

OPINION ENTERED: APRIL 26, 2013

CLAIM NO. 200982357

HARDIN COUNTY BOARD OF EDUCATION

PETITIONER

VS.

**APPEAL FROM HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE**

TOMMY THURMAN
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AND

TOMMY THURMAN

PETITIONER

VS.

HARDIN COUNTY BOARD OF EDUCATION
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING**

* * * * *

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

ALVEY, Chairman. The Hardin County Board of Education ("Hardin County") appeals from the October 17, 2012 Opinion,

Award and Order rendered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"), and Tommy Thurman ("Thurman") appeals from the ALJ's November 19, 2012 order overruling his petitions for reconsideration. Hardin County argues the ALJ erred by failing to dismiss the Form 101. Thurman argues any overpayment in the settlement agreement was a mistake of law by Hardin County; it should receive no credit for temporary total disability ("TTD") benefits awarded; and the ALJ erred in granting credit for the full amount previously paid pursuant to the settlement agreement.

Since we determine Thurman was not barred from pursuing a claim for benefits related to his shoulder condition and the ALJ erred regarding the appropriate credit, we affirm in part, reverse in part and remand.

Thurman sustained injuries to his low back and shoulder on July 8, 2009 while removing a hood from a school bus in the course of his work as a mechanic for Hardin County. Thurman received treatment for his back and shoulder following the injury. Hardin County and Thurman reached an agreement approved by the ALJ on June 18, 2010 providing for a lump sum payment of \$31,730.71 representing \$3,500.00 for waivers of vocational rehabilitation and the right to reopen, and the remainder for permanent partial disability ("PPD") benefits based upon a 10% low back impairment. The

amount attributable to the 10% impairment was enhanced by two pursuant to KRS 342.730(1)(c)2. The agreement stated the nature of injury or body part affected was "lumbar." The agreement noted Dr. Thad Jackson assessed a 10% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). The agreement also reflects Thurman, who was not represented by counsel when he executed the settlement agreement, agreed to dismiss his claim for income benefits with prejudice, and medical benefits were to remain open regarding his back.

Thereafter on May 10, 2012, Thurman filed a Form 101, Application for Resolution of Injury Claim, alleging an injury to his left shoulder occurring on July 8, 2009. Thurman indicated notice was given to the supervisor on the date of the accident.

Thurman testified at the hearing held September 13, 2012. Thurman stated he had spoken to the adjuster regarding settling his back claim. The adjuster prepared and mailed an agreement to him, which he signed and returned. Thurman understood he was only settling any claim he may have for a back injury. Thurman received treatment for his shoulder until shortly before entering the agreement. Thurman did not submit any bills to the carrier

after the settlement, and his treatment was paid by Medicare.

The parties agreed the work injury produced a 10% impairment rating for the low back condition and a 7% impairment for the shoulder condition for a combined 16% impairment pursuant to the AMA Guides.

In the October 17, 2012 Opinion, Award and Order, the ALJ made the following findings relevant to this appeal:

5. The Defendant filed a Special Answer on July 9, 2012, which included a Motion to Dismiss. The Defendant argues that Thurman is bound to the terms of the Form 110 Settlement Agreement, which solely identified a back injury, resolved all claims except for future medical benefits on the back injury, and failed to reserve any claim involving the left shoulder. The Defendant acknowledges having paid some medical benefits for the left shoulder prior to the June 18, 2010 settlement agreement, but has not paid any medical benefits on either the shoulder or low back since that date.

6. Thurman argues that the settlement agreement on a "lumbar" condition does not foreclose the right to subsequently file and pursue a shoulder injury; that he did not release all claims against the Employer; that the limitations period has not expired on the claim; that the Form 110 is ambiguous and should be construed against the drafter; and that the carrier was "on notice" of the shoulder injury and should be estopped from relying on the Form 110 when it knew at the time that Thurman also had a shoulder injury. Thurman testified that

when he signed the settlement agreement he thought he was settling only his back injury claim, and not his shoulder injury claim.

7. In a post-Hearing telephonic conference on September 20, 2012, the parties agreed to supplement the issues to be decided in this case as follows: If the shoulder claim was not dismissed, the parties agreed that Thurman's impairment for that injury is 7%; that his shoulder impairment should be combined with his lumbar impairment for 16% whole person impairment; that no multipliers were applicable to the PPD calculation; and that Thurman was temporarily totally disabled by reason of the shoulder surgery from March 6, 2012 to June 6, 2012.

8. The ALJ relies on the plain reading of the Form 110 to find that Thurman is not foreclosed from pursuing his shoulder claim. The Defendant's argument for dismissal of the Form 101 is that the previous Form 110 was silent with respect to a shoulder injury, i.e., it identified only a "lumbar" injury. However, the ALJ believes that this fact cuts more in Thurman's favor than it does the Defendant's favor. If the shoulder had been listed, then that claim could have been resolved by the terms of the agreement; but by not listing the shoulder, it was not resolved by the settlement.

The related argument raised by the Defendant is that the agreement failed to preserve a shoulder claim. The ALJ was provided no authority stating that such was required of Thurman at the time. As the drafter of the document, the Defendant could have foreclosed and [sic] indemnity claim on the shoulder by including it as a body part involved in the settlement. The fact that the

agreement did not contain language preserving a shoulder claim does not mean it was waived. Another example of the inartful drafting of the agreement by the Defendant relates to its reliance on the "dismiss... with prejudice" language of the Form 110; such is countered by the fact that the claim was not dismissed with prejudice because it was kept open by the preservation of medical benefits. The Defendant had paid medicals on the shoulder before the settlement. The settlement agreement did not dispose of the shoulder claim one way or another, and therefore it remains viable.

The ALJ somewhat appreciates the Defendant's frustration over this result. There is a high degree of custom in this practice, and in that regard the result is unusual. Parties reasonably expect finality with their settlement agreements, and this result seems a bit contrary to that. Further, there is no suggestion of heavy-handedness by the Defendant with the settlement agreement in that the settlement was reasonable for both parties; to Thurman's benefit, the ALJ notes that while a carrier often requires a complete dismissal of the claim in exchange for a lump sum payment, his future medical benefits on his back injury were preserved. Also recognized is the fact that in the two years following the settlement agreement, the Defendant has not had a single medical bill presented for payment. The ALJ is entirely satisfied that the Defendant thought it had forever bought its peace with Thurman with the settlement agreement. However there is no getting around the fact that Thurman injured his shoulder on July 8, 2009; he received medical treatment for it prior to the 2010 settlement; and that the settlement agreement failed to

dispose of the shoulder claim. The ALJ was not provided authority on which to sustain the Defendant's argument that the settlement agreement on the low back injury now forecloses his claim for benefits for a shoulder injury arising out of the same occurrence. For these reasons, the motion to dismiss is overruled.

9. Thurman's PPD for his combined low back and left shoulder impairment is calculated as follows: AWW of \$673.87 x 2/3 = \$449.25 x 16% x 1.0 = \$71.88 per week from July 8, 2009 until his 65th birthday, as limited by KRS 342.730(4). The period of PPD shall be interrupted during the period of temporary total disability, as awarded in paragraph two of the Award and Order below.

As reflected in the June 18, 2010 Form 110, Thurman received \$31,730.71 in settlement of his back injury claim. Of that sum, \$3500.00 was paid for the waivers of reopening and vocational rehabilitation. Therefore, he was paid \$28,230.71 for his claim to permanent indemnity benefits. As against the weekly award set forth in the preceding paragraph for the combined impairment of his back and shoulder injuries, the defendant is entitled to a credit of \$28,230.71.

The ALJ determined that the Defendant is entitled to a credit against the full amount previously paid rather than against Thurman's actual occupational disability for his back injury at the time of settlement because the shoulder injury was a new injury claim submitted by a Form 101; having accepted Thurman's argument that the Form 110 was a partial settlement as to all potential claims in the case, the amount previously paid should be similarly considered a partial

settlement as to the total amount potentially owed. This was not a reopening for increased indemnity benefits, where following a prior settlement the ALJ must determine the worker's actual disability on the date of the settlement to calculate the any [sic] increased award. *Beale vs. Faultless Hardware*, 837 S.W.2d 893 (Ky. 1992).

On October 29, 2012, Thurman filed a petition for reconsideration noting the ALJ erroneously terminated PPD benefits at age 65 rather than age 66. On October 31, 2012, Thurman filed a supplemental and amended petition for reconsideration arguing there was a voluntary overpayment in the settlement agreement and the ALJ erred in granting a \$28,230.71 credit to Hardin County. By order dated November 19, 2012 the ALJ granted Thurman's petition for reconsideration and amended the award to provide benefits are payable until Thurman qualifies for normal Social Security retirement benefits. The ALJ overruled Thurman's supplemental petition for reconsideration.

On appeal, Thurman concedes there was an overpayment as to the number of weeks of PPD benefits in the settlement agreement. However, Thurman argues the overpayment was a mistake of law by Hardin County. Thurman concedes benefits should terminate upon the date he qualifies for normal Social Security retirement benefits, 280 weeks following the period of TTD. Thus, there was an overpayment of

\$8,742.34. Thurman argues allowing a credit for the overpayment would, in essence, change the Form 110 settlement agreement and take away \$8,742.79 paid thereunder.

Next, Thurman argues Hardin County should receive no credit for the TTD ordered by the ALJ. Pursuant to Triangle Insulation and Sheet Metal County v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990), Thurman argues he should not be deprived of future income as a result of an overpayment. He notes the PPD benefits awarded by the ALJ are future periodic benefits and, therefore, Hardin County should not receive a credit for TTD benefits awarded.

Finally, Thurman argues the ALJ erred in allowing Hardin County a credit for the full amount previously paid pursuant to the settlement agreement, depriving him of any benefits for the shoulder injury. Thurman notes the \$28,230.71 credit would extinguish the liability for the PPD benefits for his shoulder. He contends this would be an inequitable result because the \$28,230.71 paid to him was solely for the back injury and calculated correctly, except for the carrier's failure to apply KRS 342.730 (4) which would have shortened the number of weeks of benefits.¹

¹ The lump sum settlement exceeds the total benefit awarded by the ALJ due to the number of weeks used in the settlement calculation and the apparent application of the two multiplier, whereas the parties stipulated no multiplier was applicable for the shoulder injury.

Thurman contends if Hardin County is to receive any credit, it should only be the sum of \$19,488.37, the correct calculation of PPD benefits for the back injury based on 280 weeks discounted to 255.1836 weeks. He argues Hardin County should not benefit or receive a windfall because its carrier made a mistake of law.

Hardin County argues the ALJ erred by failing to dismiss the Form 101. Hardin County contends the terms of the settlement agreement can only be determined by viewing the agreement itself. Hardin County contends the agreement on its face appears to be a final resolution of the matter. Hardin County asserts there is no uncertainty or incompleteness evident within the settlement agreement. The agreement indicates the claim is dismissed with prejudice and includes a waiver of the right to reopen. Hardin County asserts there is no indication in the agreement it is a partial settlement or that any rights are reserved. Hardin County notes KRS 342.270(1) states an employee is required to join all causes of action against the employer which have accrued or are known or reasonably should be known by him. Failure to join all accrued causes of action results in the claim being barred as waived by the employee. Hardin County argues the requirement should apply to pre-claim settlements. Hardin County notes

Thurman was aware of the shoulder condition since he underwent physical therapy for that condition as recently as one month prior to the settlement. Hardin County concedes the agreement only addressed the low back but argues the injury, not the body part affected is significant. Hardin County notes Thurman injured both his shoulder and back in a single traumatic incident. Hardin County contends the filing of the Form 101 was essentially a reopening of a settled claim, which Thurman is barred from pursuing because he had waived his right to reopen.

We find no error in the ALJ's determination Thurman was not barred from pursuing the claim for a shoulder condition. The agreement only stated the affected body part was "lumbar" and did not address the shoulder condition. As noted by the ALJ, if the agreement had listed the shoulder condition, Thurman's claim would have been barred. Further, had the agreement contained language to the effect Thurman was settling any and all claims arising from the incident, his shoulder claim would be barred.

KRS 342.270 does not bar Thurman from pursuing the shoulder claim. KRS 342.270(1) states in part as follows:

When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which

have accrued and which are known, or should reasonably be known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

The above language was adopted by the General Assembly effective December 12, 1996. Until the adoption of KRS 342.270(1), workers were permitted to file multiple claims and were not required to join them, even when the claims resulted from the same accident. Woodbridge INOAC, Inc. v. Downs, 864 S.W.2d 306 (Ky. App. 1993). In accordance with the above language, an application for benefits filed by an employee triggers the start of litigation. Once filed, KRS 342.270(1) places the burden upon the claimant to join all accrued and known causes of action against the same named employer. The policy underlying KRS 342.270(1) is one of judicial economy. It is intended to eliminate piecemeal litigation, the added costs to employers incumbent in such practices, and the added burden on our judicial system in general, thereby guaranteeing a proper resolution of issues such as offset, credit, excess disability and overlapping disability. Ridge v. VMV Enterprises Inc., 114 S.W.3d 845 (Ky. 2003); see also Jeep Trucking Inc. v. Howard, 891 S.W.2d 78 (Ky. 1995).

In an unpublished case, the Supreme Court of Kentucky addressed the applicability of KRS 342.270(1) where a

claimant did not file an application regarding a 1996 injury and settled the matter after a 1999 injury had occurred. On appeal, the employer asserted because it was possible to file a claim for the effects of the 1999 injury and to join it with the claim for the 1996 injury before the claim was settled, KRS 342.270(1) required the claimant to do so. See Westerfield v. Diversified Health Care Inc., 2003-SC-0758-WC, 2003-SC-0783-WC (rendered December 16, 2004 and designated not to be published). In that case, the Supreme Court noted the word "pendency" refers to "the state or condition of being undecided." Black's Law Dictionary 1154 (7th ed. 1999). The Court continued by stating the following:

Keeping in mind that the rights and benefits for a work-related injury must be asserted in a timely manner or lost and that there is nothing to be decided until an application for benefits is filed, we conclude that a claim is pending for the purpose of KRS 342.270 (1) between the time the application is filed and decided. Therefore, unless an application is filed with respect to an injury before the worker and employer agree to settle their rights and liabilities regarding that injury (i.e., unless there is a pending claim regarding that injury), the obligation to join other known causes of action against the named employer does not arise even if they have accrued. Slip opinion at 7-8. (Emphasis added)

Since the settlement agreement in the case *sub judice* was approved by an ALJ prior to the filing of the Form 101, the merger provision contained in KRS 342.270 has no application to Thurman's claim.

It is important to note the parties did not reopen the settlement agreement and the terms of the agreement remain in effect. The agreement extinguished, with the exception of medical expenses, Hardin County's liability for the back condition. KRS 342.730(1)(e) provides:

For permanent partial disability, impairment for nonwork-related disabilities, **conditions previously compensated under this chapter**, conditions covered by KRS 342.732, and hearing loss covered in KRS 342.7305 **shall not be considered in determining the extent of disability** or duration of benefits under this chapter. (Emphasis added).

Based upon the clear language of the statute, Thurman's low back condition was a condition previously compensated at the time he filed his Form 101. Accordingly, the shoulder injury should have been adjudicated as if it were an injury separate from the low back injury even though the injuries arose from the same incident. Thurman was entitled to keep the benefit of his bargain. There was no need for the ALJ to consider the back injury or recalculate the award.

With respect to the shoulder injury, there was no disagreement regarding the appropriate impairment rating.

The parties stipulated the back condition, for which Thurman has already been compensated, produced a 10% impairment rating pursuant to the AMA Guides. The parties further stipulated the injury produced a 7% impairment rating for the shoulder condition. The shoulder impairment, combined with the impairment assessed for the back, produces a 16% impairment rating. Thus, Thurman, pursuant to the stipulation, is entitled to PPD benefits based upon a 6% impairment rating multiplied by a factor of 1.00 pursuant to KRS 342.730(1)(b). There is no credit against the shoulder award for the back condition since the back condition is not a part of the claim asserted in the Form 101. Benefits for the shoulder injury must be calculated independently from the back injury. Further, the award of PPD benefits shall be interrupted during the two periods of TTD.

Hardin County is entitled to a credit for the PPD benefits paid pursuant to the settlement agreement during the period TTD benefits were awarded for the shoulder injury since the claimant is not entitled to an amount greater than the total disability rate. In Matney v. Newberg, 849 S.W.2d 526, 527 (Ky. 1992), the Kentucky Supreme Court noted a claimant may not, at one time, be compensated for more than total occupational disability because he can, in fact, be no

more than totally occupationally disabled. The appropriate credit is \$76.37 per week against the weekly TTD benefit awarded from March 6, 2012 to June 6, 2012.

Accordingly, the October 17, 2012 Opinion, Award and Order rendered by Hon. Douglas W. Gott and the November 19, 2012 order overruling Thurman's petitions for reconsideration are **AFFIRMED IN PART, REVERSED IN PART** and this matter is **REMANDED** for entry of an amended award in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

COUNSEL FOR PETITIONER/RESPONDENT - HARDIN COUNTY BOARD OF EDUCATION:

HON J. DALE GOLDEN
HON DUSTIN C. BEARD
771 CORPORATE DRIVE, SUITE 905
LEXINGTON, KY 40503

COUNSEL FOR RESPONDENT/PETITIONER - TOMMY THURMAN:

HON DANNY DARNALL
911 N MULBERRY ST
ELIZABETHTOWN, KY 42701

ADMINISTRATIVE LAW JUDGE:

HON DOUGLAS W. GOTT
400 EAST MAIN STREET, STE 300
BOWLING GREEN, KY 42101