

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001439-WC

UNITED PARCEL SERVICE, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-64252

KENNETH L. HOWARD;
HON. ROGER D. RIGGS,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, BUCKINGHAM, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: United Parcel Service (UPS) petitions for our review of an opinion by the Workers' Compensation Board (Board) affirming a decision by an administrative law judge (ALJ) awarding permanent partial disability benefits to Kenneth L. Howard based on a 22% impairment rating pursuant to the Fifth Edition of the AMA Guides. We affirm.

Howard suffered a work-related low back injury on September 28, 1998. He underwent surgery on September 28, 1999.

On May 16, 2001, Howard filed a claim for benefits. Thereafter, an ALJ awarded Howard permanent partial disability benefits based on a 22% impairment rating under the Fifth Edition of the AMA Guides. UPS appealed to the Board, and the Board affirmed the ALJ's award. UPS then filed this petition for review.

The ALJ had the benefit of several evaluations and opinions concerning impairment before rendering his decision. Dr. Don Bryson, Howard's family practitioner, concluded that Howard suffered 65-75% impairment. Dr. Bryson offered no explanation based on AMA Guides as to how he reached the impairment rating.

Dr. Phillip A. Tibbs was the neurosurgeon who performed the surgery on Howard.¹ Dr. Tibbs completed his analysis of Howard's final condition after the Fifth Edition of the AMA Guides took effect. Using the Fifth Edition of the AMA Guides, Dr. Tibbs concluded that Howard suffered 22% impairment as a result of the injury. Further, Dr. Tibbs concluded that this rating was not due in part to the arousal of a pre-existing dormant non-disabling condition nor did he find that Howard suffered from active impairment prior to the injury.

Pursuant to a request by UPS, Dr. Ellen M. Ballard, a specialist in physical and occupational medicine and

¹ Dr. Tibbs performed a discectomy and posterior lumbar interbody fusion on Howard.

rehabilitation, provided two figures as to Howard's impairment. Dr. Ballard's first figure, determined after an examination in June 1999 prior to Howard's surgery, indicated 10% impairment. This figure was reached utilizing the Fourth Edition of the AMA Guides, the edition in effect at the time of the examination. The second figure, determined by Dr. Ballard in August 2001 subsequent to Howard's surgery, indicated a 25% impairment. This figure was reached utilizing the Fifth Edition of the AMA Guides, the latest edition available at the time of the second examination.

Dr. Leon H. Ensalada, a specialist in occupational medicine and environmental medicine and pain management, also provided an evaluation of Howard's condition for UPS. In August 2001 Dr. Ensalada concluded that Howard had a 10% impairment as a result of the injury. Dr. Ensalada based his conclusion solely on a review of Howard's medical records. However, despite conducting his review after the effective date of the Fifth Edition of the AMA Guides, Dr. Ensalada reached his figure utilizing the Fourth Edition. Dr. Ensalada also concluded that half of Howard's total impairment was attributed to his prior back injuries.²

² Howard had suffered three back sprains or strains prior to this injury.

The relevant statute in connection with UPS's petition for review reads as follows:

For permanent partial disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by the permanent impairment rating caused by the injury or occupation disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available.

KRS³ 342.730(1)(b). Pursuant to 803 KAR⁴ 25:010 Section 1(9), the "latest edition available" is defined as follows:

"Latest available edition" means that edition of the "Guides to the Evaluation of Permanent Impairment" which the commissioner has certified as being generally available to the department, attorneys, and medical practitioners, by positing prominently at the department's hearing sites the date upon which a particular edition of the "Guides to the Evaluation of Permanent Impairment" is applicable for purposes of KRS Chapter 342.

The Fifth Edition of the AMA Guides was certified by the commissioner of the Department of Workers' Claims as being the "latest edition available" on March 1, 2001. As Howard filed his claim after March 1, 2001, the "latest edition available" at that time was the Fifth Edition.

³ Kentucky Revised Statutes.

⁴ Kentucky Administrative Regulations.

Because Howard's injury occurred when the Fourth Edition of the AMA Guides was the "latest edition available," UPS argues that the ALJ's decision based upon the Fifth Edition was a retroactive application of the statute in violation of KRS 446.080(3). That statute states that "[n]o statute shall be construed to be retroactive, unless expressly so declared." In support of its argument, UPS cites Maggard v. International Harvester Co., Ky., 508 S.W.2d 777 (1974). Therein, the court held that "the law in effect on the date of the injury . . . is the law that fixes the rights of the claimant." Id. at 783. Thus, UPS argues that since a permanent partial disability rating is a mathematical function of the AMA Guides, the use of an addition of the AMA Guides that became effective after the date of the injury is an improper retrospective application of the statute. UPS also argues that it had a "vested right" in the obligation established under the Fourth Edition because it was the "latest edition available" on the date Howard suffered his injury.

We disagree with UPS's arguments. First, the language of the statute, KRS 342.730(1)(b), requires that income benefits for permanent partial disability be based on a permanent impairment rating as determined by the "latest edition available" of the AMA Guides. In order to accept UPS's argument, we would have to read the statute as meaning that the

permanent impairment rating would be determined by the "latest edition available at the time of the injury." We decline to read the statute in that manner and believe that the legislature would have included the words "at the time of the injury" had it intended that to be the meaning.

UPS also argues that it had a "vested right" in the obligation established under the Fourth Edition because it was the "latest edition available" on the date Howard suffered his injury. If UPS had such a vested right, its retroactive application of the law argument might have merit. Black's Law Dictionary defines a vested right as "a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." Black's Law Dictionary 1324 (7th ed. 1999). An expectant right is "a right that depends on the continued existence of present conditions until some future event occurs; a contingent right." Id. at 1323.

In this case, the "continued existence of present conditions" involves the continued standing of the Fourth Edition of the AMA Guides as the "latest edition available." Once this condition changed, UPS's expectant right, the right that any injury suffered by an employee would be evaluated under the Fourth Edition, could no longer be claimed. Thus, UPS may not rely on the protection offered under its retroactive

application of law argument since such protection is only afforded vested rights. See Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33, 36 (1991), and Cline v. Johnson County Bd. of Educ., Ky., 584 S.W.2d 507, 508 (1977). Therefore, we find no error by the ALJ in granting an award of benefits to Howard on an impairment rating based on the Fifth Edition of the AMA Guides.⁵

UPS's second argument is that the ALJ erred in not finding that there was prior active impairment. The ALJ relied on the evidence of Dr. Tibbs that "Howard's condition is not due in part to arousal of a pre-existing dormant condition or congenital abnormality." Further, Dr. Tibbs stated that Howard "did not have an active impairment prior to this injury." That evidence was sufficient to support the ALJ's decision in this regard.⁶

The opinion of the Board is affirmed.

ALL CONCUR.

⁵ We note the concurring opinion of Board Member Stanley, but we take no position concerning whether his approach or the approach of the other two members to this issue is correct. Under either approach, the opinion of the ALJ would be affirmed.

⁶ UPS also argues that the ALJ focused on the issue of prior active occupational disability rather than prior active functional impairment and that the case should be remanded for consideration of the issue of prior active functional impairment. We do not believe this argument has merit.

BRIEF FOR APPELLANT:

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