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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000490-WC

ROCK DRILLING, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-86699

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND NICKELL, JUDGES.

CAPERTON, JUDGE: The Appellant, Rock Drilling, Inc., appeals the February 13, 2012, opinion of the Workers' Compensation Board, affirming the October 3, 2011, opinion of the Administrative Law Judge (ALJ). On appeal, Rock Drilling

raises two issues, namely: (1) whether the Administrative Law Judge and Workers' Compensation Board erred in holding that the statutory 3.0 multiplier under Kentucky Revised Statutes (KRS) 342.730(1)(c)1 could be awarded on reopening; and (2) whether the ALJ and the Board erred in determining that they could not consider the impairment agreed upon at the time of the original settlement as the impairment to use on reopening. Following a thorough review of the record, the arguments of the parties, and the applicable law, we affirm.

Howell sustained a work-related injury to his right knee while working for Rock Drilling, Inc. on May 19, 2006. Howell had surgery to repair a torn meniscus, and was off work until July 9, 2006. Howell received temporary total disability benefits (TTD) from May 22, 2006, through July 9, 2006, at the rate of $631.22 per week. He was released to regular duty and returned to his regular job, running a drill rig, until he was terminated for what Rock Drilling asserts were unrelated reasons.[1] Howell collected unemployment benefits for a period of time before accepting a job with HTA Construction from December 2007 through February 2008. Howell asserts that he was forced to quit this job because of increased right knee pain. He then obtained another job as a water truck driver for Certified Construction Company, earning the same or greater wages.

Howell originally settled his claim in September of 2007. The Form 110 entered into by the parties indicated that Dr. David Changaris had assigned an 11% impairment to the body as a whole, and Dr. Navin Kilambi had assigned a 1%

[1] Howell asserts that he was terminated because he was slow in performing his job and could not keep up with production.

impairment to the body as a whole. The claim was settled on a compromise percentage of 6% impairment, to be paid at the rate of $24.14 per week for 425 weeks, representing a straight calculation of benefits with no multiplier pursuant to KRS 342.730(1)(c)1.

Howell asserts that after settling his claim, his right knee continued to get worse. He states that it became painful and swollen, and developed a locking sensation. Therefore, on May 30, 2008, Howell returned to the care of Dr. Kilambi, who initially treated Howell on a conservative basis, and eventually sent him for an MRI. The MRI was positive for an additional tear of the lateral meniscus in the right knee. The MRI demonstrated a partial lateral meniscus tear at the previous partial lateral meniscectomy site. The MRI also demonstrated a lateral femoral trochlear facet and lateral subluxation of the patella, with no visible chondromalacia. The diagnosis at that time was a small re-tear of the lateral meniscus in the right knee, which was symptomatic.

On or about October 15, 2008, Dr. Kilambi performed athroscopic surgery for repair of the right meniscus partial meniscectomy. On November 24, 2008, Howell returned to Frazier Rehab for approximately four weeks of physical therapy. On December 14, 2008, Howell was released to return to work by Dr. Kilambi. Shortly after doing so his employer, Certified Construction, had a general cutback and Howell was laid off.

Howell continued to have problems with his right knee, and again returned to Dr. Kilambi on May 6, 2009, complaining of worsening of the knee

condition accompanied by lateral kneecap pain. After examination, Dr. Kilambi referred Howell back to Frazier Therapy for additional physical therapy, which he attended from May 20, 2009, through June 17, 2009.

Howell subsequently saw Dr. Kilambi on September 30, 2009. At that time, he complained of both right and left knee pain. Dr. Kilambi received a history of Howell's descending a ladder at home when his right knee locked and he slipped off the bottom round of the ladder, causing him to fall backwards and hyper-flex his left knee. Howell reported that this caused his knee to be stiff and painful on the lateral side of the left knee joint.

Dr. Kilambi concluded that Howell had sustained a lateral meniscus tear to his left knee as a result of the locking of the right knee. He recommended that Howell have an MRI on the left knee with the possibility of subsequent surgery. Surgery was ultimately performed on the left knee on April 26, 2010. Howell was off work from April 26, 2010, through July 2010.

Dr. Warren Bilkey also examined Howell on two separate occasions, December 29, 2009, and October 7, 2010. At the time of the December 29, 2009, examination, Dr. Bilkey concluded that Howell had reached maximum medical improvement with respect to the right knee injury, but not with respect to the left knee injury. Dr. Bilkey recommended that Howell be restricted to sit-down duty, and felt that while he might be capable of sedentary work, Howell should avoid any activities that involved full bending of the knee, such as squatting, repetitive bending of the knee, climbing, and carrying any more than 10 pounds, as well as

avoiding any lifting from the floor. Dr. Bilkey stated that these restrictions were related to the May 19, 2006, work injury.

At the time of the re-examination on October 7, 2010, Dr. Bilkey received the history of Howell's additional treatment to the left knee. Dr. Bilkey concluded that Howell suffered a 1% whole person impairment for injury to the left knee. With respect to the impairment in the right knee, Dr. Bilkey continued his assessment of 15% impairment.

Howell subsequently filed a motion to reopen his claim on January 12, 2010, seeking an increase in permanent partial disability benefits, and alleging an increase in his permanent impairment as a result of an additional surgery on his right knee. He further alleged the development of left knee problems arising from a complication of the right knee problem.

Following the taking of proof, the ALJ entered an opinion, order, and award on October 3, 2011. Therein, the ALJ indicated addressing a claim of a worsening of disability on reopening required initially determining what Howell's impairment was at the time of the 2007 settlement. The ALJ stated that:

> Because the original litigation was resolved by settlement rather than an opinion and award, it must first be determined what plaintiff's impairment was at the time of his 2007 settlement. In reviewing the available evidence on this issue, it is noted the only impairment ratings at that time in the current record are a 1% and an 11%. 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 Administrative Law Judge is persuaded the 1% rating for the right knee was the most credible as of the time of his 2007 settlement.

The ALJ went on to determine that at the time of the opinion, Howell had a 7% impairment to the body as a whole attributable to his right knee condition, and an additional 1% impairment to the body as a whole attributable to the left knee condition, for a total of 8% impairment.

In calculating the benefits payable to Howell following reopening, the ALJ first calculated the benefits to which he would have been entitled in September of 2007, had he been found to have only 1% impairment. Noting that Howell had returned to work at the same or greater wages, the ALJ calculated the 1% rating, with no multiplier, as equivalent to $3.08 per week, which would have been payable for 425 weeks, beginning on July 10, 2006. Thus, though Howell was receiving $24.14 per week under the terms of the settlement, the ALJ found that only $3.08 per week would be credited against the increased award on appeal.

The ALJ then calculated the value of the 8% rating. In so doing, the ALJ found that Howell did not retain the physical capacity to return to the type of work he performed at the time of his injury and, therefore, the 3.0 multiplier of KRS 342.730(1)(c)1 was utilized. This amounted to benefits of $96.58 per week, from which the ALJ deducted the $3.08 per week credit, for a net award of $93.50 per week on reopening.[2] Those benefits were to begin on January 13, 2010, and continue for the remainder of the 425 weeks that began on July 10, 2006.[3]

[2] As a result of the combination of the award and the earlier settlement, Howell would actually receive a total of $93.50 + $24.14, equaling an amount of $117.64 per week for his 8% impairment.

[3] Suspended during any intervening periods of TTD, per statute.

Rock Drilling filed a petition for reconsideration with the ALJ, challenging the award of the 3.0 multiplier on reopening, in light of two unpublished Court of Appeals decisions and an unpublished Supreme Court decision, holding that the 3.0 multiplier cannot be awarded on reopening. The petition for reconsideration also raised the issue as to the ALJ's assumption that he was limited to choosing only a 1% impairment or an 11% impairment in determining the extent of Howell's impairment at the time the claim was originally settled. Rock Drilling also requested that it be permitted credit against any past-due benefits for the full $24.14 it had been paying each week.

On October 31, 2011, the ALJ entered an order on the petition for reconsideration. The ALJ overruled the petition with respect to the application of the 3.0 multiplier, reasoning that the cited appellate decisions prohibited only reopening "solely" for the purpose of the 3.0 multiplier. The ALJ also overruled the petition insofar as it argued that the ALJ had the discretion to determine that Howell had a 6% disability at the time of settlement, as reflected in the settlement. The ALJ did allow Rock Drilling a credit of $24.14 against past-due benefits.

On February 13, 2012, the Workers' Compensation Board affirmed the decision of the ALJ. This appeal followed. At the outset, we note that when reviewing a decision of the Workers' Compensation Board, the function of the Court of Appeals is to correct the Board only where it perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western*

Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). We review this matter with that standard in mind.

In addressing the arguments of the parties, we note first that KRS 342.125 states, in pertinent part that:

> (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:
>
> (a) Fraud;
>
> (b) Newly discovered evidence which could not have been discovered with the exercise of due diligence;
>
> (c) Mistake; and
>
> (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.
>
> (2) No claim which has been previously dismissed or denied on the merits shall be reopened except upon the grounds set forth in this section.
>
> (3) Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c) 2, or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

Further, we note that KRS 342.730 states:

> (1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows ….
>
> . . . .
>
> > (c) 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or
> >
> > 2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments. . . .
> >
> > . . . .
> >
> > 4. Notwithstanding the provisions of KRS 342.125, a claim may be reopened at any time during the period of permanent partial disability in order to conform the award payments with the requirements of subparagraph 2 of this paragraph.

As its first basis for appeal, Rock Drilling argues that the ALJ and the Board erred in awarding the 3.0 multiplier of KRS 342.730(1)(c)1 on reopening of

a claim. In making this argument, Rock Drilling asserts that KRS 342.125 and KRS 342.730 specifically limit the grounds on which an award can be reopened, and that application of the 3.0 multiplier under KRS 342.730(1)(c)1 is not one of those grounds. Further, Rock Drilling argues that the fact that the legislature specifically designated application of the 2.0 multiplier under KRS 342.730(1)(c)2 as a ground for reopening indicated that they did not want to include the 3.0 multiplier.

Rock Drilling also directs the attention of this Court to three unpublished decisions which it asserts support its position.[4] While acknowledging the findings of the ALJ and the Board that the holdings of the aforementioned

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[4] In *Phillips Tree Experts, Inc. v. Travis*, 2007 WL 1159761 (Ky. 2007)(2006-SC-000633-WC), the Court stated that:

> The grounds for reopening stated in KRS 342.125(1) include: (a) fraud; (b) newly discovered evidence; (c) mistake; and (d) change of disability as shown by objective medical evidence of a change of impairment . . . .
>
> Although KRS 342.730(1)(c)4 provides an additional ground for reopening, it mentions only subparagraph 2. It evinces a legislative intent to permit an award made under subparagraph 2 to be reopened and amended to reflect the cessation or resumption of employment at the same or greater wage, regardless of whether KRS. 342.125 would permit reopening. Nothing in subparagraph 4 evinces the intent to affect awards made under subparagraph 1.

Id. at *2-3. Later that same year, this Court addressed the issue in *Patricia L. Shaw v. Jane Todd Crawford Hospital*, 2007 WL 3230234 (Ky. App. 2007)(2007-CA-000981-WC), ruling that, "although KRS 342.730(1)(c)4 provides an independent ground for reopening a claim for additional benefits under KRS 342.730(1)(c)2, it does not provide an independent ground for reopening for additional benefits under KRS 342.730(1)(c)1." *Id*. at *4.

Rock Drilling argues that more recently, in *Pepsi Cola General Bottlers, Inc. v. Murrell*, 2010 WL 1851385 (Ky. App. 2010) (2009-CA-002044-WC), this Court confirmed that a party cannot rely on the exception created for reopening an award under KRS 342.730(1)(c)2 to reopen for purposes of KRS 342.730(1)(c)1. *Id*. at *3.

cases restricted reopenings "solely" related to application of the 3.0 multiplier, Rock Drilling asserts that this is a distinction without a difference. Rock Drilling asserts that the holding in each case was based upon the clear language of the statute, and that the legislature did not see fit to include a method by which either party could move to reopen a settlement or award to affect application of the 3.0 multiplier.

In response, Howell argues that Rock Drilling's interpretation of KRS 342.125 is diametrically opposed to the literal and implied meaning of the statute. Howell argues that the significant language in the statute is contained in subsection (d), which states that an ALJ may reopen and review any award or order on the grounds of "change of disability as shown by objective medical evidence . . . due to a condition caused by the injury since the date of the award. . . ." Howell notes that in this case, he settled for 6% disability without a three multiplier because at the time of settlement, he had returned to work with Rock Drilling at the same job he had when he was injured, and was only terminated after the agreement had been approved. Howell states that although he obtained two subsequent jobs with other employers, his knee never became symptom free, and that he was eventually rendered incapable of performing his former job. Howell thus asserts that he had legitimate grounds to move to reopen, pursuant to KRS 342.125(1)(d), and that the ALJ properly reopened the original settlement to consider the change in disability, and to ultimately award the three multiplier.

Having reviewed the unpublished cases cited by Rock Drilling, as well as the arguments of the parties and the applicable law, we are in agreement with the ALJ and the Board that those holdings pertain to reopenings which were solely for the purpose of enhancing an award by the three multiplier. By contrast, Howell's reopening was not solely for application of the three multiplier, but was also largely because of his claim for increased impairment following a second knee surgery. Considering the evidence below, in light of the worsening of Howell's condition and subsequent surgeries, we believe that the ALJ's decision to award the three multiplier on reopening was supported by substantial evidence.

As the Board correctly noted, authority has consistently held that injured employees, in matters of workers' compensation, are entitled to be compensated for the whole of their disability. *See Fleming v. Windchy*, 953 S.W.2d 604 (Ky. 1997); *Spurlin v. Brooks,* 952 S.W.2d 687 (Ky. 1997); *Campbell v. Sextet Mining Co.*, 912 S.W.2d 25 (Ky. 1995); and *Beale v. Shepherd*, 809 S.W.2d 845 (Ky. 1991).

Howell briefly returned to work with Rock Drilling. He subsequently obtained similar employment which he was only able to perform for a short time. After undergoing two additional surgeries, Howell sustained an increased impairment rating, and no longer retained the capacity to perform the work he had been performing at the time of the original injury. As a result, the ALJ determined that the three multiplier was applicable. We are ultimately in agreement with the

Board that the decision of the ALJ was supported by substantial evidence. Accordingly, we affirm.

As its second basis for appeal, Rock Drilling argues that the ALJ and the Board erred in determining that they could not consider the impairment agreed upon at the time of the original settlement as the impairment to use on reopening. While acknowledging that KRS 342.730(1)(b) requires permanent partial disability to be determined on the basis of impairment ratings calculated pursuant to the AMA Guides, Rock Drilling argues that in the situation where an ALJ is determining benefits to be paid pursuant to an increase of disability on reopening, the ALJ should also have the option to consider the impairment rating agreed upon at the time of settlement.

In support of that argument, Rock Drilling asserts that KRS 342.265 and relevant caselaw have long held that, once approved by an ALJ, a settlement agreement has the same force and effect as an award. Thus, it asserts that the 6% rating upon which the parties compromised in the original settlement is tantamount to a finding by the approving ALJ that Howell did have a 6% permanent partial impairment at the time of the settlement. Howell argues that a finding otherwise would always force the ALJ to make a finding that one of the parties made a "bad bargain" at the time of the original settlement. *Sub judice*, Rock Drilling argues that by deciding to "carve out" only the 1% rating on reopening, the ALJ permitted Howell to be unjustly enriched insofar as he is continuing to receive his benefits of $24.14 per week. Likewise, Rock Drilling argues that had the ALJ opted to use the

11% rating, it would have been manifestly unfair to Howell because Rock Drilling would have received more credit than it was actually paying.

In response, Howell argues that the ALJ properly found that he had only a 1% disability at the time of the original settlement. Howell argues that the finding of the percentage of disability suffered by a claimant is a matter within the discretion of the ALJ. He argues that the disability ratings submitted by the parties during the course of litigation of a claim are merely vehicles manufactured by the parties to facilitate settlement. Accordingly, he asserts that if the parties voluntarily agree to a monetary figure which lessons the risk, but which may not necessarily render the highest possible reward, the actual percentage of disability is not a controlling factor. In this instance, Howell argues that the ALJ properly exercised his discretion and found a 1% disability at the time of the original settlement.

Having reviewed the law, the findings of the Board, and the arguments of the parties concerning this second issue, we are again compelled to affirm. While there may be some merit to the argument that being forced to choose between either a 1% or an 11% rating seems unfair to one party or another, under the law, the ALJ is bound to use only an impairment rating assessed by a medical expert. The ALJ simply does not have the discretion to choose an assessment rating based upon the belief that it may be more fair than the ratings assigned by the medical professionals. While the parties may have agreed to settlement based upon a compromise 6% disability rating, our law is clear that a

settlement award is by its very nature a product of compromise, and that no statement contained therein is binding on future actions. *Beale v. Faultless Hardware*, 837 S.W.2d 893 (Ky. 1992). Therefore, we believe that the ALJ properly exercised his discretion in finding the 1% disability rating assessed at the time of settlement to be most credible. Accordingly, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the February 13, 2012, opinion of the Workers' Compensation Board affirming the October 3, 2011, decision of the Administrative Law Judge.

ALL CONCUR.

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