RENDERED: May 28, 1999; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001813-WC

MINE 25 CORPORATION;
MINE 26 CORPORATION;
MINE 26 PROCESSING CORPORATION; and
UNINSURED EMPLOYERS' FUND

APPELLANTS

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-91-039972, WC-91-015781, WC-90-016772

HURSHEL FLEMING;
WILLIAM WINDCHY;
SUN GLO CORPORATION;
TROJAN MINING, INC.;
HON. DONNA TERRY, Chief
Administrative Law Judge

APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: KNOPF, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: In their petition for review of a decision of the Workers' Compensation Board (Board), appellants argue the Board exceeded its authority in reviewing, reversing and remanding a decision of the Administrative Law Judge (ALJ). Although we do not believe the Board exceeded the proper scope of review, having examined the record and applicable law, we reverse.

The underlying facts and procedural history of this matter have been thoroughly set forth in Fleming v. Windchy, Ky., 953 S.W.2d 604 (1997). For the sake of simplicity we will summarize only those facts relevant to the immediate appeal. On March 16, 1990, claimant, Hurshel Fleming (Fleming), injured his back while in the employ of Sun Glo Coal Company (Sun Glo). For this injury he received temporary, total disability (TTD) benefits until August 1990. Thereafter, he returned to work and suffered yet another back injury, on April 19, 1991, while in the employ of Trojan Mining, Inc. (Trojan), Sun Glo's successor corporation. Fleming received TTD benefits until July 1991 and has not returned to work since that time. A claim of permanent total disability benefits was filed on Fleming's behalf for both the 1990 and 1991 injuries. Prior injuries sustained by Fleming included a 1977 back injury, for which a six percent (6%) occupational disability was awarded, and a 1988 knee injury, for which a ten percent (10%) occupational disability was awarded.

Following the Supreme Court decision, the case was remanded to the ALJ for further proceedings consistent with that opinion. On remand, the ALJ entered an initial order on January 26, 1998, and modified order on March 3, 1998. The Special Fund appealed that decision to the Board, which reversed and remanded. This appeal ensued.

In the appeal sub judice, appellants argue the Board exceeded its authority in reversing the ALJ's decision. They contend the Special Fund sought review from the Board solely on the issue of apportionment of lifetime benefits between Trojan,

its successors, and the Special Fund. Rather than limit the scope of review strictly to apportionment of liability, the Board, in part, increased the actual weekly payment sum arising from the 1991 injury. Appellants contend the Board's construction of the issue raised before it was an abuse of its jurisdictional authority. We disagree.

KRS 342.285(2)(c) provides:

> (2) The board shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on questions of fact, its review being limited to determining whether or not:
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> > (c) The order, decision, or award is not in conformity to the provisions of this chapter[.]

Our review of the Board's opinion reveals that it made every effort to interpret and apply the holding in Fleming, albeit inaccurately. Moreover, it appears the Board's decision was premised on the fact that KRS 342.1202(1) directs that any award of income benefits for permanent total or partial disability, under KRS Chapter 342, based in whole or part on a pre-existing back condition, shall be apportioned fifty/fifty (50/50). Relying on this statutory provision, the Board modified the amounts and durations of Fleming's combined awards. In that the Board's opinion was an effort to conform with the provisions of KRS Chapter 342, it acted within the scope of its conferred authority. Nonetheless, we believe the Board misinterpreted the instructions set forth in Fleming and, therefore, reverse its decision. See Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992).

In Fleming v. Windchy, Ky., 953 S.W.2d 604 (1997), our Supreme Court addressed, inter alia, the appropriate manner in which to ascertain and apportion disability benefits where a prior injury is being compensated as a permanent, partial disability and the claimant is subsequently rendered totally disabled by another work-related injury. The difficult question remained in how to allocate liability where the first compensable injury rendered the claimant only partially occupationally disabled, however the subsequent injury, when combined with the prior partial disability, rendered the claimant totally occupationally disabled. But for the other injury, neither, standing alone, would have been totally disabling. Moreover, the question remained on the new nature of the prior partial disability and, to what extent and by what method was the employer liable for compensating the injured worker. Our Supreme Court opined:

> [W]e remain committed to the principle embodied in the [Campbell v. Sextet Mining Co., Ky., 912 S.W.2d 25 (1995)] holding, that a worker who is rendered permanently and totally disabled by a work-related injury which occurs during the compensable period of a prior, work-related injury is entitled to an award of lifetime benefits, computed pursuant to KRS 342.730(1)(a), for the entire amount of disability not excluded as a prior, active condition.
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> . . . Likewise, a defendant may not be held liable for any additional occupational effect which results from the fact that a subsequent disabling injury is superimposed upon the injury for which the defendant is liable. . . . [W]e agree that the award for the 1990 injury may extend only for 425 weeks, with benefits payable at the 1990 rate pursuant to KRS 342.730(1)(b).

> . . . KRS 342.120(6) provides that where the combined effect of a worker's previous disability and a new injury results in a greater overall degree of disability that the latest injury, alone, would have caused, the employer is liable only for the percentage of disability attributable to the latest injury. Pursuant to KRS 342.120(7), that greater disability which results from the combined effect of the latest injury superimposed upon the previous disability is apportioned to the Special Fund.

Fleming, 953 S.W.2d at 607.[1]

The essence of Fleming holds that where a worker is being compensated for a partial injury, and during the period of compensation receives a subsequent work-related injury which when taken with the prior injury has a combined effect of rendering the worker totally disabled, the latter injury is superimposed on the former entitling the worker to total disability benefits for as long as he remains disabled. In other words, the permanent, partial disability is transformed into a permanent total disability.[2] The net effect of this treatment permits the worker

[1] We note that the Court's opinion refers to the pre-1997 amendments to KRS Chapter 342.

[2] As the Court notes, one source of controversy is the rate of compensation for partial and total disabilities which are permanent. Permanent, total disability is compensated at a higher maximum rate for a longer duration. KRS 342.730 provides income benefits for a permanent, totally disabled employee to be paid for life (provided the employee remains totally disabled) at 66 2/3% of the employee's average weekly wage, but not more than 100% of the state average weekly wage. KRS 342.730(1)(a). As where a permanent, partial disability is compensated at 66 2/3% of the employee's average weekly wage multiplied by the permanent impairment rating, but not to exceed 75% of the state average weekly wage. KRS 342.730(1)(b). Further, where the permanent, partial disability rating is 50% or less as a result of the work-related injury, the period of compensation is 425 weeks. KRS 342.730(1)(d).

entitlement to lifetime benefits computed in accordance with KRS 342.730(1)(a), addressing permanent, total disability awards.

The next application of Fleming calls for the method of apportioning liability where the subsequent injury would not, in and of itself, have rendered the worker totally disabled. In applying the facts of this matter the Court stated:

> Here, the sum of claimant's 16% noncompensable disability and the percentages of occupational disability attributed to the 1990 and 1991 injuries totals 100%. However, since the 1991 injury rendered claimant totally, occupationally disabled, the occupational effect of the injury exceeded that which would have been the case had there been no prior disability. The occupational effect of the 1991 injury was twofold. First, together with the arousal of ongoing degenerative back problems, it accounted for 42% of claimant's permanent, total disability. Second, due to the difference in KRS 342.730(1)(a) and (b), it caused the 1990 injury, which was being compensated as only 42% permanent, partial disability, to become 42% of a permanent, total disability. It is this second effect which the Special Fund would have us ignore but which we determined, in *Campbell*, should be compensable. We are aware that, in doing so and in placing liability on the Special Fund pursuant to KRS 342.120(6) and (7), we broadened the concept of "excess disability." However, we are not persuaded that we erred in doing so.
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> . . . [S]ince, we have reaffirmed the principle of *Campbell*, we conclude that the correct method for excluding the percentage of prior, active disability on these facts is to permit an offset against Trojan's and the Special Fund's liability pursuant to the award of total disability to the extent that benefits paid by the defendants pursuant to the partial disability award overlap the compensable period of the subsequent total disability award. In this way, there will be no duplicate compensation for the disability caused by the 1990 injury, each defendant

> will be held liable only for the disability which resulted from the injury for which it is held liable, and claimant will be compensated for the whole of his disability at each point in time.

Id. at 608. (Footnotes omitted).

In a footnote to the above-quoted passage, the Court recognized that, "[h]ere, it is undisputed that liability is apportioned equally between Trojan and the Special Fund pursuant to KRS 342.1202(1)."[3] Specifically, this notation followed reference to the Court's broadened concept of "excess disability." We believe the Board misconstrued this reference in modifying the ALJ's benefits award. It appears the Board perceived any and all compensation should be equally divided between Trojan and the Special Fund. The Board interpreted the decision as allocating an 84% occupational disability resulting from the 1991 injury. Following the expiration of the maximum payment period for permanent, partial disability the Board's order divided Fleming's compensation equally between Trojan and the Special Fund, so long as Fleming remained disabled. This result runs afoul of the Court's holding.

Rather, the intended outcome directs Sun Glo and the Special Fund to equally share in compensating Fleming for the 1990 permanent, partial disability, at the rate set forth in KRS 342.730(1)(b), for a period not to exceed 425 weeks. Thereafter, the Special Fund would remain solely liable for the entire amount of compensation, for as long as Fleming remained disabled, under

[3] Trojan and the Special Fund had further stipulated that liability would be apportioned 50/50.

the concept of "excess disability." Concerning the 1991 injury, Trojan, or its successors, and the Special Fund would share equally in compensating Fleming for the permanent, total disability for as long as Fleming remained disabled. During the compensable period in which the payment of disability benefits overlap, Trojan's and the Special Fund's liability would be offset to the extent of benefits paid By Sun Glo and the Special Fund for the partial disability award. In other words, the ALJ's order on remand accurately reflects the Supreme Court's decision when it provided, in pertinent part, the following award:

> 1. Plaintiff Hurshel Fleming is 100% occupationally disabled, of which 16% was preexisting active prior to the 1990 and 1991 injuries which formed the subject of the instant litigation.
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> 2. For Claim No. 90-16772, Hurshel Fleming shall recover temporary total disability income benefits already paid from March 17, 1990 to August 19, 1990 and thereafter the sum of $74.18 per week for 21% permanent occupational disability from August 20, 1990 and continuing thereafter for so long as he shall remain disabled, for a period not to exceed 425 weeks. Hurshel Fleming shall further recover from the Special Fund the sum of $74.18 per week representing 21% permanent occupation disability commencing August 20, 1990 and continuing thereafter for so long as he shall be disabled for a period not to exceed 425 weeks and benefits thereafter at the rate of $148.36 per week for so long as he shall remain disabled, representing "excess disability" caused by the combined effects of the injury occurring on March 16, 1990 and the injury occurring on April 19, 1991. The Special Fund's liability for this excess liability is determined pursuant to the factors set forth in Young [v.] Fulkerson, Ky., 463 S.W.2d 118 (1971).
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> 3. For claim No. 91-15781, Hurshel Fleming shall recover from defendant Trojan Mining, Inc. and pursuant to operation of KRS

> 342.610(2), Mine 25 Corporation, Mine 26 Corporation, and Mine 26 Processing Corporation, temporary total disability income benefits already paid and thereafter the sum of $76.03 per week for 21% permanent occupational disability from July 1, 1991 and continuing thereafter for so long as he is so disabled. Both of the latter sums shall be subject to credit to the extent that the award of permanent partial disability benefits from the 1990 injury (Claim No. 90-16772) overlap this lifetime disability award. Successors by merger of Mine 25 Corporation, Mine 26 Corporation and Mine 26 Processing Corporation shall be liable for said benefits pursuant to KRS 271B.11-060.

"The Court of Appeals is compelled to follow precedent established by the decisions of the Supreme Court." Special Fund v. Francis, Ky., 708 S.W.2d 641, 642 (1986). As our analysis of the Supreme Court's instructions in Fleming conflicts with the Board's opinion but conforms to the ALJ's revised order, we reverse the June 19, 1998, order of the Board and affirm the January 26, 1998, order and March 3, 1998 modification of the ALJ.

ALL CONCUR.

BRIEF FOR MINE 25 CORPORATION; MINE 26 CORPORATION; MINE 26 PROCESSING CORPORATION:

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BRIEF FOR UNINSURED EMPLOYERS' FUND:

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