

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 29, 2013

CLAIM NO. 200479333

CHARLES FREEMAN

PETITIONER

VS. APPEAL FROM HON. ALLISON EMERSON JONES,
ADMINISTRATIVE LAW JUDGE

DIXIE FUEL COMPANY
and HON. ALLISON EMERSON JONES,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Dixie Fuel Company ("Dixie") appeals from the January 28, 2013 Opinion, Order and Award on Remand rendered by Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ Jones"), and from the March 6, 2013 order denying its petition for reconsideration. On remand, the ALJ determined Charles Freeman ("Freeman") was entitled to

permanent partial disability ("PPD") benefits for increased disability at a weekly rate of \$19.42. The sole question on appeal is whether the ALJ erred in calculating the increased PPD benefits. We agree the calculation was incorrect, though not for the reasons raised by Dixie. Accordingly, we reverse and remand.

Freeman filed a claim alleging injuries to his back, legs, spine, and tailbone resulting from a July 12, 2004 accident. The claim was settled by agreement approved March 27, 2008 based upon a 5% impairment rating, enhanced by the two multiplier pursuant to KRS 342.730(1)(c)2. Two years later, Freeman filed a motion to reopen, claiming his condition had worsened since the settlement date, rendering him permanently and totally disabled.

ALJ Lawrence F. Smith ("ALJ Smith") issued an opinion on August 29, 2011, finding Freeman's condition had worsened, but he was not permanently totally disabled. ALJ Smith determined Freeman, on reopening, qualified for a 9% impairment rating enhanced by a 3.2 multiplier pursuant to KRS 342.730(1)(c)1 and 3. ALJ Smith reduced the weekly benefit by \$28.70, the amount of the weekly benefit provided in the settlement agreement.

Dixie appealed. The Board affirmed ALJ Smith's finding that Freeman's condition had worsened, but found

error where the ALJ failed to make any findings regarding the extent of his disability at the time of settlement. The Board remanded for additional findings regarding whether any multiplier was applicable at the time the claim was settled.

ALJ Jones issued her Opinion, Order and Award on Remand on January 28, 2012. Looking back to the settlement date, she determined the two multiplier did not apply. She further found Freeman was unable to perform the type of work he performed at the time of the injury, thus entitling him to the three multiplier. However, the ALJ did not actually apply the three multiplier in her calculation of Freeman's award at the time of settlement, because her interpretation of the previous Board decision was that she was precluded from doing so. Her calculation resulted in a reduction of Freeman's weekly benefit on reopening by \$14.34.

Dixie filed a petition for reconsideration arguing it was entitled to a reduction of the weekly benefit by \$28.70, the weekly benefit in the settlement agreement, rather than the \$14.34 applied by the ALJ on remand. By order dated March 6, 2013, the ALJ denied the petition stating as follows:

The Board remanded this claim to the ALJ to determine whether the two-multiplier was applicable at the time of settlement. The ALJ determined that it was not. As such, to determine the

amount of benefits due Plaintiff on reopening [,] the ALJ had to calculate the correct amount of benefits due Plaintiff at the time of the settlement without regard to the agreement of the parties. See KRS 342.125(7).

On appeal, Dixie again argues it is entitled to a reduction of the benefits awarded on reopening by the amount of the weekly benefit contained in the settlement agreement, which included the two multiplier. We disagree. Freeman's benefit must be calculated as the value of his current disability award less the amount he would have been entitled to at the time of the settlement. See Dunn v. Slater, 2008 SL 2484933. See also D&R Acoustics, Inc. v. Reynolds, WCB 2003-82363 (rendered November 16, 2011); Rock Drilling, Inc. v. Howell, WCB 2006-86699 (rendered February 13, 2012). As ALJ Jones correctly noted, the actual dollar amount contained in the settlement agreement is irrelevant to this calculation.

Contrary to Dixie's assertions, the result is not a windfall in Freeman's favor. The actual compensation received pursuant to the settlement agreement extinguished Dixie's liability for the impairment existing at the time of the agreement. However, Freeman is entitled to be fully compensated for the additional impairment. Fleming v. Windchy, 953 S.W.2d 604 (Ky. 1997); Spurlin v. Brooks, 953

S.W.2d 687 (Ky. 1997); Campbell v. Sextet Mining Co., 912 S.W.2d 25 (Ky. 1995); Beale v. Shepherd, 809 S.W.2d 845 (Ky. 1991). The only logical method of calculating the additional impairment would be to look back to Freeman's actual impairment at the time of the settlement agreement, with application of the appropriate factor and multipliers pursuant to KRS 342.730(1)(b) and KRS 342.730(1)(c). Because Freeman never litigated his initial claim to completion, the settlement agreement did not bind the parties on the issue of the appropriate multiplier. It was therefore proper for ALJ Jones to determine the applicability of the three multiplier.

As noted above, however, ALJ Jones did not actually apply the multiplier, notwithstanding this factual finding. This error is the result of ambiguity in the Board's prior opinion, in which we stated, "the three multiplier is not available to Freeman on reopening." Though this statement is correct, it should not be interpreted to mean the portion of Freeman's impairment constituting a worsening of condition cannot be enhanced by the three multiplier. On the contrary, the three multiplier is applicable to Freeman's impairment at the time the settlement was reached, as ALJ Jones determined. Though this issue was not expressly raised by either party, it is

within this Board's authority to ensure the ALJ's award is in conformity with the law. KRS 342.285(2)(c). Accordingly, this matter must again be remanded.

Upon remand, Freeman's benefit must be calculated as the value of his current disability award less the amount he would have been entitled to at the time of the settlement had it been litigated. ALJ Jones found that Freeman was entitled to a 3.2 multiplier at the time of settlement, which must be applied on remand. Freeman has had a worsening of this condition, currently resulting in a 9% impairment rating enhanced by a 3.2 multiplier. Thus, the value of his current award is calculated as $\$441.32 \times .09 \times .85 \times 3.2 = \108.04 , less $\$441.32 \times .05 \times .65 \times 3.2 = \45.90 , resulting in an award of $\$62.14$ for the additional disability/impairment.

Accordingly, the January 28, 2012 Opinion, Order and Award on Remand rendered by Hon. Allison Emerson Jones, Administrative Law Judge, and the March 6, 2013 order denying Dixie's petition for reconsideration are **REVERSED** and this matter is **REMANDED** for entry of an amended award in conformity with the views expressed herein.

ALL CONCUR.

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