RENDERED: July 23, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000973-WC

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

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-79-06778

CLYDE REEDER;
EASTOVER MINING COMPANY;
HONORABLE DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE;
AND THE WORKERS' COMPENSATION
BOARD — APPELLEES

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

BEFORE: COMBS, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: The Special Fund appeals from a March 23, 1998, order of the Workers' Compensation Board reversing an order by the Administrative Law Judge and remanding for recalculation of income benefits payable by the Fund and by Eastover Mining Company, a nominal appellee herein, to Clyde Reeder, the appellee in substance. The Special Fund maintains that the Board has exceeded its authority as an appellate tribunal by considering

sua sponte a purported error not otherwise raised in the proceedings. The Special Fund also maintains that the Board, along with the ALJ, misapplied the law governing recalculation of benefits following a finding, upon reopening, of increased partial disability. For the reasons that follow, we are persuaded that the Board's *sua sponte* consideration of a palpable error was within its authority, and that its remand in light of that error correctly applied the pertinent law. Accordingly, we affirm the Board's order.

While working for Eastover Mining Company in 1978, Clyde Reeder suffered a work-related injury to his back. In February 1979 he duly applied for disability benefits to the "old" Workers' Compensation Board, and by order entered December 22, 1980, the old Board found him to be 50% (fifty-percent) permanently occupationally disabled. 15% (fifteen-percent) of this disability was deemed non-compensable; 15% (fifteen-percent) was assigned to Eastover; and the remaining 20% (twenty-percent) was assigned to the Special Fund. Under the benefit statute (KRS 342.730) in effect at that time, Reeder was entitled to a weekly benefit, for as long as he remained disabled, equal to the lesser of $112.00 (one-hundred twelve dollars) or an amount calculated as follows:

> Average Weekly Wage X a Statutory Multiplier
> X Percentage of Compensable Disability.

See C.E. Pennington Co. v. Winburn, Ky., 537 S.W.2d 167 (1976) (discussing this calculation). Instead of making this calculation and comparing the result with the statutory maximum,

however, the old Board simply multiplied the statutory maximum by Reeder's compensable percentage of disability and arrived at an award of $39.20 per week, which it then apportioned between Eastover and the Special Fund. Reeder sought administrative reconsideration of this award, and he appealed to circuit court. He did both on the ground that he should have been found totally disabled. By order entered July 17, 1981, the circuit court affirmed the Board's determination of the extent of Reeder's disability.

In October 1993, Reeder settled the balance of his claim with both Eastover and the Special Fund for a lump sum of $17,000.00 (seventeen thousand dollars), apportioned $9,000.00 (nine thousand dollars) and $8,000.00 (eight thousand) respectively. Then in January 1997, alleging that his condition had worsened and that his disability had increased, Reeder filed the instant motion to reopen his 1979 award. The ALJ found that Reeder's disability had increased to 60% (sixty-percent). He apportioned the additional 10% (ten-percent) disability in the same manner as the original award and so determined that Eastover and the Special Fund would thenceforth owe Reeder $20.16 and $26.88 respectively per week.

All the parties complained to the Board. Eastover and the Special Fund maintained that the ALJ had failed to give proper consideration to the 1993 settlement. That settlement, they insisted, had disposed of their liability for all of Reeder's benefits except those based on the newly determined 10% (ten-percent) disability. Accordingly, they argued that they

should not have been ordered to pay more than $3.36 and $4.48 per week, respectively. Reeder complained that the ALJ should have found that he, Reeder, had become totally disabled.

The Board denied Reeder's appeal. It found that substantial evidence supported the ALJ's determination of the extent of his disability. Before ruling on Eastover's and the Special Fund's appeals, however, the Board noted the mistake mentioned above concerning the original miscalculation of Reeder's benefits. In light of that mistake, the Board ruled on its own motion that Reeder's benefits should be recalculated according to the correct formula. Application of that formula would require a determination of Reeder's average weekly wage, and so the Board remanded the claim to the ALJ for that purpose.[1] The Board then ruled that although Eastover and the Special Fund were entitled to credit for the full amount of their 1993 settlement, that settlement was for no more than the amount incorrectly awarded in 1980. Upon determination of the correct amount, Eastover and the Special Fund would be liable, prospectively, not only for the benefits associated with Reeder's increased disability but also for the difference between what should have been awarded originally and what had been awarded.

Reeder has not appealed from the Board's ruling, so we may accept its finding that the extent of Reeder's disability was appropriately determined. Eastover and the Special Fund complain

[1]Although the record was not sufficient to permit the Board to calculate definitively the benefit to which Reeder was entitled, it estimated the amount as at least $85.00 per week and possibly as much as $112.00 per week.

that the Board exceeded its authority by raising the benefit miscalculation issue when none of the parties had done so and the ALJ had been given no opportunity to address it. They complain further that, even if the recalculation of Reeder's award might, in other circumstances, be appropriate, the 1993 settlement renders recalculation in this case moot. The settlement, they insist, was meant to resolve 100% (one hundred percent) of Reeder's then existing claim, whatever the amount of that claim might in fact have been.

Eastover and the Special Fund thus raise both a procedural and a substantive objection to the Board's ruling. The procedural objection--that the Board does not have authority to scour the record for errors the parties have not seen fit to address--not only raises fundamental questions about the nature of the Board, but also raises important questions about the relationship of the Board to the courts. We begin our discussion, therefore, by recalling that administrative bodies, such as the Workers' Compensation Board, derive their authority to make and enforce rules solely from the General Assembly. Separation of powers concerns require both that within its designated area the Board be accorded wide discretion to carry out its legislative mandate and, on the other hand, that it be permitted neither to exceed nor to disregard that mandate. Kerr v. Kentucky St. Bd. of Registration for Professional Engineers and Land Surveyors, Ky. App., 797 S.W.2d 714 (1990); American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). In

reviewing agency adjudications, courts owe deference not only to agency fact-finding, but also to the agency's interpretation of its enabling legislation and its own rules. Graybeal v. McNevin, Ky., 439 S.W.2d 323 (1969); Goodwin v. City of Louisville, 309 Ky. 11, 215 S.W.2d 557 (1948).

Furthermore, although the system provided by the General Assembly for adjudicating workers' compensation claims has often been compared to a court system, *see e.g.* Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), and although this analogy is apt for many purposes, it is important to remember that the Board is not a court and is not bound, unless through legislation or regulation, by the rules of civil procedure. Western Baptist Hospital, *supra*, (concurring opinion by Justice Combs); Board of Education of Ashland School District v. Chattin, Ky., 376 S.W.2d 693 (1964) (dissenting opinion by Judge Montgomery). This is not to say that such doctrines as error preservation, *res judicata,* and law of the case have no application to administrative tribunals. They do have. United States v. Utah Constr. & Min. Co, 384 U.S. 394, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966); Smith v. Dixie Fuel Co., Ky., 900 S.W.2d 609 (1995); Pennwalt Corporation v. Beale, Ky. App., 840 S.W.2d 830 (1992); Keefe v. O.K. Precision Tool & Die Co., Ky. App., 566 S.W.2d 804 (1978). It is to say, however, that these doctrines need not function in the administrative context precisely as they do in the judicial one. Smith, *supra*; Beale v. Faultless Hardware, Ky., 837 S.W.2d 893 (1992); Oubre v. District of

Columbia Department of Employment Services, 630 A.2d 699 (D.C. 1993).

With these general principles in mind, we turn to the specific question of the Board's authority to reverse an ALJ's order on grounds not previously raised. KRS 342.285, **Appeal to Workers' Compensation Board**, provides in pertinent part as follows:

> (1) An award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award.
> (2) No new or additional evidence may be introduced before the board except as to the fraud or misconduct of some person engaged in the administration of this chapter and affecting the order, ruling, or award, but the board shall otherwise hear the appeal upon the record as certified by the administrative law judge and shall dispose of the appeal in summary manner. The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact, its review being limited to determining whether or not:
> (a) The administrative law judge acted without or in excess of his powers;
> (b) The order, decision, or award was procured by fraud;
> (c) The order, decision, or award is not in conformity to the provisions of this chapter;
> (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or
> (e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . . .

Usually, of course, one or more of these defects in the ALJ's order will be alleged by a party, and it is the allegation of error that gives rise to the Board's review. Parties, furthermore, are strongly encouraged to raise their objections before the ALJ, not only because it is more efficient to correct mistakes as early as possible, but also because in that way the reviewing Board may consider the ALJ's explanation of his or her decisions. Unlike appellate courts, however, the Board has general authority to review allegations of error raised by the parties for the first time on administrative appeal. Smith v. Dixie Fuel Co., *supra*. Does this authority extend to the consideration of errors which have not been objected to at all?

For courts, of course, the answer would ordinarily be no: "A reviewing court should limit its review to the issues raised by the parties, as it is possible for a party to waive assignments of error, either expressly or impliedly." Rainey v. Mills, Ky. App., 733 S.W.2d 756, 757 (1987). It has been held, moreover, that *sua sponte* rulings are improper unless the parties are first given notice and an opportunity to be heard. Storer Communications of Jefferson County, Inc. v. Oldham County Board of Education, Ky. App., 850 S.W.2d 340 (1993). Eastover and the Special Fund, however, have not objected to the Board's ruling on these grounds. Assuming, therefore, that the requirements of due process were satisfied, we are persuaded, notwithstanding the contrary rule for courts, that the Board had the authority to raise the miscalculation issue *sua sponte* and to modify the ALJ's order in light thereof.

Our conviction is based upon the General Assembly's apparent intent that the Board actively participate, along with the arbitrators and ALJ's, not merely in providing a neutral forum wherein workers and employers can dispute compensation claims, but also in bringing about the fair, efficient, and accurate operation of a complex benefit program. This intent was expressed, we believe, in the General Assembly's modification in 1994 of KRS 342.281. That statutory amendment made clear, in the wake of our Supreme Court's contrary ruling in Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991), that Board procedures need not mimic court procedures. In particular, the legislature provided that the Board, despite its strictly "appellate" role, may consider allegations of error not raised before the ALJ.[2]

That the scope of that authority includes *sua sponte* consideration of patent legal errors is indicated, we believe, by the provision, in KRS 342.125, for broad, on-going review of compensation awards. That statute, **Reopening and review of award**

[2]The Special Fund notes that in the 1996 revision of KRS 342.281 the sentence added in 1994 expressly asserting the Board's authority to consider newly raised allegations of error was removed. The statute now reads as it did following the 1988 amendments, which was the version of the statute construed in Osborne v. Pepsi-Cola. The Special Fund maintains that this return of KRS 342.281 to its pre-1996, pre-Smith v. Dixie Fuel Co., form evidences a legislative intent to reinstate Osborne. As intriguing as this suggestion is, the omission of this sentence does not strike us as a "plain and unmistakable" indication of the legislature's intent to depart from the interpretation of the Workers' Compensation Act advanced in Smith v. Dixie Fuel Co.. A clear indication of that intent would be necessary, however, to justify our adoption of such a reinterpretation. *See* Democratic Party of Kentucky v. Graham, Ky., 976 S.W.2d 423, 429 (1998) (citing Butler v. Groce, Ky., 880 S.W.2d 547 (1994)).

or order, expressly provides for review of a compensation award upon "an arbitrator's or administrative law judge's own motion." This statute clearly contemplates active oversight of the compensation system by the ALJ's and arbitrators. Because the Board would seem to have the authority, under KRS 342.285, to order an ALJ to engage in that oversight, we can perceive no reason to deny the Board the right to exercise directly the same function. *Cf.* Croke v. Public Service Commission of Kentucky, Ky. App., 573 S.W.2d 927 (1987) (observing that statutory agencies have only those powers expressly conferred or fairly implied).

As suggested above, the statutory purpose underlying these liberal provisions for review of compensation awards indicates a legislative recognition that the workers' compensation system is not easily administered. Errors are inevitable, and, over the long duration of some awards, conditions are sure to change. The system thus requires both oversight, for the detection of errors and the determination of altered circumstances, and flexibility, for correction and adjustment. Accordingly, the statutory review provisions, KRS 342.125, have incorporated procedures roughly analogous to those provided for courts in CR 60.02 (for the reconsideration of errors) and in KRS 403.250 (for the adjustment of domestic relations support orders in light of changed circumstances). While an awareness of these analogies is helpful, it is also important to be aware of their limitations.

For example, legal errors, in general, are not subject to review pursuant to CR 60.02. Commonwealth v. Gross, Ky., 936 S.W.2d 85 (1996). If the same rule applied to KRS 342.125, the Special Fund's insistence that the Board's resurrection of the miscalculation error here was barred by *res judicata* would have merit. The old award is long since final, and, under the Civil Rules, the Board would have no authority to reopen it on the ground of legal error.

KRS 342.125, however, is different. As observed recently by our Supreme Court, "the reopening statute . . . for workers' compensation claims may be invoked for mistakes of law as well as fact . . ." Wheatley v. Bryant Auto Service, Ky., 860 S.W.2d 767, 768 (1993). *See also* Oubre v. District of Columbia Department of Employment Services, *supra* (discussing, in a similar factual context, the relaxation of finality doctrines in the workers' compensation arena).

Wheatley involved a controversy much like the one now before us. In that case, shortly after a disability benefit award had become final, the ALJ realized that he had awarded benefits for a maximum of 425 weeks when the claimant was actually eligible to receive them for life. On his own motion the ALJ reopened and amended the order to correct the mistake. The question on appeal was whether he had the authority under KRS 342.125 to do so. Both the Board and this Court, relying on principles of *res judicata*, said no. Our Supreme Court disagreed. Noting the importance to the Workers' Compensation System that patently incorrect and unjust awards be correctable,

the Court held that the reopening statute contemplated review on the ground of mistakes of law as well as fact. The Court further held that,

> [s]ince the authority for correcting this mistake was statutory, there was no prohibition by reason of the finality of the decision against making the correction, such as there would be had there been a court decision where finality had attached.

860 S.W.2d at 769.

Unlike the situation in Wheatley, however, here it was the Board, not an ALJ, who acted on its own motion to correct a mistake, here the mistake was discovered years, not days, after the award became final, and here the original award had been appealed to and upheld by the circuit court. We do not believe that these differences distinguish this case from Wheatley. As discussed above, we are persuaded that under KRS 342.125 and 342.285 the Board has the same authority as the ALJs to raise on its own motion patent and substantial errors in the administration of the workers' compensation system. Furthermore, the remedy the Board ordered is prospective only. There would seem, therefore, to be no prejudice to Eastover or the Special Fund stemming from this issue's long period of dormancy. On the other hand, the injustice to Reeder of perpetuating the mistake is no less obvious than the injustice sought to be averted in Wheatley.

Eastover and the Special Fund insist, however, that Reeder's 1981 appeal to circuit court distinguishes this case from Wheatley and makes the Board's ruling inappropriate. It is undisputed that Reeder did not raise this issue as part of his

appeal, but according to Eastover and the Special Fund that fact makes no difference. They rely on that portion of Wheatley quoted above, which they construe as indicating a distinction between the finality that attaches to a workers's compensation award that has been appealed to a court and that which attaches when the right to appeal has been waived. Wheatley dealt with the latter, they maintain, whereas the former is somehow no longer reachable by KRS 342.125. We are aware of no such subspecies of finality. An administrative order is not converted to a judicial order by virtue of being affirmed on appeal. It is the distinction between administrative orders, which in this case are subject to reopening under KRS 342.125, and judicial judgments, which in general are less vulnerable to reopening, that Wheatley recognizes.

There is another reason for our conviction that the Board's ruling in this case was within its authority. An exception to the rule that courts may not reopen final judgments to correct errors of law comes into play whenever the error involves the mistaken assertion of subject matter jurisdiction. Such an error may be raised on the trial court's or an appellate court's own motion at any time. Commonwealth Health Corp. v. Croslin, Ky., 920 S.W.2d 46 (1996). This principle has been extended to unauthorized assertions of remedial authority even where the authority to address liability and to provide an authorized remedy is patent. Gaither v. Commonwealth, Ky., 963 S.W.2d 621 (1997). In Commonwealth v. Griffin, Ky., 942 S.W.2d 289 (1997), our Supreme Court expressed dissatisfaction with the

characterization of unauthorized-remedy cases as subject-matter-jurisdiction cases. The issue, the Court said, was "another type of jurisdiction." *Id.* at 291. Nevertheless, the Court agreed that where the parties are not authorized to waive a statutory limitation on a remedy, the trial court is jurisdictionally bound by that limitation, and reviewing courts may address the issue at any time. There would seem to be a similar authority in an administrative agency to correct at any time its unlawful assertions of power. *Cf.* Boone County Water and Sewer District v. Public Service Commission, Ky. 949 S.W.2d 588 (1997) (dissenting opinion by Justice Wintersheimer arguing that the PSC's authority to order refunds was implicit in its lack of authority to collect more than the approved rates).

This authority to amend "jurisdictional" defects is pertinent here. For, although it is not always easy to say whether a mistake is truly jurisdictional (*see* Arnett v. Kennard, Ky., 580 S.W.2d 495 (1979) (distinguishing truly jurisdictional requirements from "ultra mandatory" procedural rules), there is good reason to believe that the mistake the Board discovered in this case was. The benefit statute specified the manner in which the old board was to calculate Reeder's award, and, by the time of that award, ambiguities in the statute had been resolved by our Supreme Court. Pennington, *supra*. When it made the award to Reeder, therefore, the old board did not have authority to "interpret" KRS 342.730 differently and use another method of calculation, at least not in the absence of a valid and validly approved settlement agreement. *Cf.* Schaab v. Irwin, 298 Ky. 626,

183 S.W.2d 814 (1944) (upholding the circuit court's correction of a miscalculated disability award despite the fact that the issue had not been presented to the Board, because the court had a duty to ensure that the Board conformed to its statutorily defined function); *cf. also* Schulte v. Workmen's Compensation Board of Kentucky, Ky. App., 571 S.W.2d 108 (1978) (noting the distinction between "mistakes of law" subject to correction under KRS 342.125 and Stearns Coal and Lumber, *supra,* and the first-impression interpretation of statutes which, as in Keefe v. O.K. Precision Tool & Die Co., *supra*, do not give rise to retrospective relief even though subsequently deemed incorrect by a reviewing court.) Thus, even if the current Board did not have authority under KRS 342.125 to address this issue on its own motion, we believe its action was justified on this alternative ground.

One more difference between this case and Wheatley needs to be discussed, a difference that provides the basis for Eastover and the Special Fund's substantive objection to the Board's ruling. Unlike the award in Wheatley, the erroneous award in this case was eventually settled for a lump sum. Should this settlement be construed, as Eastover and the Special Fund contend, as, in essence, Reeder's "quit claim," or waiver, of all his rights under the original award, whatever they might subsequently prove to be?

Although waivers of important rights may sometimes be inferred from a party's actions, the general rule is that waivers must be express and knowing. Greenburg Deposit Bank v. GGC-Goff

Motors, Ky., 851 S.W.2d 476 (1993). Accordingly, although we can not say that the finding of a waiver would never be appropriate in circumstances similar to these, we are not persuaded that the Board erred by declining to find a waiver here. The absolute waiver alleged by Eastover and the Special Fund was not express, and the parties' behavior does not compel an inference that such a waiver was intended. As noted by the Board, Reeder was not represented by counsel in his settlement negotiations, and the settlement strongly favored the Special Fund. These facts suggest that Reeder's participation was not particularly knowing. Absent some express indication to the contrary, therefore, it is highly unlikely that Reeder considered the possibility that his award might be more valuable than it seemed, nor is it likely that he would have accepted the $17,000.00 settlement had he suspected the award's correct amount.

It is to be borne in mind, moreover, that, under KRS 342.265, settlements must be approved by an ALJ. Although the standards for ALJ approval are not specified in the Act,[3] we do not believe that the ALJ's role is intended to be merely ministerial. *See* Commercial Drywall v. Wells, Ky. App., 860 S.W.2d 299 (1993) (rejecting a "ministerial" interpretation of KRS 342.265). If the ALJ is to serve meaningfully as a settlement overseer, however, the settlement terms he or she reviews must indicate accurately and clearly the rights the employee is relinquishing. Neither Eastover nor the Special Fund

[3] *Cf.* KRS 403.180 providing that domestic relations settlements must be "conscionable."

maintains, however, that the settlement they proposed to the ALJ indicated the breadth of waiver they are urging here. Accordingly, we find no error in the Board's decision to limit the settlement credit due Eastover and the Special Fund to the benefit amount actually provided under the erroneous award. That amount seems clearly to have been the basis of the parties' settlement.

As our Supreme Court has observed,

> "the theme pervading much of the adjectival law of workmen's compensation is the necessity of striking a balance between relaxation of rules to prevent injustice and retention of rules to ensure orderly decision making and protection of fundamental rights."

Osborne v. Pepsi-Cola, 816 S.W.2d at 645 (quoting from 3 Larson, *Workmen's Compensation Law*, § 77A.83 (1989, 1990 Cum. Supp.)). This case concerns the Board's authority to strike that balance in the manner it sees fit. We believe that authority is extensive. Although the rights compromised and conferred by the Workers' Compensation Act are so important that the courts will always be deeply involved in their interpretation and enforcement, the fact remains that the Workers Compensation Board is a duly authorized agency. Separation of powers considerations dictate that the General Assembly and the Board be free to develop those procedures they think best for the efficient and fair administration of the Act. While due process constraints are apt to render those procedures court-like, there is no requirement that they conform strictly to the Civil Rules, or to the procedures this Court might prefer.

In the exercise of its authority to establish a claims procedure, the General Assembly has conferred broader powers of review on the Workers Compensation Board than are enjoyed by reviewing courts. In particular, the Board is authorized to raise on its own motion significant errors in the awarding of benefits despite the fact that such errors have escaped the attention of the parties and have not been addressed at an earlier stage of the proceedings. Although this somewhat informal review procedure may compromise to some extent the finality of workers' compensation awards, it helps to ensure, on the other hand, the fairness and correctness of those awards. This is precisely the sort of balancing, as our Supreme Court noted in Osborne, that is required of a workers' compensation system. Absent some indication that it has run afoul of constitutional guarantees, we are unable to say that the particular balance struck here exceeds the General Assembly's or the Board's authority. In light of the Board's statutory duty to ensure the fair and accurate award of benefits and its constitutional duty to respect the limits of its jurisdiction, we conclude that the Board had the authority to address on its own motion the miscalculation of Reeder's benefits.

We also conclude that the Board remedied that miscalculation appropriately. Although the error was patent on the record, it had theretofore been overlooked and compounded by at least two ALJs. One of those ALJs had approved the lump-sum settlement of the erroneous award, but the record gives no indication that he would have done so absent the error. On the

contrary, the error was substantial enough to make it virtually certain that he would not have done so. The Board did not abuse its discretion, therefore, by limiting the amount of settlement credit to the amount of the erroneous award and by deeming Reeder entitled, prospectively, to the balance of the award once it is correctly determined. Accordingly, we affirm the March 23, 1998, opinion and order of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

David R. Allen
Special Fund
Louisville, Kentucky

BRIEF FOR EASTOVER MINING COMPANY:

Antony Saragas
Huff Law Offices
Harlan, Kentucky

BRIEF FOR CLYDE REEDER:

Edward L. Bowling
WILSON, STANLEY, BOWLING & COSTANZO
Middlesboro, Kentucky