

OPINION ENTERED: June 4, 2012

CLAIM NO. 201082195

SIDNEY COAL COMPANY, INC.

PETITIONER

VS.

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

BRIAN J. REED  
and HON. ALLISON EMERSON JONES,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**STIVERS, Member.** Sidney Coal Company, Inc. ("Sidney Coal") appeals the December 19, 2011, opinion, order, and award of Hon. Lawrence Smith, Administrative Law Judge ("ALJ Smith") awarding income benefits for Brian J. Reed ("Reed") as follows:

1. Plaintiff shall recover benefits based upon a 39% functional impairment in accordance with KRS 342.730 in

effect on the date of the injury. The calculation of the award shall be as follows:

\$711.07 (Maximum employee factor-  
66.67% of employee average weekly wage  
not to exceed 75% of state average  
weekly wage)  
x 39% (39% wbi)  
277.60  
x1.7 (per KRS 342.730(b))  
\$471.92  
x3.2 (per KRS 342.730(1)(c)(1 and  
3))(inability to return to the type of  
work performed at the time of injury,  
and over the age of 50)  
1510.14\*

\*In compliance with the provisions of KRS 342.730(1)(d) which prohibits awards of PPD exceeding 99% of 2/3's of the employee's average weekly wage, but not to exceed the maximum of \$711.79, the weekly benefit is reduced to \$711.79. Therefore, pursuant to the provisions of KRS 730(1)(c)(2), plaintiff is entitled to recover the amount of \$711.70 [sic] per week beginning March 12, 2011, and continuing for 520 weeks.

Sidney Coal filed a petition for reconsideration in which it argued as follows:

The Defendant/Employer respectfully asserts that the above-referenced calculation and award of the weekly benefit is in error because pursuant to the decision rendered in Stewart v. Kiah Creek Mining, 42 S.W.3rd 614 (Ky. 2011) the weekly benefit is limited to 99% of the maximum possible weekly benefit. Accordingly, the weekly benefit should have been limited to \$704.68.

Reed also filed a petition for reconsideration in which he pointed out a typographical error made in ALJ Smith's award by stating as follows:

That the Administrative Law Judge mistakenly typed \$711.07 and \$711.70 to be used [sic] calculating Plaintiff's PPD benefits on pg. 17 of the opinion. These were simply typo's [sic] since the ALJ correctly calculated the benefits using the \$711.79 figure.

In an order dated January 26, 2012, ALJ Jones put forth the following findings:

This matter was reassigned to the undersigned Administrative Law Judge (ALJ). Prior to reassignment, the prior ALJ, the Hon. Lawrence F. Smith, rendered an Opinion, Order and Award on December 19, 2011. Pending before the undersigned ALJ are the parties' cross petitions for reconsideration of that Opinion, Order and Award.

The prior ALJ determined that Plaintiff was entitled to recover a weekly permanent disability benefit of \$711.70. The parties agree that the amount of PPD in [sic] December 19, 2011 Opinion, Order and Award is incorrect. They disagree, however, on [sic] amount of PPD the prior ALJ should have awarded Plaintiff. Plaintiff contends that he is entitled to a weekly PPD benefit of \$711.79, the amount appearing in the ALJ's calculation, but mistyped as \$711.70 in the award. Defendant contends that the prior ALJ actually calculated the award incorrectly. It maintains that Plaintiff is entitled to a weekly PPD benefit of \$704.68.

The following facts are necessary for the current ALJ to recalculate the PPD benefit: 1) Plaintiff's date of birth is March 27, 1957; 2) Plaintiff sustained a work-related injury on July 23, 2010; 3) Plaintiff graduated from high school; 4) Plaintiff's average weekly wage at the time of injury was \$945.00; 5) Plaintiff suffered a 39% whole body impairment (as determined by the prior ALJ); 6) Plaintiff cannot return to his former line of work (as determined by the prior ALJ); and 7) the state average weekly wage at the date of injury was \$711.79.

The correct method for calculating PPD under KRS.730 was explained by the Kentucky Supreme Court in *Stewart v. Kiah Creek Mining*, 42 S.W.3d 614, 617 (Ky. 2001). The undersigned ALJ will now calculate the benefit following those steps:

1. Calculate the benefit for partial disability as directed by KRS 342.730(1)(b):

a. Calculate the permanent disability rating by multiplying the AMA impairment by the applicable factor from the table in KRS 342.730(1)(b).

$$.39 \times 1.7 = .663$$

b. Multiply the disability rating by 66 2/3% of the worker's average weekly wage (\$630.00) or 75% of the state's average weekly wage (\$533.61), whichever is less.

$$.663 \times \$533.61 = \$353.78$$

2. Multiply the benefit for partial disability as directed by KRS 342.730(1)(c)1.

$$\$353.78 \times 3.2 = \$1132.09$$

3. Apply KRS 342.730(1)(d):

a.) Determine the duration of the benefit based upon the permanent disability rating obtained in step 1a.  
**520 weeks because the percentage exceeds 50%**

b.) Limit the benefit to a maximum of 99% of 66 2/3% of the worker's average weekly wage (\$623.70) or 100% of the state's average weekly wage (\$711.79) because KRS 342.730(1)(c)1 applies.

**\$711.79 is the weekly PPD benefit Plaintiff is entitled to receive for a maximum of 520 weeks.**

Accordingly, for the reasons set forth above and being otherwise sufficiently advised, **IT IS HEREBY ORDERED** that Plaintiff's petition for reconsideration is **GRANTED** because the amount of the PPD in the prior Opinion, Order and Award is a facially patent typographical error. Defendant's petition for reconsideration is **DENIED**.

**IT IS FURTHER ORDERED** that Page 17, section VII-Order and Award, numbered paragraph 1 of the December 19, 2011, Opinion, Order and Award is **AMENDED** as follows: 'Therefore, pursuant to the provisions of KRS 730(1)(c)(2), plaintiff is entitled to recover the amount of \$711.79 per week beginning March 12, 2011, and continuing for 520 week or until Plaintiff qualifies for normal old-age Social Security retirement benefits, whichever occurs first.'

Sidney Coal also appeals the January 26, 2012, order ruling on the petitions for reconsideration.

The October 5, 2011, benefit review conference ("BRC") order lists the following relevant stipulation: "7. Plaintiff's average weekly wage was \$1,128.15."

On appeal, Sidney Coal argues the "weekly benefit should have been limited to 99% of the maximum possible weekly benefit, or \$704.68." We affirm the December 19, 2011, opinion, order, and award by ALJ Smith as amended by ALJ Jones' January 26, 2012, order ruling on the petitions for reconsideration.

KRS 342.730(1)(d), the statute pertaining to the calculation of permanent partial disability ("PPD") benefits, is clear and unambiguous and states, in part, as follows:

...

Benefits payable for permanent partial disability shall not exceed ninety-nine percent (99%) of sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage as determined under KRS 342.740 and shall not exceed seventy-five percent of the state average weekly wage, except for benefits payable pursuant to paragraph (c)1. of this subsection, which shall not exceed one hundred percent (100%) of the state average weekly wage....

The Supreme Court of Kentucky in the case of Stewart v. Kiah Creek Mining, 42 S.W.3d 614 (Ky. 2001), cited by Sidney Coal in support of its argument, clearly articulates

the proper formula to use when calculating PPD benefits and instructs as follows:

We find nothing in the plain language of KRS 342.730(1)(d) that is unclear and, therefore, subject to interpretation. It contains three separate provisions, all of which affect partial disability awards. First, it sets the duration of the awards: 425 weeks for a disability rating of 50% or less and 520 weeks for a disability rating of more than 50%. Second, it limits the maximum benefit for partial disability to 99% of 66 2/3% of the worker's average weekly wage and also limits it to 75% of the state's average weekly wage unless KRS 342.730(1)(c)1 applies, in which case the benefit is limited to 100% of the state's average weekly wage. Third, it limits the maximum duration of partial disability benefits to 520 weeks even if the disability rating which is calculated in KRS 342.730(1)(b) yields a percentage that is greater than partial.

Based upon the plain language of KRS 342.730(1), we conclude that the proper method for calculating the award of a partially disabled worker who is unable to return to the type of work he performed when injured is as follows:

1. Calculate the benefit for partial disability as directed by KRS 342.730(1)(b):

- a.) Calculate the permanent disability rating by multiplying the AMA impairment by the applicable factor from the table in KRS 342.730(1)(b).

b.) Multiply the disability rating by 66 2/3% of the worker's average weekly wage or 75% of the state's average weekly wage, whichever is less.

2. Multiply the benefit for partial disability by 1.5 as directed by KRS 342.730(1)(c)1.

3. Apply KRS 342.730(1)(d):

a.) Determine the duration of the benefit based upon the permanent disability rating obtained in step 1a.

b.) Limit the benefit to a maximum of 99% of 66 2/3% of the worker's average weekly wage and 100% of the state's average weekly wage because KRS 342.730(1)(c)1 applies.

c.) The duration of the benefit may not exceed 520 weeks even if the permanent disability rating equals or exceeds 100%.

Id. at 617-618.

This Board finds no precedent in support of the proposed calculation by Sidney Coal. We also note ALJ Smith's December 19, 2011, opinion, order, and award contains ambiguous calculations that this Board has difficulty deciphering. We set forth, once again, ALJ Smith's calculations which are as follows:

1. Plaintiff shall recover benefits based upon a 39% functional impairment

in accordance with KRS 342.730 in effect on the date of the injury. The calculation of the award shall be as follows:

\$711.07 (Maximum employee factor-  
66.67% of employee average weekly wage  
not to exceed 75% of state average  
weekly wage)  
x 39% (39% wbi)  
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3))(inability to return to the type of  
work performed at the time of injury,  
and over the age of 50)  
1510.14\*

\*In compliance with the provisions of KRS 342.730(1)(d) which prohibits awards of PPD exceeding 99% of 2/3's of the employee's average weekly wage, but not to exceed the maximum of \$711.79, the weekly benefit is reduced to \$711.79. Therefore, pursuant to the provisions of KRS 730(1)(c)(2), plaintiff is entitled to recover the amount of \$711.70 per week beginning March 12, 2011, and continuing for 520 weeks.

*ALJ Smith did, however, reach the correct result. As ALJ Smith determined the three multiplier is applicable, the pertinent cap on Reed's award of PPD benefits is the maximum of 99% of 66 2/3% of Reed's average weekly wage or 100% of the state's average weekly wage. ALJ Smith ultimately needed only to recognize the pertinent cap on Reed's award of PPD benefits is 100% of the state's average weekly wage in calculating the award. He did so, albeit*

with a typographical error. ALJ Jones' order on reconsideration, however, sets forth calculations consistent with KRS 342.730(1)(b), KRS 342.730(1)(c)1, KRS 342.730(1)(d), and Stewart v. Kiah Creek Mining, supra, and corrects ALJ Smith's typographical error. As the order ruling on the petitions for reconsideration corrects ALJ Smith's typographical error and contains calculations consistent with the applicable law, remanding the case for entry of an amended order is unnecessary.

Accordingly, the December 19, 2011, opinion, order, and award by ALJ Smith as amended by the January 26, 2012, order ruling on the petitions for reconsideration by ALJ Jones are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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