

RENDERED: NOVEMBER 7, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-000963-WC

ROAD FORK DEVELOPMENT COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-64828

MICKEY JAMES SMITH;
HON. W. BRUCE COWDEN, ALJ;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, DYCHE AND McANULTY, JUDGES.

BARBER, JUDGE: The sole issue herein is whether the Workers' Compensation Board erred in affirming the Administrative Law Judge's application of the "2x" multiplier under KRS 342.730(1)(c)2. We vacate the Opinion of the Board and remand with direction that the ALJ make additional findings and recalculate the award.

The Appellee is Mickey James Smith ("Smith"), an electrician in the coal mining industry. Smith sustained two

work-related injuries while employed by the Appellant, Road Fork Development Co., Inc. ("the employer"). The first occurred on September 9, 2000, when Smith injured his neck and shoulder in a rock fall. He missed four days of work that he took as personal leave. Smith returned to work and sustained a second injury on October 18, 2000. This time, he injured his low back while pulling on a cable. It is uncontroverted that Smith did not return to work after October 18, 2000. The parties stipulated the payment of ttd from October 19, 2000 through January 24, 2001 at the rate of \$509.03 per week for a total payment of \$4,257.15.

The medical evidence was in conflict and included the report of David Forester, M.D., treating psychiatrist. The ALJ found that Dr. Forester diagnosed major depression and panic attacks, assigned a 30% psychiatric impairment rating and opined that Smith's current emotional difficulties were the direct result of the injuries of September 9 and October 18, 2000.

The ALJ determined that Smith had met his burden of proving the work-relatedness and medical causation of his psychiatric claim. The ALJ relied upon the opinion of Dr. Forester in concluding "that the Plaintiff's current emotional difficulties are the direct result of injuries occurring in the course of his employment on September 9, 2000, and subsequently

when he attempted to return to work and injured his low back on October 18, 2000 while pulling a buggy cable."

The ALJ was further persuaded by Dr. Forester's 30% impairment rating and the vocational assessment of Dr. Ralph Crystal, in concluding that Smith was not totally disabled. Using the applicable KRS 342.730(1)(b) grid factor of 1.35% the ALJ calculated a disability rating of 40.5%. The ALJ found that Smith retained the physical capacity to return to the type of work he had performed at the time of the injury; further, that Smith had not returned to work and was not currently earning any wages. Pursuant to KRS 342.730(1)(c)2, the ALJ ordered that the payment of ppd during the period of cessation of employment, for any reason, with or without cause, shall be two times the amount otherwise payable under KRS 342.730(1)(b).

The employer appealed to the Board¹ and argued that the ALJ had erred in applying the "2x" multiplier, because Smith had never returned to work. The employer asserted that the Legislature did not intend for KRS 342.730(1)(c)2 to be applied to claims where the claimant did not work after his injury. The Board noted that it had previously rejected this argument in another decision and affirmed the ALJ's Opinion and Award.

¹ Smith cross-appealed to the Board asserting that the ALJ failed to properly consider application of the "3x multiplier" under KRS 342.730(1)(c)1. The Board concluded that the ALJ's decision, in that regard, had a substantial evidentiary foundation. Smith did not appeal from the Board's decision.

On May 9, 2003, the employer filed a petition for review in this Court again asserting that the ALJ erred in his application of KRS 342.730(1)(c)2. We agree insofar as the second injury is concerned, Smith having returned to work after the first. The applicable version of KRS 342.730(c)2² provides:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two 2 times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

The language of the statute contemplates that the employee has actually returned to work after the injury. We believe that the Legislature intended to provide an incentive for injured employees to return to work, by assuring them of a double benefit during any period of cessation of employment, regardless of reason. Employees who make the effort to return to work are rewarded, if that attempt later proves to be unsuccessful.

² Effective July 14, 2000.

In the case *sub judice*, Smith had two separate injuries to separate parts of his body. He returned to work after the September 2000 injury to his neck and shoulder; his employment ceased when he sustained the October 2000 injury to his low back. Dr. Forester opined that Smith's 30% psychiatric impairment rating was the direct result of both injuries. The ALJ, as was his prerogative, found Dr. Forester's rating to be the most accurate. The ALJ's conclusion -- that Smith's psychiatric impairment was *due to both injuries* -- has not been challenged on appeal. The ALJ also concluded that Smith retained the physical capacity to return to work.

Thus, Smith is entitled to the "2x" multiplier for ppd benefits attributable to the first injury for any period of cessation of employment, because he returned to work and worked until the time of the second injury. Smith is not be entitled to the "2x" multiplier ppd benefits awarded for the second injury, because he did not return to work thereafter, contrary to the ALJ's finding that he retained the physical capacity to do so.

Accordingly, we vacate the Board's Opinion affirming the ALJ's Opinion and Award, and remand this case with direction that the ALJ make additional findings and recalculate the award. Specifically, the ALJ should find the percentage of impairment attributable to each of the two injuries, and redetermine the

percentage of permanent partial disability for each under KRS 342.730(1)(b). The ALJ should then apply KRS 342.730(1)(c)2, as appropriate, and recalculate the award.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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