

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 28, 2018

CLAIM NO. 201273080

JOHN BINKLEY

PETITIONER

VS. APPEAL FROM HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

METRO PROPERTY MANAGEMENT CO. INC.
and HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

* * * * *

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

STIVERS, Member. John Binkley (“Binkley”) appeals from the May 25, 2018, Opinion, Award, and Order and the June 25, 2018, Order of Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”). On reopening, the ALJ awarded Binkley increased permanent partial disability (“PPD”) benefits “from the date of his Motion

to Reopen and for the balance of the 311.7413 [sic] weeks contemplated in the Settlement Agreement approved on December 11, 2015.”¹

On appeal, Binkley asserts the ALJ erred by limiting the duration of his award of increased PPD benefits to the balance of 311.7143 weeks as set forth in a previously approved settlement agreement. Instead, Binkley argues the ALJ should have awarded a period of 425 weeks of PPD benefits.

The Form 110-I Agreement as to Compensation and Order Approving Settlement was entered into between Binkley and his employer, Metro Property Management Co., Inc. (“Metro”), and approved by Hon. Robert Swisher, then Administrative Law Judge, on December 4, 2015. The Form 110 indicates Binkley’s date of birth is September 1, 1955, and the work-related injury at issue occurred on August 27, 2012, in the following manner: “Removing window glass from [sic] an apartment. Glass slipped and broke striking IW’s wrist.” Binkley sustained a laceration on his left wrist, he underwent surgery, and Metro paid \$75,882.84 in medical expenses. Dr. Michelle Palazzo assessed a 24% whole person impairment rating for the following diagnoses: “Lesion of median nerve at L wrist, L wrist laceration w/tendon and nerve involvement, L trigger thumb.” The Form 110 indicates temporary total disability (“TTD”) benefits were paid from August 28, 2012, through November 11, 2015, at the rate of \$308.10 per week and totaling \$51,539.91. The terms of the settlement agreement include PPD benefits to be paid in the amount of \$289.12 per week for 311.7413 [sic] weeks.

¹ In the June 25, 2018, Order, the ALJ corrected the number of weeks of the award from 311.7413 to 311.7143 “as set forth on page two of the Settlement Agreement.”

The Motion to Reopen at issue was filed by Binkley on July 14, 2017, and alleges, “Mr. Binkley’s symptoms and limitations have worsened as a result of his original work-related injury and he has undergone additional surgical procedures.” Attached to his motion are medical records indicating Binkley underwent a “left cubital tunnel release with anterior nerve transposition and fascial flap,” performed by Dr. Michelle Palazzo, on July 18, 2017. Binkley’s motion was sustained by order dated August 14, 2017.

Numerous medical records of Dr. Palazzo were filed in the record by both parties. Pertinent to this appeal is Dr. Palazzo’s January 18, 2018, record in which she assessed a 25% whole person impairment rating.

The March 29, 2018, Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: benefits per KRS 342.730, credit for overpayment of TTD (duration), and extent and duration. Under “Other” is the following: “1) INCREASE IN DISABILITY SINCE 12/11/15 AGREEMENT; 2) Plaintiff alleges total disability; 3) applicable version of KRS 342.730(4); 4) Proper use of AMA Guides.” Stipulations reveal an additional period of TTD benefits were paid by Metro from July 18, 2017, through January 15, 2018.

In his brief to the ALJ, Binkley asserted he is permanently totally disabled. In the alternative, Binkley asserted he was entitled to increased PPD benefits based upon the increased impairment rating. Notably, Binkley failed to put forth any argument regarding the duration of the PPD benefits to which he was entitled.

In the May 25, 2018, Opinion, Award, and Order, the ALJ determined Binkley sustained his burden of proving a worsening of condition and set forth the following findings and conclusions:

A. Reopening for Increased Occupational Disability

When a worsening of condition and an increase in occupational disability is claimed, the burden remains with the plaintiff. See Griffith v Blair, 430 S.W.2d 337 (Ky. 1968) and Jude v Cabbage, 251 S.W.2d 584 (Ky. 1952).

KRS 342.125(1)(d) requires a change of disability to be shown by "objective medical evidence of a worsening ... of impairment." KRS 342.0011(33) defines "objective medical findings" as being "information gained through direct observation and testing of the patient applying objective or standardized methods." See Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001); Gibbs v. Premier Scale Company/Indiana Scale Company, 50 S.W.3d 754 (Ky. 2001). The Courts have held that although a greater permanent impairment rating is objective medical evidence of a worsening of impairment, it is not the only evidence by which the statute permits a worsening of impairment to be shown. KRS 342.0011(33) does defines "objective medical findings" as being "information gained through direct observation and testing of the patient applying objective or standardized methods." See Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001); Gibbs v. Premier Scale Company/Indiana Scale Company, 50 S.W.3d 754 (Ky. 2001).

Whether a worsening of impairment rises to the level of greater compensability is determined under KRS 342.730(1) and KRS 342.0011(11). KRS 342.730(1)(b) and KRS 342.0011(11)(b) require a worker who remains partially disabled to show a greater permanent impairment rating in order to obtain a greater award. But KRS 342.730(1)(a) and KRS 342.0011(11)(c) require a worker who was partially disabled at the time of the initial award and totally disabled at reopening to show only that a worsening of impairment due to the injury is permanent and causes the worker to be totally disabled. *Id.*

Plaintiff argues he is now permanently and totally disabled. In doing so he cites his ongoing pain and constant pinch he feels, difficulty in making a fist and difficulty doing things like picking up a gallon of milk. The undersigned finds Binkley's testimony credible with respect to the condition of his left upper extremity. He experienced a significant injury and has decreased functionality in his left upper extremity as a result. Binkley has undergone six surgical procedures post-injury.

The question for the undersigned is whether or not, since the settlement of his claim on December 11, 2015, he has suffered a change in disability. The claim was settled based on a 24% whole person impairment rating from Dr. Palazzo. She has now, with the aid of a therapist, assessed Binkley as having 25% impairment.

The undersigned finds it significant that Binkley has not returned to work following his injury. At the time he settled his claim in 2015 he was not working. That continues to be the case. The rating from Dr. Palazzo indicates a slight increase in overall impairment with some improvement in the sensory functioning of Binkley's left hand. That is consistent with his testimony. It also notes a decrease in his overall range of motion in the hand.

The undersigned is not persuaded that Binkley is permanently and totally occupationally disabled. The record does not demonstrate that the small loss of range of motion in his left hand since the date of settlement is so significant that it has rendered him totally disabled.

In addition, Binkley has significant experience in apartment maintenance, forklift operation and has demonstrated the ability to perform trigonometry and apply it to tasks in the workplace. Those are all skills he possessed at the date of the original settlement and the undersigned is not persuaded that since that date he has suffered a worsening of his condition that would render him totally disabled. This is in agreement with Dr. Gabriel's opinion that Binkley's current condition and resulting restrictions are no greater now in 2018 than they were in December, 2015.

The undersigned is persuaded, however, that Binkley has an increased impairment in 2018 as compared to 2015. In making this finding the undersigned is aware of the Defendant's argument that Dr. Palazzo merely signed off on the 25% impairment rating and did not participate in the measurements that accompanied that rating. The evidence from Binkley indicates, persuasively, he has an overall worsening of his condition in terms of discomfort and range of motion that is captured in the rating from Dr. Palazzo.

As such, in finding a decrease in Binkley's range of motion in the left hand and therefore an increased impairment rating of 25% appropriate, the undersigned finds Binkley entitled to an increased award based upon 25% impairment from the date of his Motion to Reopen for the balance of the 311.7413 weeks contemplated by the Settlement Agreement.

In the order, the ALJ awarded increased PPD benefits of \$301.17 from the date of Binkley's Motion to Reopen "and for the balance of the 311.7413 [sic] weeks contemplated in the Settlement Agreement approved on December 11, 2015."²

Binkley filed a petition for reconsideration asserting the duration of PPD benefits in the Form 110 is irrelevant, as the ALJ, pursuant to KRS 342.125(7), "is not bound by any provision or calculation contained within the Form 110 regarding the extent and duration of the Plaintiff's disability." Regarding KRS 342.730(4), Binkley asserted as follows:

4. KRS 342.730(4) was found unconstitutional in *Parker v. Webster Co. Coal, LLC*, 529 S.W.3d 759, thus the unconstitutional statute cannot now be applied on reopening. As the Supreme Court held in *Legislative Research Com'n v. Fischer*, 366 S.W.3d 905 (Ky. 2012), an unconstitutional statute is null and void from the date

² We note neither party raised the fact the ALJ failed to determine the impairment rating at the time of settlement. Based upon the ALJ's conclusion Binkley successfully proved a worsening of condition on reopening through Dr. Palazzo's impairment rating of 25%, this Board can only assume the ALJ ultimately relied upon the 24% impairment rating assessed by Dr. Palazzo at the time of settlement and reflected in the settlement agreement.

of its enactment. The Plaintiff is therefore entitled to a 425 week award from the date of his injury.

In the June 25, 2018, Order, the ALJ set forth the following additional

findings:

This matter is before the Administrative Law Judge on Plaintiff's Petition for Reconsideration of the Opinion, Award and Order on reopening issued May 25, 2018. The Defendant filed its response to the Petition for Reconsideratio [sic] on June 18, 2018.

Plaintiff submits the Administrative Law Judge failed to determine the date from which his increased [sic] begins and improperly limited the duration of the increased award to the balance of the 311.7413 weeks identified the the [sic] Form 110 Settlement Agreement approved on December 11, 2015.

First the undersigned notes the Opinion, Award and Order incorrectly states the number of weeks as being 311.7413. It should be 311.7143 as set forth on page two of the Settlement Agreement. The undersigned *sua sponte* amends the Opinion, Award and Order to reflect that typographical error.

Second, as to the date the Plaintiff's increased permanent partial disability award begins, it is the date of the Motion to Reopen alleging that increase in occupational disability, July 14, 2017.

Third, as to the Plaintiff's argument regarding the duration of benefits, KRS 342.125(6) specifically limits an award of additional permanent partial disability [sic] award to the period of the original award. On that issue the Plaintiff's Petition is overruled.

Finally, the Plaintiff argues that for the period of time during which the Defendant paid TTD, his PPD award should be suspended and reinstated such that he receives the full number of weeks on his PPD award. The undersigned agrees that the PPD award was recessed from July 18, 2017 through January 15, 2018 while Plaintiff received TTD benefits. For that reason the increased award begins July 14, 2017, recesses from July

18, 2017 through January 15, 2018, and resumes again for the balance of the 311.7143 weeks remaining on the original PPD award.

Plaintiff's Petition for Reconsideration is sustained in part and overruled in part consistent with the above.

On appeal, Binkley asserts the ALJ erred by limiting the new award of PPD benefits to the duration of 311.7143 weeks pursuant to KRS 342.125(6). Instead, Binkley contends KRS 342.125(7) is controlling, as the ALJ is not bound by the terms of the settlement agreement. Binkley maintains, “[a]lthough the ALJ’s [sic] believed that he was bound to honor the terms of the original agreement, Subsection (7) states otherwise.” Binkley asserts he is now entitled to 425 weeks of PPD benefits.

While we affirm the ALJ’s reliance on KRS 342.125(6) in his award of increased PPD benefits for the duration of the 311.7143 weeks agreed to in the December 4, 2015, settlement, we vacate the award of PPD benefits and remand for additional findings.

The two statutory provisions implicated in this appeal are KRS 342.125(6) and (7). KRS 342.125(6), the statutory provision adhered to by the ALJ, provides as follows:

In a reopening or a review proceeding where there has been additional permanent partial disability awarded, the increase shall not extend the original period, unless the combined prior disability and increased disability exceeds fifty percent (50%) but less than one hundred (100%), in which event the awarded period shall not exceed five hundred and twenty (520) weeks, from commencement date of the original disability previously awarded. The law in effect on the date of the original injury controls the rights of the parties. (emphasis added.)

KRS 342.125(7), the statutory provision Binkley argues is applicable,

provides:

When an agreement has become an award by approval of the administrative law judge, and the reopening and review of that award is initiated, no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party. The parties may raise any issue upon reopening and review of this type of award which could have been considered upon an original application for benefits.

This Board is cognizant of the fact KRS 342.125(7), which pertains to the reopening of an approved settlement agreement, stands for the proposition that no “statement” contained in the settlement agreement shall be considered by the ALJ as an admission against the interests of any party. Pursuant to the plain language of this statutory provision, “statements” include those pertaining to “jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter.” Consequently, this Board has consistently held the ALJ’s approval of a settlement agreement does not limit fact-finding discretion of future ALJs with regard to essential elements of the original claim on reopening. W.E. Caldwell Co. v. Borders, 193 S.W.2d 453 (Ky. 1946). In the case *sub judice*, KRS 342.125(7) permitted the ALJ to consider Binkley’s argument on reopening that he is now permanently totally disabled, as the ALJ was not bound by the terms of the settlement agreement regarding the extent of his disability. That said, with respect to Binkley’s alternative argument on reopening regarding an increase in PPD benefits, KRS 342.125(6) is the applicable statutory provision relevant to the duration of those PPD benefits. Again, we note here that, in his brief to the ALJ, Binkley failed to set forth any argument regarding his alleged entitlement to 425 weeks of PPD benefits, and the first time this argument was

presented with any specificity was in his petition for reconsideration. However, as “extent and duration” was listed as a contested issue at the BRC, this Board will address the merits of Binkley’s argument.

An established rule of statutory construction is that, where two statutes are potentially applicable to the same subject matter, the more specific statute controls. Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005). KRS 342.125(6) specifically states that, in a reopening where additional PPD benefits have been awarded, **the increase shall not extend the original period of the award of PPD benefits** except in one specified factual scenario.³ In contrast, KRS 342.125(7) makes no reference to what can or cannot be done, in a reopening, to the original period of PPD benefits agreed to in a settlement agreement. Under the rules of statutory construction, the more specific mandate in KRS 342.125(6) regarding the inability of an ALJ to increase the original period of the award of PPD eclipses the more generalized declarations regarding settlement agreements in KRS 342.125(7). Neither the ALJ nor this Board are at liberty to interpret a statute at variance with its stated language. McDowell v. Jackson Energy RECC, 84 S.W.3d 71, 77 (Ky. 2002). This means we cannot insert language into KRS 342.125(7) where such language does not exist, nor can we ignore the clear and specific mandate as set forth in KRS 342.125(6) that speaks directly to the issue on appeal. We affirm the ALJ’s reliance upon KRS 342.125(6). That said, we vacate the ALJ’s award of PPD benefits and remand for additional findings regarding KRS 342.730(4).

³ KRS 342.125(6) permits the ALJ to increase the duration of the PPD award to 520 weeks if “the combined prior disability and increased disability exceeds fifty percent (50%), but less than one hundred percent (100%).”

The record reveals Binkley's date of birth is September 1, 1955. The Form 110 Settlement Agreement is silent regarding the date upon which Binkley's original award of PPD benefits should commence. Nonetheless, the first period of voluntary TTD benefits spans August 28, 2012, through November 11, 2015; therefore, PPD benefits commencing on the date of injury and suspended by this period of TTD would commence no earlier than November 12, 2015. On its own, due to Binkley's age, KRS 342.730(4) is implicated, as Binkley will be older than 65 years of age for the latter portion of his award of PPD benefits. As represented in the March 29, 2018, BRC Order, Metro paid an *additional* period of TTD benefits from July 18, 2017, through January 15, 2018. As clarified in the June 25, 2018, Order, the increased award of PPD benefits begins on July 14, 2017, and is suspended during this second period of TTD benefits, and resumes once again for the balance of the 311.7143 weeks. It is indisputable, then, that KRS 342.730(4) is relevant.

In the March 29, 2018, BRC Order, "applicable version of KRS 342.730(4)" was listed as a contested issue; however, the ALJ failed to address this issue in the May 25, 2018, Opinion, Award, and Order. In his petition for reconsideration, Binkley mentioned KRS 342.730(4). We acknowledge Binkley failed to request additional findings. However, the applicable version of KRS 342.730(4) was a contested issue at the BRC which the ALJ failed to address. Therefore, on remand, the ALJ must address it. We are cognizant that, in 2018, the Kentucky General Assembly passed House Bill 2 which, in part, amended KRS 342.730(4) so as to terminate income benefits "as of the date upon which the employee reached the age of seventy (70) or four (4) years after the employee's injury or last exposure, whichever

last occurs.” This bill was signed by the Governor in March 30, 2018, and became effective July 14, 2018. The Kentucky Court of Appeals recently held in Lafarge Holcim v. James Swinford, Claim No. WC 2016-90245, 2018-CA-000414-WC (rendered September 7, 2018) (Designated To Be Published), that the limitations contained in this recently enacted version of KRS 342.730(4) do not have retroactive application. Consequently, this Board has been holding all appeals concerning this issue in abeyance pending the finality of Lafarge Holcim v. James Swinford, *supra*. Thus, we understand the ALJ, on remand, may choose to follow this precedent.

Accordingly, to the extent the ALJ relied upon KRS 342.125(6) and limited the new award of PPD benefits to the duration of the 311.7143 weeks as agreed to in the original settlement agreement, the May 25, 2018, Opinion, Award, and Order and the June 25, 2018, Order are **AFFIRMED**. We **VACATE** the award of PPD benefits and **REMAND** for additional findings regarding the application of KRS 342.730(4) consistent with the views expressed herein.

ALL CONCUR.

DISTRIBUTION:

METHOD

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