RENDERED: May 7, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001913-WC

ROBERT L. WHITTAKER,
ACTING DIRECTOR OF
SPECIAL FUND — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-85-017853

MAGOFFIN COAL CORPORATION;
GRADY BURSON;
HON. W. BRUCE COWDEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Robert L. Whittaker, Acting Director of Special Fund (Special Fund), appeals from an order of the Workers' Compensation Board (Board) which held that it was required to pay the entirety of benefits awarded to appellee, Gary Burson (Burson), in the event that he lives past his life expectancy. We affirm.

Because of the unusual procedural aspects of this case, a review of the steps this matter took in reaching us is in

order. Burson sustained a work-related injury on June 18, 1985. An opinion and award entered May 19, 1988, found Burson to be 50% occupationally disabled. Liability was apportioned 40% to his employer, Magoffin Coal Corporation (MCC), and 10% to the Special Fund.

In 1991 Burson moved to reopen his claim alleging that he was now 100% occupationally disabled. Burson's motion was granted, and in an opinion and award entered May 21, 1993, the Administrative Law Judge (ALJ) found him to be 100% occupationally disabled. In apportioning liability, the ALJ found that the doctrine of res judicata required him to apply the same apportionment ratios set forth in the 1988 award and apportioned liability 80% to MCC and 20% to the Special Fund.

On May 28, 1993, the Special Fund filed a petition for reconsideration. In its petition, the Special Fund relied on Newburg v. Damron, No. 90-31991, rendered by the Board on May 14, 1993, for the proposition that in the event a claimant outlives his life expectancy, the employer and the Special Fund are to pay the claimant their respective share of the weekly benefit owed for each week the claimant outlives his life expectancy. The Special Fund's petition was denied.

Following denial of its petition for reconsideration, the Special Fund filed its notice of appeal to the Board on July 9, 1993. On the same day, the Special Fund also filed a motion seeking to hold the appeal in abeyance on the ground that:

> The issue presented by this appeal concerns the payment liability on apportioned awards should the claimant live beyond the life expectancy set forth in the U.S. Decennial

> Life Tables. That issue is now before the Court of Appeals in Pickands-Mather & Co. v. Newburg, 93-CA-001382, (on appeal from Newburg v. Damron, W.C.B. No. 90-31991 & 89-20787). A final decision in that case will be dispositive of the within appeal.

The Special Fund's motion was granted by order entered July 30, 1993.

While the Special Fund's appeal was in abeyance, the Kentucky Supreme Court rendered its decision in Newberg v. Weaver, Ky., 866 S.W.2d 435 (1993). The question in Weaver was whether the Special Fund's liability could be accelerated when the claimant and employer enter into a pre-award settlement calling for periodic payments throughout the claimant's lifetime instead of a lump-sum payment. In its opinion, the Court discussed the case of Newburg v. Chumley, Ky., 824 S.W.2d 413 (1992):

> [In Chumley], we ruled that neither Palmore v. Helton, [Ky., 779 S.W.2d 196 (1989)], nor KRS 342.120 entitled a worker who reached a pre-award lump-sum settlement with his employer to receive during his life expectancy an amount of benefits from the Special Fund greater than he otherwise would have received. When payment of the Special Fund's share of the award was complete, payment would be suspended until such time as the worker lived beyond his anticipated life expectancy. We also noted that KRS 342.120 controls the distribution of benefits during the worker's life expectancy. It does not address the procedure to be followed where the worker lives beyond his anticipated life expectancy. Because the worker and the employer in that case had reached a settlement and its terms had been fulfilled, the employer's obligation was complete. However, if the worker lived beyond his life expectancy the Special Fund would, at that time, resume payment for its percentage of a total disability award for so long as the worker lived.

Weaver, 866 S.W.2d at 437. (Emphasis added). The Court ultimately held that the periodic payments under a settlement cannot extend "beyond the percent of the worker's life expectancy represented by the percent of disability to which the parties have agreed... . After the employer's obligation was paid in full, the obligation of the Special Fund would come due." Id. at 438.

On May 9, 1994, the Board entered an opinion and order on the Special Fund's appeal in this case wherein it removed the appeal from abeyance on its own motion. The Board held:

> In Newberg v. Weaver, Ky., 866 S.W.2d 435 (1993), the Supreme Court held that if a worker lived beyond his life expectancy, the Special Fund would then be responsible for "its percentage of a total disability award for so long as the worker lived." (emphasis added). Accord Newberg v. Chumley, Ky., 824 S.W.2d 413, 417 (1992). In the judgment of this Board, the cited authority establishes that the legal payment scheme for a total disability award is: First, the employer pays the full weekly benefit for a period commensurate to its apportioned liability; secondly, the Special Fund pays the full weekly benefit commencing with the termination of the employer's payment period and extending through the date upon which claimant reaches his projected life expectancy; and thirdly, the employer and the Special Fund pay their respective proportionate shares of the weekly benefits for the balance of the claimant's life.

Based upon its holding, the Board remanded the matter to the ALJ with instructions to enter an award in conformity with its opinion.

Unfortunately for all involved and for reasons which do not appear of record, the ALJ waited until March 16, 1998, to enter an amended order in accordance with the Board's opinion and

order. During this four year period, the Pickands case wound its way through this Court and the Kentucky Supreme Court. In a published opinion rendered on March 23, 1995, the Court held that once a claimant outlives his life expectancy, the Special Fund is liable for the entire weekly benefit for as long as the claimant remains disabled. Pickands Mather & Co. v. Newberg, Ky., 895 S.W.2d 3, 4 (1995). In ruling as it did, the Court found that the Special Fund's reliance on Weaver for the proposition that it was only required to pay its proportional share once the claimant exceeded his life expectancy was misguided. Pickands, 895 S.W.2d at 4. Despite the ruling in Pickands, the ALJ amended his order in accordance with the Board's instructions to hold that MCC and the Special Fund would each pay their proportionate share of benefits in the event Burson outlives his life expectancy.

Following entry of the ALJ's order, MCC appealed, arguing that Pickands controls the apportionment of benefits in the event Burson exceeds his life expectancy and that the ALJ erred in apportioning the benefits in accordance with Weaver. The Board agreed, and in an order entered June 26, 1998, held:

> Upon remand, the ALJ entered an order precisely as directed by this Board. Normally we would be precluded from considering the issue raised here based upon the law of the case. See Inman vs. Inman, Ky., 648 SW2d 847 (1982). However, we believe that exceptions to this rule exist, one of which would be when there has been an alteration in the interpretation of the law between the time this Board entered its decision and the entry of the order on remand and re-appeal. That is precisely what has occurred in this claim. The ultimate issue is easily resolved. The question relates to the payment of benefits in the event that the injured worker outlives his life expectancy

> when a total disability is involved. It is an issue that has been resolved since the Supreme Court rendered its decision in Pickands [citation omitted]. Our ultimate holding is that the matter must be reversed and remanded for the ALJ to enter an award in accordance with [Pickands] directing that in the event Burson outlives his life expectancy that the Special Fund ("SF") shall be responsible for the entirety of any disability benefits due.
>
> ...
>
> In other words, the impact of [Pickands] was that our opinion of May 6, 1994, was erroneous and our reliance upon Weaver was misplaced. Since the issue had not become finalized, it is appropriate upon remand for the ALJ to enter an award in accordance with [Pickands] directing the SF to pay the entirety of the benefits in the event that Burson outlives his life expectancy.
>
> Accordingly, the decision of Hon. W. Bruce Cowden, Jr., Administrative Law Judge, is hereby REVERSED AND REMANDED for entry of an award in conformity with this opinion.

The Special Fund has now appealed directly from the Board.

Before addressing the merits of the appeal, we first note that this whole situation could have been avoided had the Board not removed the case from abeyance on its own motion. By proceeding without first waiting for this exact issue to be resolved in Pickands as requested by the Special Fund, the Board set into motion a chain of events which resulted in the dilemna currently before us. The Board is not entirely to blame, however, given the fact that almost four years elapsed between the initial Board's opinion and the entry of the ALJ's order amending his original opinion. Had either the Board waited for the Pickards decision to be rendered or the ALJ timely entered his order, this matter would have been resolved years ago.

Instead, the parties have been exposed to unnecessary, lengthy and expensive litigation.

We must also address MCC's contention that the Special Fund has not appealed from a final order because the Board remanded the matter to the ALJ. Because the Board's order would result in a disposition which would terminate the matter, there is no problem with finality in this case. King Coal Co. v. King, Ky. App., 940 S.W.2d 510, 511 (1997).

We now address the merits. The Special Fund maintains that the effect of the Board's opinion is to give Pickands improper retroactive effect. The Special Fund argues that the law in effect on the date of injury controls, and that the law in effect on July 18, 1985, should control apportionment in this case.

Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case." Inman v. Inman, Ky., 648 S.W.2d 847, 849 (1982). There is, however, an exception to the doctrine of the law of the case.

> Notwithstanding the firmness of [the law of the case] rule in general, a number of courts have maintained and held that the rule is not inflexible but is subject to exception, although the exception must be rare and the former decision must appear to be clearly and palpably erroneous. In such a case it is deemed to be the duty of the court to admit its error rather than to sanction an unjust result and "deny to litigants or ourselves the right and duty of correcting an error merely because of what we may be later

> convinced was merely our ipse dixit in a prior ruling in the same case." McGovern v. Kraus, 200 Wis. 64, 227 N.S. 300, 305, 67 A.L.R. 1381. That opinion thoroughly considers the qualification of the rule where the error in a former decision was great. The court notes the analogy of sustaining petitions for rehearing which substantially change the position and views of the court from those originally taken. Upon sensible and cogent reasons for making an exception in an extraordinary case, the court modified the practice formerly established in Wisconsin and, as indicated above, reserved unto itself a right and recognized the duty to correct a prior ruling made by it in the same case whenever the error was great and substantial and proper reasons exist for doing do.

Union Light, Heat & Power Co. v. Blackwell's Adm'r., Ky., 291 S.W.2d 539, 542 (1956). Union has not been overturned, and it appears that courts are not required to abide by an erroneous opinion made on a former appeal. See, Frenel v. Commonwealth, Department of Highways, Ky., 361 S.W.2d 280 (1962); Folger v. Commonwealth, Department of Highways, Ky., 350 S.W.2d 703 (1961). We believe this case to be one of the rare exceptions to which the Union exception applies.

First, prior to Pickands there was no clear determination of the issue at hand. Second, due to the way this case has been handled by the Board and the ALJ, the decision rendered by the Board under Weaver had never become final, and as such, was still subject to change. Had the ALJ entered his amended order in a timely fashion prior to Pickands and had the matter become final, our decision may have been different.

Having considered the parties' arguments on appeal, the decision of the Board is affirmed and this matter is remanded to

the ALJ with instructions to amend his order to comply with the Board's opinion and order of June 26, 1998.

ALL CONCUR.

BRIEF FOR APPELLANT:

Benjamin C. Johnson
Appellate Attorney for Special Fund
Louisville, KY

BRIEF FOR APPELLEE, MAGOFFIN COAL COMPANY:

John T. Chafin
Prestonsburg, KY