA ratings assigned to Howell at that time – an 1% impairment rating from Dr. Kilambi and an 11% rating from Dr. Changaris. However, on reopening the ALJ did not consider the impairment rating the parties agreed to and instead only chose between the 1% and the 11% impairment ratings. Due to this, Rock Drilling did not receive as large of a credit against the current award as it would have received had 6% been chosen as the original impairment rating. After reviewing the evidence, the ALJ assigned Howell a 1% impairment rating at the time of his settlement.

Rock Drilling concedes that KRS 342.730(1)(b) requires permanent partial disability ratings to be calculated on the basis of impairment ratings determined pursuant to the *AMA Guides*. However, Rock Drilling believes that since the original settlement impairment rating was approved by an ALJ and

has the force and effect of an award, it should have at least been considered as an option for an impairment rating. We disagree.

KRS 342.125(7) states that:

[w]here an agreement has become an award by approval of the administrative law judge, and a reopening and review of that award is initiated, no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party.

Stated another way, the percentage of occupational disability contained in a settlement agreement is not conclusive as to the actual disability on that date. *Beale v. Faultless Hardware*, 837 S.W.2d 893, 896 (Ky. 1992). Because the agreed-upon impairment rating in the original settlement is not binding on the parties, has no *res judicata* effect, and was not based on the *AMA Guides*, the ALJ properly reviewed the two impairment ratings assigned by doctors which were included in the record, and chose the one he found to most accurately reflect Howell's condition. The ALJ did not abuse his discretion in finding the 1% impairment rating was most credible.

### **CONCLUSION**

For the reasons set forth above, we affirm the Court of Appeals.

All sitting. All concur.



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