

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 7, 2011

CLAIM NOS. 200801130 & 200571525

CRITTENDEN COUNTY HEALTH & REHAB

PETITIONER

VS.

APPEAL FROM HON. RICHARD M. JOINER,  
ADMINISTRATIVE LAW JUDGE

PATRICIA SISCO,  
EMILY RAYES-PRINCE, M.D.,  
INJURED WORKER'S PHARMACY,  
and HON. RICHARD M. JOINER,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION VACATING IN PART,  
REVERSING IN PART, AND REMANDING

\* \* \* \* \*

BEFORE: ALVEY, Chairman; COWDEN and STIVERS, Members.

**ALVEY, Chairman.** Crittenden County Health and Rehab ("Crittenden County") appeals from the opinion and award rendered May 23, 2011 by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, an increase in permanent partial disability ("PPD") benefits, and medical benefits

to Patricia Sisco ("Sisco"). Crittenden County also appeals from the order ruling on the petition for reconsideration entered June 29, 2011.

Sisco sustained a low back injury on September 14, 2005, which was resolved by settlement agreement approved March 14, 2008. As a result of that injury, Sisco was paid TTD benefits from September 15, 2005 through November 30, 2005, and again from March 9, 2006 through January 29, 2007. Sisco sustained a second low back injury on September 23, 2007. We will not engage in a lengthy discussion of the facts and will only review the relevant procedural history. Periods of PPD benefits and TTD benefits are also relevant to this appeal and will be discussed below.

On March 14, 2008, a Form 110-I settlement agreement was approved by Chief Administrative Law Judge, Sheila Lowther. By virtue of this agreement, the parties settled PPD benefits for the claim stemming from the September 14, 2005 injury for a lump sum of \$37,299.26 based upon a 15% impairment rating. On September 11, 2008, Sisco filed a claim for benefits stemming from her second injury which occurred on September 23, 2007. On April 8, 2009, the ALJ rendered an opinion and award wherein he determined Sisco had sustained a second injury on September

23, 2007. The ALJ awarded TTD benefits beginning January 28, 2008 due to the 2007 injury, and provided Crittenden County a credit in the amount of \$103.68 for the PPD benefits paid pursuant to the in the settlement of the 2005 injury. Sisco was paid TTD benefits from January 28, 2008 through February 8, 2010, minus the \$103.68 credit. Sisco also filed a motion to reopen the 2005 claim on December 15, 2008<sup>1</sup> alleging a worsening of her condition and entitlement to an increase in disability benefits.

In an opinion and award on the bifurcated issues of compensability and liability for medical benefits stemming from the September 23, 2007 injury rendered April 8, 2009, the ALJ ruled as follows:

The award of temporary total disability benefits will produce a period of overlapping disabilities between the award for permanent partial disability relating to the September 15[sic], 2005 injury and the award of temporary total disability relating to the September 23, 2007 injury. *Cabe v. Skeens*, 422 S.W.2d 884 (Ky. 1967). The injury of September 23, 2007 was not entirely independent of the injury of September 15[sic], 2005. Therefore, there should be a deduction for the income benefits that have been paid on the permanent partial disability award from the income benefits awarded herein for temporary total disability.

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<sup>1</sup> Although the motion to reopen was dated September 12, 2008, it was not filed until September 15, 2008.

. . .

2. The plaintiff, Patricia Sisco, shall recover of the defendant/-employer, Crittenden County Health and Rehab, and/or its insurance carrier with respect to the injury of September 23, 2007, temporary total disability benefits at the rate of (\$240.00 - \$103.68) equals [sic] \$136.32 per week from January 28, 2008 through the present and continuing until further order of the administrative law judge, together with interest at the rate of 12% per annum on all past and unpaid installments of compensation and defendant shall take credit for any compensation heretofore paid.

As it pertains to this appeal, in the opinion and award rendered May 23, 2011, the ALJ found:

**Was there an injury as defined by the Act?** This threshold issue is whether Patricia Sisco had an injury as defined in the Workers' Compensation Act. Under the Kentucky Workers' Compensation Act, "injury" means, in part:

... any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is

increased by the nature of the employment....

Here, I previously found:

Here, the employer stipulated that there was an injury on September 15[sic], 2005. The employer disputes that there was a new injury in September 2007.

What has happened here is that Ms. Sisco was employed by Crittenden County Health and Rehab for a long time. On September 15[sic], 2005 while assisting a patient, Ms. Sisco injured her back. This resulted in two low back surgeries performed by Dr. Davies. After Ms. Sisco was released to return to work, she did return to work, and in September 2007 she slipped and fell. Following this fall there were minor changes on physical examination, but Dr. Davies was not able to get requested imaging studies to be able to definitively state his opinion on the question of whether the new traumatic event caused a change in physical condition. While Dr. Travis did not think the September 2007 fall constituted an injury, Dr. Guarnaschelli stated, after having done a record review and physical examination of Ms. Sisco:

Clinically and by history, the patient has undergone two operative procedures and an extensive amount of conservative medical management following her 2005 injuries, and has been capable of returning to limited duty to work as of

the time of her 2007 injury. Since her subsequent 2007 injury until the present time however, this patient continues with an exacerbation of her low back, mid axial and overall regional complex pain syndrome, for which she is not functioning either with routine activities at home or at work. Although examination and radiographic studies do not allot or clarify the proximate cause of her current pain syndrome, it is apparent that the initial injury of 2005, followed by two major operative procedures and adjunctive conservative measures has served as the main, although not necessarily the sole, [sic] cause of her current pain syndrome. The subsequent age-related changes in the most recent slip and fall of 2007 have served as an aggravating event, but I believe by history alone, and by review of her medical evolution and history, that the 2005 work-related injury has been the major and/or proximate cause of her current symptoms. I believe that the current recommendations by Dr. Davies and by Dr. Prince are appropriate, and in addition to a medical protocol, hopefully without narcotic medications, but with the use of words and other conservative measures provided by the pain management, this overall pain

syndrome can be managed, and that any subsequent surgical intervention is best avoided.

I find Dr. Guarnaschelli's opinion to be well informed and reasoned. What he describes is a significant injury in 2005 followed by what we hope will be a minor injury in 2007. However, the diagnostic testing has not been done to determine what the extent of the injury might be. Whether it is called an exacerbation or an aggravation, the fall in September of 2007 was an injury. It carries with it the obligation to provide medical treatment and paid [sic] temporary total disability benefits if applicable.

I find nothing in the newly adduced evidence to change this conclusion that there was an injury in September 2007. Therefore my final finding and conclusion is that there were injuries both in September 2007 and on September 15[sic], 2005.

**What is the appropriate period of Temporary Total Disability?** Temporary total disability is defined in the Act as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a).

I previously concluded that the appropriate period of temporary total disability was:

The employer concedes temporary disability from September 15, 2005 through November 30, 2005 and March 9, 2006 through January 29,

2007. These periods relate to the September 2005 injury. Following the September 2007 injury, Ms. Sisco continued to work on limited duty until she was taken off work entirely in January 2008 by Dr. Davies. She has not worked since then. I conclude that during the time from January 28, 2008 until the present and continuing, Patricia Sisco has not reached maximum medical improvement and has not reached a level of improvement that would permit a return to employment.

This latter period of time was attributed to the September 2007 injury. That period of temporary total disability has now ceased. It ceased with Ms. Sisco achieving maximum medical improvement on February 8, 2010 when Dr. Davies placed her at maximum medical improvement. Therefore, the final determination with respect to temporary total disability is that Ms. Sisco was temporarily totally disabled as a result of the September 2005 injury from September 15, 2005 through November 30, 2005 and then from March 9, 2006 through January 29, 2007. This is assessable against the September 2005 injury. Following the September 2007 injury Ms. Sisco was temporarily totally disabled from January 15, 2008 through February 8, 2010. This is assessable against the September 2007 injury.

. . .

**Is the disability or impairment proximately caused by the injury?** This is a thornier question. It is apparent to me that the entire impairment is caused by one or the other of the injuries or by combination of both.

After considering the evidence of causation, particularly the report of Dr. Travis, I believe that it is appropriate to assess the entire permanent impairment against the injury of September 15[sic], 2005.

. . .

**Should any benefits be apportioned between parties or causes?** Apportionment is appropriate when there are multiple causes of disability. In this case, the ultimate cause of permanent disability is primarily the injury of September 15[sic], 2005 with the September 23, 2007 incident being a temporary aggravation of that condition.

. . .

8. The benefits shall be calculated based on a 27.60% disability rating subtracting the weekly amount previously paid on the settlement. The permanent partial disability benefits shall be suspended during the period of temporary total disability attributable to the injury of September 23, 2007.

9. The settlement with respect to the September 14, 2005 provides for a lump-sum payment as of March 14, 2008 at the rate of \$103.68 per week [sic]

**AWARD**

It is hereby **ORDERED AND ADJUDGED** by the Administrative Law Judge as follows:

1. The plaintiff, Patricia Sisco, shall recover of the defendant/-employer, Crittenden County Health and Rehab, and/or its insurance carrier with respect to the September 15[sic],

2005 injury, temporary total disability benefits at the rate of \$230.40 per week from September 15, 2005 through November 30, 2005 and March 9, 2006 through January 29, 2007.

2. The plaintiff, Patricia Sisco, shall recover of the defendant/-employer, Crittenden County Health and Rehab, and/or its insurance carrier with respect to the September 23, 2007 injury, temporary total disability benefits at the rate of \$240.00 per week from January 15, 2008 through February 8, 2010.

3. The plaintiff, Patricia Sisco, shall recover of the defendant/-employer, Crittenden County Health and Rehab, and/or its insurance carrier with respect to the September 15[sic], 2005 injury permanent partial disability benefits at the rate of \$198.72 beginning February, 2010 for a period which extends for 425 weeks from the date the settlement was approved, March 14, 2008 as extended by the period of temporary total disability benefits relating to the second injury of September 23, 2007 together with interest at 12% per annum on all past due and unpaid installments of compensation. The employer may take credit for compensation at the rate of \$103.68 for the period which overlaps the period of the above award.

In its petition for reconsideration, Crittenden County asked the ALJ to make certain corrections of typographical errors. In the same petition for reconsideration, Crittenden County also asked the ALJ to correct pages 25 and 26 of the opinion and award to reflect

"[t]he permanent partial disability benefits shall not be suspended during the period of temporary total disability benefits attributed to the September 23, 2007 injury." Crittenden County also requested the third paragraph on page 26 be amended to read:

The plaintiff, Patricia Sisco, shall recover from the defendant/employer, Crittenden County Health and Rehab, and/or its insurance carrier with respect to the September 15[sic], 2005 injury permanent partial disability benefits at the rate of \$190.87 beginning December 12, 2008 [sic] until December 16, 2014 (the date upon which the 425 week award terminates), together with interest at 12% per annum on all past due and unpaid installments of compensation. The employer may take credit for compensation at the rate of \$103.68 per week for permanent partial disability benefits previously paid pursuant to the March 14, 2008 order approving settlement.

In the June 29, 2011 order on reconsideration, the ALJ corrected the typographical errors pointed out by Crittenden County. Regarding the third issue raised in the petition for reconsideration, the ALJ ruled as follows:

The employer's third contention is that the benefits for which credit was granted should terminate on December 16, 2014. The evidence of benefits paid comes from the settlement agreement. It shows that the payment made was a lump sum payment discounted as of the date of approval of the agreement. Therefore it is a payment

of a stream of benefits that begin on the date of approval of the agreement. The parties, by agreement, altered the payment period. This distinguishes this case from the *Sweasy* case. See *Sweasy v. Walmart[sic] Stores Inc.*, 295 S.W.3d 835 (Ky. 2009). Had the parties wanted to reflect that the payments began as asserted by the employer on some date prior to the approval of the agreement, the agreement would have reflected a past-due amount with interest. Since no past-due amount or interest was mentioned, I inferred that the period for which payments were actually made began on the date of the approval of the agreement. I find no error in this inference.

On appeal, Crittenden County argues the ALJ misapplied the law with respect to the credit for payment of PPD benefits and the proper period for which increased PPD benefits are payable. Specifically, Crittenden County argues pursuant to *Sweasy v. Wal-Mart Stores, Inc.* #1269, 295 S.W.3d 835 (Ky. 2009), and KRS 342.730(1)(d), PPD benefits are to be paid from the date the impairment rises, which is when the work-related injury produces a harmful change in the human organism. Sisco argues the ALJ improperly applied *Sweasy* to the claim *sub judice*, and his opinion and award should be affirmed. We disagree.

It is undisputed Sisco is entitled to increased PPD benefits beginning December 15, 2008 through the date the 425 week award stemming from the September 14, 2005

injury date terminates. While we understand the ALJ's concern with Crittenden County receiving a greater discount than that to which it would appear to be entitled based upon the fact the 2008 settlement provided for no interest and assessed a discount on past due benefits, we are constrained by Sweasy. We must respectfully reverse the ALJ's opinion and award regarding the appropriate date for determining the beginning of the disability award period as a matter of law.

In Sweasy, the Kentucky Supreme Court held:

This appeal concerns KRS 342.730(1)(d), which provides compensable periods of 425 weeks for disability ratings of 50% or less and of 520 weeks for disability ratings that exceed 50%. KRS 342.730(1)(d)'s failure to specify when the period of a 425-week award begins may be read to imply legislative intent to permit such an award to begin on a date other than when the permanent impairment or disability of 50% or less arises. Yet, mindful of policy and purpose for which KRS 342.730(1)(b)-(e) were enacted, we conclude that the legislature intended no such absurdity. Neither the Court of Appeals nor the employer points to a reasonable basis for an ALJ to commence benefits on a date other than the date that the permanent impairment or disability arises. Perceiving there to be no reasonable basis, we turn to the question of when permanent impairment or disability arises for the purpose of commencing partial disability benefits.

A condition "arises" when it comes into being, begins, or originates. Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's Guides to the Evaluation of Permanent Impairment consider the amount of impairment that remains at MMI to be "permanent." The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. We conclude, therefore, that the compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration.

The evidence compelled a finding that the claimant's injury produced permanent impairment and disability from the outset. Thus, it also compelled a partial disability award in which the compensable period began on the date of injury. The claim must be remanded for that purpose.

Sweasy, 840, 841 (footnotes omitted).

Based upon the foregoing, it was error for the ALJ to determine the 425 week payment period of PPD benefits did not begin until March 14, 2008 when the settlement agreement was approved, rather than commencing on September 14, 2005 when the injury and resulting

disability occurred. No period of latency as discussed in Sweasy is present here. Specifically, Sisco began receiving TTD benefits immediately after her injury. It cannot be said Sisco had any delay in onset of her disability. On remand, the ALJ shall determine the compensable period began commensurate with the September 14, 2005 injury date, extended by periods of TTD benefits pursuant to KRS 342.730(1).

In rendering a decision, KRS 342.285 grants an ALJ, as fact-finder, the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested with broad authority to decide questions involving

causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

That said, we note KRS 342.285(2)(c) provides the Board may determine on appeal whether an order, decision, or award is in conformity to the provisions of KRS Chapter 342, and KRS 342.285(3) provides, in relevant part, the Board may "in its discretion" remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." These provisions permit the Board to *sua sponte* reach issues even if unpreserved in order to properly apply the law. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

It is noted the parties resolved PPD benefits relating to the September 14, 2005 injury by agreement on March 14, 2008. It is important to note no statement in a settlement agreement is binding in future actions. Beale vs. Faultless Hardware, 837 S.W.2d 893 (Ky. 1992). The claimant did not litigate her initial claim to completion.

Rather, she agreed to settle it based upon a 15% impairment enhanced by the 3.0 multiplier as set forth in KRS 342.730(1)(c)1. Sisco filed a motion to reopen the 2005 claim on December 15, 2008. A settled award is the product of a compromise. Therefore, the disability or permanent impairment rating contained in this agreement may or may not be accurate. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999), Beale v. Faultless Hardware, *supra*, and Newberg v. Davis, 841 S.W.2d 164 (Ky. 1992), explain that the parties to a settlement are entitled to the benefit of their bargain and that KRS 342.125(7) prohibits any statement contained in a settlement agreement from being considered as an admission against interest if the claim is reopened. As a consequence, the ALJ is required to compare the worker's actual disability at settlement with that at the time of reopening. If it has increased, the worker receives additional benefits for the difference.

In this instance, the ALJ failed to make that assessment. Specifically, the ALJ failed to make a determination as to her occupational disability and the PPD benefits to which she is entitled prior to the date Sisco moved to reopen her claim for a worsening of her condition and increase, if any, of PPD benefits. The ALJ merely found Sisco to be entitled to benefits based upon a 24%

impairment rating. In addition to assessing the correct date for onset of disability as discussed above, the ALJ shall determine the extent of Sisco's occupational disability immediately prior to December 15, 2008, whether she had an increase in disability as she alleged, and the extent of the worsening of her occupational disability. The award of PPD benefits shall not be extended by the period of TTD benefits due to the September 23, 2007 injury which the ALJ determined resulted in no permanent partial disability.

Accordingly, the opinion and award rendered on May 23, 2011 by Hon. Richard M. Joiner, Administrative Law Judge, and the order ruling on the petition for reconsideration dated June 29, 2011, are hereby **VACATED IN PART, REVERSED IN PART, AND REMANDED** for further findings and entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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