

RENDERED: July 2, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-2642-WC

WHITAKER COAL COMPANY

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-94-012588

SCOTT HAZLETT; TIM WILSON;
W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

* * *

BEFORE: EMBERTON, GARDNER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Whitaker Coal Company (Whitaker) petitions for review of a decision of the Workers' Compensation Board (Board). Whitaker argues that the award of attorney's fees to Tim Wilson (Wilson), for the representation of Scott Hazlett (Hazlett), who received retraining incentive benefits (RIB), was premature because there was no evidence that Hazlett had either ceased coal mine employment or enrolled in a bona fide training program. Having reviewed the record and the law, we reverse and remand.

Hazlett filed his claim for benefits on March 28, 1994. Statutory amendments to KRS 342.732 went into effect April 4, 1994. On December 16, 1994, the administrative law judge (ALJ) awarded Hazlett a RIB, but because he was still working for Whitaker, the award was held in abeyance pending the final resolution of whether the amended statute was retroactive. Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109 (1995).

Hazlett apparently moved for an order directing the payment of benefits because he had been subject to a company-wide layoff March 29, 1995. This motion is not part of the record, but a renewed motion for same was made, to which Whitaker responded that nothing in the record indicated that Hazlett had not subsequently engaged in the severance and processing of coal. The ALJ issued an order on February 3, 1997, stating that because Hazlett had been laid off prior to the amendment, the order was removed from abeyance, and Whitaker was ordered to begin paying the RIB benefits for 208 weeks.

Thereafter, Wilson moved for an attorney fee in the amount of \$6,116.57. Whitaker responded that as of February 17, 1997, its attorney had been told by Wilson that Hazlett was working in the coal mining industry. Nevertheless, the ALJ entered an order awarding the attorney fee.

Whitaker appealed the award of attorney's fee to the Board, who, after holding it in abeyance pending our decision in the unpublished case of Tall Timber Coal Co. v. Yates, 96-CA-1844 (May 23, 1997), affirmed the award:

It is obvious that a great deal of confusion has existed in this claim. Because we believe that the ALJ's order directing payments to be made to Hazlett is now a final and enforceable award, the decision in Tall Timber Coal Co. vs. Yates is inapplicable. Thirty (30) days after the February 3, 1997 order, Whitaker became obligated to pay directly to Hazlett RIB benefits. Upon that order['s] becoming final, Wilson became vested in his entitlement to the full attorney fee. Whitaker alleges Hazlett is now again working in the severance and processing of coal. That allegation, however, has no affect on the ALJ's February 3, 1997 order, which remains enforceable and in effect. Whether a future reopening or other action on the part of Whitaker will affect the ALJ's February 3, 1997 order is not before us. However, even if that remedy were available to Whitaker, future contingencies do not affect the entitlement of the attorney to an attorney fee that has become vested. See Stephens vs. Denairo Mining Co., Inc., Ky., 833 SW2d 383 (1992); and Elkhorn Stone Co. vs. Webb, Ky., 478 SW2d 720 (1972).

Because we find that the ALJ committed two errors of law, we reverse. First, the ALJ determined in the February 3, 1997 order that Hazlett had been laid off prior to the amendment. In fact, the amendment became effective April 4, 1994, and Hazlett was laid off March 29, 1995. Therefore, the new statute forbidding the payment of RIBs directly to the miner, unless he is no longer working in the mining industry in the severance and processing of coal through no fault of his own, applies to Hazlett's claim.

Second, even when Hazlett was laid off on March 29, 1995, he had the affirmative duty to prove that he had met one of the conditions for collection of the RIB award. Hazlett did not

even provide an affidavit to the effect that he was no longer working as a coal miner through no fault of his own. He simply submitted a motion stating that he had been laid off by Whitaker. Whitaker responded, admitting that it last employed Hazlett March 29, 1995, but arguing that the record was devoid of evidence that Hazlett was not working in the coal mining industry for another employer since the layoff.

We believe that before a claimant, who has been found entitled to a RIB award, but not entitled to collection at the time of the award, may receive the award, he must at least submit an affidavit stating, for example, that he was laid off on a certain date and that he has not since engaged in the mining industry in the processing and severance of coal. A statement from the last employer, verifying the layoff, would also assist the trier-of-fact.

By contrast, Hazlett did not provide an affidavit and nowhere stated that he is no longer working in the mining industry since the layoff. Whitaker raised these very points in its response to the motion directing payment.

While it is true that Whitaker did not appeal the order to the Board, its appeal of the award of attorney's fee is based upon the award of RIB benefits. Furthermore, we are empowered to correct what we perceive to be a palpable error, even if not sufficiently raised or preserved for review by appellant, if we believe manifest injustice results from the error. CR 61.02.

In this case, we believe manifest injustice results

from the ALJ's errors. Hazlett is not entitled to collect his RIB award until he meets the requirements stated above. Once he establishes entitlement to collection, he is entitled only to the balance of the 208 weeks from the date the original award becomes final or the appellate process has been exhausted. Meade v. Spud Mining, Ky., 949 S.W.2d 584, 588 (1997). Wilson is not entitled to an attorney fee until Hazlett is found entitled to collection of his award.

For these reasons, the decision of the Workers' Compensation Board is reversed and remanded for further consideration consistent with this opinion.

GARDNER, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, JUDGE, DISSENTING. I respectfully dissent. Upon the finality of the February 3, 1997, order of the Administrative Law Judge, the right to receive payment of the fee became vested in Mr. Wilson. Thereafter, whatever contingency may affect payment of the benefits award to Mr. Hazlett has no bearing on the right of Mr. Wilson to be paid his fee.

I would affirm the Workers' Compensation Board.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES, SCOTT
HAZLETT AND TIM WILSON:

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