

RENDERED: April 10, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

97-CA-0384-WC

ISLAND CREEK COAL CO.,
OHIO NO. 11

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-93-42810

DENNIS GOODLOE;
HON. DONNA H. TERRY,
Chief Administrative Law Judge;
and KENTUCKY WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, KNOFF, and SCHRODER, Judges.

BUCKINGHAM, JUDGE. Island Creek Coal Company, Ohio No. 11
(Island Creek) petitions for review of an opinion by the Workers'
Compensation Board (Board) which reversed an order of an
administrative law judge (ALJ) terminating the payment of
retraining incentive benefits (RIB) to Dennis Goodloe and
allowing Island Creek to recoup RIB paid from February 6, 1996,
to the date of the ALJ's order from any future RIB to which

Goodloe is entitled. For the reasons set forth hereinafter, we affirm.

While employed by Island Creek, Goodloe filed an application for RIB on October 20, 1993. On June 7, 1994, the ALJ awarded Goodloe RIB to be paid directly to him. No appeal was taken from the award, and it became final thirty days thereafter.

Kentucky Revised Statute (KRS) 342.732(1)(a) was amended effective April 4, 1994, while Goodloe's claim for RIB was pending, to prohibit the direct payment of RIB to claimants still employed in the coal mining industry. Island Creek did not raise the issue of possible retroactive application of this amendment to Goodloe's claim. However, in September 1995, the Kentucky Supreme Court held in Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109, 112 (1995), that this amendment to the statute applied retroactively to all claims pending as of its effective date.

Island Creek alleges that at the time Thornsbury was rendered, Goodloe had been laid off from his job in the coal mining industry and thus was properly entitled to direct payment of RIB at that time. However, Island Creek further alleges that on February 6, 1996, it recalled Goodloe to work, and it disputes Goodloe's entitlement to direct payment of RIB from this point forward.

On June 11, 1996, Island Creek filed a Motion to Recoup Overpayment and Terminate Payment of RIB Award. No sworn

affidavit was attached to the motion nor was any further proof produced before the ALJ entered an order granting Island Creek's motion on July 17, 1996.¹ Under the terms of the order, payment of RIB terminated and Island Creek was allowed to recoup from any future RIB award any RIB paid from February 6, 1996, through July 17, 1996.

Goodloe appealed to the Board which reversed the order of the ALJ. The Board noted in its opinion that final awards could not be reopened or reviewed except pursuant to KRS 342.125 and further noted that, contrary to the requirements for a motion to reopen, no proof had been presented regarding Island Creek's motion. The Board found that the ALJ's order violated KRS 342.125(1), which prohibits the alteration of benefits previously paid.² The Board stated that any benefits paid prior to June 11, 1996 (the date of Island Creek's motion), could not be recouped from future RIB awards pursuant to KRS 342.125(1). Furthermore, applying Keefe v. O.K. Precision Tool & Die Co., Ky. App., 566 S.W.2d 804, 806-07 (1978), the Board held that a final award may be reopened only upon a showing that the ALJ misapplied the law as it stood at the time of the award and that subsequent interpretations of the law did not warrant reopening of awards

¹ All references to statutes relating to Island Creek's motion and the ALJ's order are to statutes as amended in 1994, as the 1996 amendments did not become effective until December 12, 1996--after the ALJ's order was rendered.

² This same prohibition now appears at KRS 342.125(4) (1996).

made final under the doctrine of res judicata. The Board found that the ALJ's award of direct payment of RIB to Goodloe was proper under the law at the time the award was rendered, and noted that Island Creek had not raised the issue of retroactive application of KRS 342.732(1)(a). Thus, the Board reversed the ALJ's order, and Island Creek now petitions for review of the Board's opinion.

We agree with the Board's opinion reversing the ALJ's order. Island Creek's Motion to Recoup Overpayment and Terminate Payment of RIB Award was actually a motion to reopen the original award pursuant to KRS 342.125(1), which states in pertinent part that "[r]eopening and review under this section shall be had upon notice to the parties and in the same manner as provided for an initial proceeding hereunder but shall not affect the previous order or award as to any sums already paid thereunder." First, the ALJ's order affected sums already paid under the previous order and, therefore, violated the statute. Second, since the statute required reopening and review "in the same manner as provided for an initial proceeding hereunder," the ALJ's order granting Island Creek's motion was erroneously entered since Island Creek produced no proof to support the reopening. The ALJ's decision was, therefore, not supported by substantial evidence and was properly reversed by the Board. See Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986) (holding that where the fact finder's decision favors the party with the burden of proof, that party must show that "evidence of substance"

supports the decision to prevail upon appeal).

The opinion of the Board reversing the order of the ALJ is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE GOODLOE:

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