

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: August 26, 2016

CLAIM NO. 201100713

PELLA WINDOWS DEPE PLLC

PETITIONER

VS.

APPEAL FROM HON. GRANT S ROARK,  
ADMINISTRATIVE LAW JUDGE

JAMES UNDERWOOD  
HON GRANT S ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
REVERSING IN PART,  
VACATING IN PART,  
AND REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** Pella Windows DEPE PLLC ("Pella") appeals from the December 28, 2015 Opinion, Order and Award and the February 12, 2016 Order on Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The ALJ determined James Underwood ("Underwood") was permanently partially disabled as a result of a June 3, 2009 work

injury, and permanently totally disabled as a result of a cumulative trauma injury manifesting on April 21, 2010. On appeal, Pella argues the ALJ erred in enhancing the permanent partial disability ("PPD") award by three multiplier, and erred in awarding permanent total disability ("PTD") benefits during a period Underwood continued to work at full wages. For the reasons set forth herein, we reverse in part, vacate in part and remand.

Underwood worked at Pella as a window installer. On June 3, 2009, he was attempting to climb down a ladder which was leaning against his truck. The ladder slipped out underneath him due to wet road conditions, and Underwood fell backwards onto the concrete. He landed on his upper body and was taken immediately to the emergency room. Underwood received stitches, was discharged and returned to work the next day.

Over the following ten months, Underwood testified his neck and head pain gradually worsened. He began to experience bouts of dizziness, though there is no direct medical proof linking this symptom to his neck injury. Also, the pain in his hands and wrist which he had experienced for some years began to worsen significantly, to the point it began to affect his job performance.

Eventually, his primary care physician referred him to Dr. Tuna Ozyurekoglu and fusion surgery was performed. Underwood continued to work until August 4, 2010.

Dr. Anthony McEldowney evaluated Underwood and conducted a medical records review. Dr. McEldowney noted Underwood continues to experience pain in both shoulders and arms with associated numbness and tingling. Bilateral carpal tunnel releases were performed to relieve Underwood's wrist pain. Nonetheless, there is still residual pain and weakness. Dr. McEldowney diagnosed cervical strain/sprain, right wrist sprain with carpal ligament and TFCC tears, and left wrist sprain with carpal and TFCC tears. He concluded all of the conditions are work-related. He opined Underwood reached maximum medical improvement ("MMI") on June 12, 2011 and he does not retain the physical capacity to return to his pre-injury job.

Dr. Richard Dubou evaluated Underwood on August 8, 2011. He diagnosed osteoarthritis and degenerative changes to the right and left wrist, which are not work-related. Likewise, Underwood's cervical and lumbar spine conditions are not work-related.

The ALJ relied upon Dr. McEldowney's opinion to conclude Underwood suffered work-related injuries to his

cervical spine on June 3, 2009, and cumulative trauma injuries to his bilateral wrists manifesting on April 21, 2010. Noting Underwood returned to work following the fall from the ladder, the ALJ determined Underwood was not totally disabled "as a result of the June 3, 2009 injury alone." However, he also noted Underwood's testimony he worked in pain between June, 2009 and August, 2010 and concluded he had "returned to his same job but did not, in reality, retain the physical ability to return to that job." As such, he enhanced the PPD benefits by the three multiplier pursuant to KRS 342.730 (1)(c)(1). The ALJ then concluded that Underwood was permanently totally disabled "as a result of the combined effects of his cervical injury and his bilateral wrist conditions" which manifested on April 21, 2010. He awarded PTD benefits beginning April 21, 2010.

Pella petitioned for reconsideration. In his Order on Petition for Reconsideration, the ALJ corrected the opinion to reflect that Underwood continued to work until August 4, 2010. He added:

In fact, the record establishes [Underwood] continued to work, performing the same duties up to August 4, 2010. However, [Underwood] testified that by April 21, 2010 and continuing until August, he could no

longer lift windows with his hand but, instead, had to use his forearms to lift windows. For these reasons, it is duly noted that [Underwood] continued to work through August 4, 2010, but this changes nothing in the analysis of [his] claim.

As such, the ALJ declined Pella's request to commence PTD benefits on August 4, 2010, Underwood's last day of work.

Pella also petitioned for further findings of fact regarding the application of the three multiplier in light of the fact Underwood returned to full duty work after the June 3, 2009 accident. The ALJ explained:

Quite simply, the ALJ was persuaded plaintiff continued to work for the several months after April, 2010 when his neck and wrist symptoms worsened, only through extreme motivation and will. Indeed, plaintiff's treating physicians, Dr. Guanaschelli and Dr. Tuna, took plaintiff off work for his neck, left arm and bilateral wrist complaints in August, 2010. Thus, the medical record, along with plaintiff's testimony support the conclusion that plaintiff is not capable of returning to the job he held at the time of his injury, which further supports the opinion that plaintiff is not totally disabled.

On appeal, Pella first argues it was error to commence the award of PTD benefits on April 21, 2010 because Underwood continued to work at full duty until his last day on August 4, 2010. It does not challenge the

finding Underwood is now permanently totally disabled, but argues the award should commence on August 4, 2010.

Permanent total disability means the condition of an employee who, due to an injury, has a permanent disability rating and has a "complete and permanent inability to perform any type of work" as a result of an injury. KRS 342.0011(11)(b). Work, in turn, is defined as "providing services to another in return for remuneration on a regular and sustained basis in a *competitive economy* [.]" KRS 342.0011(34). Again, Pella does not directly challenge that Underwood is now permanently, totally disabled and we note substantial evidence supports this conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Rather, Pella grounds its argument primarily in logic: one cannot be deemed completely and permanently unable "to perform any type of work" when one is, in fact, working full duty, at full wages, and in his regular position. It further highlights that no accommodations were made for Underwood during this period. Though Underwood testified he altered the method in which he lifted the windows and worked in pain, he was not relieved of any specific duties and was not provided a helper to

complete his work. Based on this reasoning, Pella urges PTD benefits must commence on Underwood's last day of work.

Looking solely at the statutory language of KRS 342.0011(11), we agree with Pella that Underwood cannot fit the definition of permanent total disability while working his regular position. The parties have directed our attention to a number of Kentucky appellate decisions, which we have considered. The Kentucky Supreme Court has stated that a return to work does not preclude a previously injured worker from continuing to be considered permanently and totally disabled. Marcum v. Wolf Creek Collieries, 850 S.W.2d 48 (Ky. 1993) *citing* Yocom v. Yates, 566 S.W.2d 796 (1978). In Yates, the Court of Appeals concluded a totally disabled coal miner did not return to regular employment when he took a part-time job as a school bus driver. The Court's analysis focused on the fact that the claimant's ability to work as a bus driver did not reflect on his inability to continue work in the coal industry.

Underwood cites to Gunderson v. City of Ashland, 701 S.W.2d 135 (Ky. 1985), where a police officer was left completely paralyzed after being shot in the line of duty. His employer made extensive accommodations so that he could continue to work as a police dispatcher. In analyzing

whether Gunderson could be considered totally and permanently disabled when he had in fact returned to work, the Court first noted there was no dispute he was left a quadriplegic and, therefore, fit the statutory definition of permanently, totally disabled. Citing Larson's Workers Compensation, Vol II, Section 57.51, the Court then considered Gunderson was only able to return to work due to the sympathy of his particular employer who had made extreme accommodations for him. Section 57.51 of Larson's handbook also identifies "business boom, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps" as factors which should not affect a determination of the claimant's future earning capacity.

Because none of these cases are factually similar in all pertinent respects, we have also considered an unpublished opinion of the Court of Appeals pursuant to CR CR 76.28(c). In Caldwell Tanks, Inc. v. Wethington, 2007 WL 2812607, the claimant was deemed permanently totally disabled as a result of a severe fall. He was able to return to work after his employer made "various extraordinary efforts" to accommodate him. In its petition for reconsideration, the employer did not challenge the

determination Wethington was permanently totally disabled. Thus, it was not permitted on appeal to argue Wethington did not fit the statutory definition of permanent total disability.

Instead, the employer argued the award of PTD benefits should be abated until such time as he ceases employment. The Court rejected this argument, concluding Gunderson controlled the issue even though a different definition of permanent total disability was then in effect. Instead, the Court focused on the fact that the ALJ found Wethington was able to continue working due to his sympathetic employer's accommodations, like the employer in Gunderson. As such, the Court of Appeals found no basis in statute or case law to afford the employer the "equitable relief" of abating the award of PTD benefits.

When compared to Underwood's situation, we can draw important factual distinctions with all of the above cited cases. The Court's statement in Marcum is arguably dicta, and involved a procedural issue concerning only coal workers' pneumoconiosis claims. In Yocum, the claimant returned only to part-time work in a different, less physical industry. Gunderson involved a much more severely injured claimant, and a highly sympathetic employer who

made extensive accommodations to allow its employee to continue working. In Wethington, the ALJ determined the claimant was able to continue working due to the sympathy of his employer who made accommodations, and thereby Gunderson controlled the issue.

Here, no special accommodations were made for Underwood. Underwood worked full duty, at full wages, between April 21, 2010 and August 4, 2010. Though he performed his work differently due to his pain, his job tasks were not altered and he did not require the use of a helper. The ALJ did not conclude Pella is a "sympathetic employer." Instead, he cited only Underwood's "extreme motivation and will".

For these reasons, we are compelled to the conclusion that, as a matter of law, a worker cannot be considered permanently totally disabled during a period he continues to work his regular job, with no accommodations, at full wages. As such, Underwood cannot be deemed permanently totally disabled until he ceased working at Pella. On remand, the ALJ is directed to amend the award to commence PTD benefits on August 4, 2010.

In its second argument, Pella claims the ALJ erroneously enhanced the award of PPD benefits by the three

multiplier. The award of PPD benefits is from June 3, 2009, the date of the fall, to April 21, 2010, the date which PTD benefits commence. Underwood worked full duty and full time during this period, though he testified he was in pain and his wrist symptoms worsened.

KRS 342.730(1)(c)(1) permits enhancement of PPD benefits where, due to an injury, the employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury. Pella requested further findings of fact on this issue in its petition for reconsideration. The ALJ explained:

Quite simply, the ALJ was persuaded plaintiff continued to work for the several months after April, 2010 when his neck and wrist symptoms worsened, only through extreme motivation and will. Indeed, plaintiff's treating physicians, Dr. Guanaschelli and Dr. Tuna, took plaintiff off work for his neck, left arm and bilateral wrist complaints in August, 2010. Thus, the medical record, along with plaintiff's testimony support the conclusion that plaintiff is not capable of returning to the job he held at the time of his injury, which further supports the opinion that plaintiff is not totally disabled.

The award of PPD benefits concerns only Underwood's June, 2009 work accident and, therefore, his cervical injury. The ALJ's analysis does not explain why,

due to the effects of the June, 2009 injury alone, Underwood was unable to continue return to the type of work he performed at the time of the injury. In light of the unique circumstances of this case - specifically, that Underwood continued to work without accommodation during this period - further analysis is required. For this reason, we vacate the award of enhanced PPD benefits and remand this claim to the ALJ for further findings of fact.

For the foregoing reasons, the December 28, 2015 Opinion, Order and Award and the February 12, 2016 Order on Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **REVERSED IN PART, VACATED IN PART AND REMANDED** with directions to enter and Opinion and Award in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

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