

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000316-WC

ROBERT L. WHITTAKER,
Director of SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-00404

DONALD PRATER; PHELPS RESOURCES, INC.,
D/B/A BLACKFIELD COAL COMPANY, INC.;
IRENE STEEN, Administrative Law
Judge; ISLAND FORK CONSTRUCTION COMPANY;
and WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 1999-CA-000320-WC

PHELPS RESOURCES D/B/A
BLACKFIELD COAL COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-00404

DONALD PRATER; ISLAND FORK
CONSTRUCTION COMPANY; IRENE STEEN,
Administrative Law Judge;
ROBERT WHITAKER, Director of SPECIAL
FUND; and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING IN PART, REVERSING IN PART

AND REMANDING WITH DIRECTIONS

** ** * * * * *

BEFORE: HUDDLESTON, BUCKINGHAM and SCHRODER, Judges.

HUDDLESTON, Judge: Phelps Resources, Inc., d/b/a Blackfield Coal Company, Inc. (Blackfield), seeks review of a decision of the Workers' Compensation Board. The issues presented in Blackfield's petition are: (1) whether the Administrative Law Judge erred by reopening Donald Prater's 1985 and 1986 injury claims against Blackfield; (2) whether the ALJ's finding that Prater's condition was the result of an exacerbation of his previous injuries was supported by substantial evidence; and (3) whether the Board erred in awarding Prater compensation for 100% occupational disability. Robert L. Whittaker, as Director of the Special Fund, also filed a petition to review the decision of the Board. The Special Fund contests the Board's award and argues that the Board exceeded its authority by granting relief in excess of that requested by Prater.

In October 1985, Prater, an underground coal miner, injured his back in the course of his employment at Blackfield. As a result of his injury and subsequent surgery, Prater filed a claim with the Kentucky Department of Workers' Claims (the Department). Prater ultimately settled his claim for 17% permanent partial disability. Prater then returned to work for Blackfield and injured his back again in October 1986. Prater endured a second surgery and filed another claim with the Department, which was later settled for 20% permanent partial disability. In 1993,

Prater received a third settlement of 5% permanent partial disability due to a neck injury sustained while working for B & G Mining. Finally, in 1996, Prater suffered a back injury while riding in a scoop bucket in the course of his employment with Island Fork Construction Company. As a result of the incident, Prater filed an application for adjustment of claim with the Department in February 1997.

In response, Island Fork filed a motion to consolidate the claim with Prater's 1985 and 1986 claims and a motion to join Blackfield as a party defendant. At the same time, Prater filed a motion to reopen the 1985 and 1986 claims against Blackfield. After a hearing, the ALJ found Prater's condition to be the result of an exacerbation of his previous injuries rather than a new injury; his occupational disability had increased to 100%; and even though he settled the 1985 and 1986 claims for a total of 37% permanent partial disability, his prior occupational disability was actually 50%. The ALJ awarded Prater compensation for the increase in his occupational disability. Blackfield appealed the ALJ's opinion and award to the Board. Prater cross-appealed on the grounds that the ALJ had incorrectly calculated his disability award.

On January 19, 1999, the Board affirmed the ALJ's findings that Prater did not suffer a new injury in the 1996 incident; that Prater's occupational disability had increased and he was now totally disabled; and that it was proper to reopen the 1985 and 1986 claims. As for Prater's cross-appeal, the Board reversed the ALJ's disability award and remanded for an award

consistent with the finding that Prater was 100% occupationally disabled. This appeal followed.

The standard this Court employs when reviewing a workers' compensation decision is set forth in Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687 (1992):

The [Workers' Compensation Board] is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of Kentucky Court of Appeals decisions in cases that originate in circuit court. The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

Kentucky Revised Statute (KRS) 342.125(1)(d) allows for the reopening and review of any award or order if there is a "[c]hange of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order." The Board found substantial evidence to support the ALJ's determination that Prater's occupational disability had increased. Specifically, the Board pointed to Dr. Joseph Rapier's medical evaluations of Prater.

Dr. Rapier examined Prater after his 1986 injury and gave him a functional impairment rating of 20%. Dr. Rapier examined Prater again in 1998, and using the same American Medical Association guidelines as before concluded that Prater's impairment

rating had increased to 21.5%. Blackfield suggests that the increase in Prater's impairment rating can be explained by the subjective nature of the range of motion test. As Dr. Rapier explained, the test does have a "subject component" to the extent that one must "assume the patient is doing the best he can." What Blackfield wants this Court to assume is that Prater was not performing to the best of his ability during the evaluation. This question can be properly characterized as one involving the credibility of the witness, and it is well established that the duty of weighing the evidence and assessing the credibility of witnesses is placed squarely at the feet of the ALJ. Square D v. Tipton, Ky., 862 S.W.2d 308 (1993); Smyzer v. B.F. Goodrich Chemical, Ky., 474 S.W.2d 367 (1971).

Next, Blackfield argues that the 1996 incident caused a new injury rather than an exacerbation of Prater's 1985 and 1986 injuries. We disagree. Dr. O.M. Patrick examined Prater in March 1988 and again in May 1997 and opined that the 1996 incident "did produce an exacerbation of . . . his pain from his pre-existing problem." In review, the Board relied on the testimony of Dr. Patrick and Dr. Robert Goodman, who found no permanent harmful change was caused by the 1996 incident. This Court does not believe the Board's assessment of the evidence was so flagrant as to cause a gross injustice. Western Baptist Hosp. v. Kelly, supra at 687.

Finally, Blackfield and the Special Fund argue that the Board awarded Prater compensation at an incorrect rate. In Prater's cross-appeal to the Board, he argued that he was entitled

to be compensated for the whole of his disability, less any non-compensable disability, which he calculated to be 13% (the difference between the two prior settlements with Blackfield totaling 37% and his actual prior occupational disability found by the ALJ to be 50%). The Board reversed the ALJ's award and found that Prater was entitled to be compensated for his total disability.

We believe that the Board erred in awarding Prater compensation for 100% occupational disability. While we agree with the Board that Fleming v. Windchy, Ky., 953 S.W.2d 604 (1997), and Campbell v. Sextet Mining Co., Ky., 912 S.W.2d 25 (1996), stand for the proposition that an injured worker should be compensated for the full amount of his disability, we must also be cognizant of the importance of encouraging settlements between employers and employees, Newberg v. Weaver, Ky., 866 S.W.2d 435 (1993). In her initial opinion and award, the ALJ found that Prater's "occupational disability subsequent to the 1985 and 1986 injuries actually resulted in an occupational disability of 50%." In her order on petition for reconsideration, the ALJ clarified this finding in light of Prater's 1993 settlement of 5% permanent partial disability by stating:

Although specifically not itemized in my earlier finding of an occupational disability of 50% immediately prior to the 1996 incident, it is, however, my finding, to be more explicit at this time, that the 5% was indeed included in the overall 50% occupational disability, as this 1993 injury also had affected Plaintiff's neck and back.

Thus, there is an 8% difference between Prater's three settlements of 17%, 20% and 5% and the finding that he was 50% disabled immediately prior to the 1996 incident. In one or more of the settlements, Prater settled for less than his actual occupational disability. There is no question that re-openings should be used to increase a claimant's benefits upon a finding of a worsening of their condition; however, re-opening a settlement and awarding the claimant compensation for occupational disability that he negotiated away in a "bad bargain" would certainly undermine the purpose of entering into a settlement to begin with. Accordingly, Prater is not entitled to recover the 8% occupational disability that he bargained away, but he should be compensated for the remaining 92%.

Prater filed his motion on July 25, 1997, and is entitled to compensation for 92% of his permanent total disability from the time he made his motion. Whittaker v. Allen, Ky., 966 S.W.2d 956, 1958 (1998); Hayden v. Elkhorn Coal Corp., Ky., 238 S.W.2d 138 (1951); Lincoln Coal Co. v. Watts, Ky., 275 Ky. 130, 120 S.W.2d 1026 (1938). Blackfield is also entitled to a credit for the amount paid under the terms of the 1985 and 1986 settlements. The record reveals the terms and conditions of the 1985 settlement, but the record does not contain the 1986 settlement. Therefore, we remand this case for a calculation of Blackfield's credit in accordance with the principles announced in Hayden v. Elkhorn Coal Corp., supra.

For the reasons stated above, the Board's decision is affirmed in part and reversed in part, and this case is remanded to the Board for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR ROBERT L. WHITTAKER,
Director of SPECIAL FUND:

Joel D. Zakem
Louisville, Kentucky

BRIEF FOR DONALD PRATER:

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BRIEF FOR PHELPS RESOURCES,
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