

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002821-WC

KIMBERLY FIELDS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 96-94997

HOSPITAL SPECIALTY; SPECIAL FUND;
WILLIAM BRUCE COWDEN, JR., ARBITRATOR;
DONNA H. TERRY, CHIEF ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: JOHNSON, KNOX AND MILLER, JUDGES.

JOHNSON, JUDGE: Kimberly Fields appeals from an order of the Worker's Compensation Board that reversed an order of the Administrative Law Judge. The ALJ had dismissed the employer's request for de novo review of a benefit review determination of an arbitrator that had awarded Fields temporary total disability (TTD) benefits and medical expenses. Based upon the recent Supreme Court case of KI USA, Corp. v. Hall, Ky., 3 S.W.3d 355 (1999), we reverse the Board's granting of a de novo review by the ALJ of the arbitrator's benefit review determination.

Fields was a full-time employee of Hospital Specialty from July 1989 to May 1997. On November 13, 1995, she suffered an injury to her right knee. On January 13, 1998, she filed a motion to resolve a medical fee dispute related to her November 1995 injury, and the matter was presented to an arbitrator. The arbitrator rendered a benefit review determination on May 21, 1998, which held Hospital Specialty responsible for medical expenses incurred in the treatment of the work-related injury, including the proposed surgery, and ordered TTD benefits from the date of surgery until she reached maximum medical improvement. The arbitrator bifurcated the claim and only decided issues related to TTD and medical expenses. The arbitrator also held the claim in abeyance, noting that upon Fields achieving maximum medical improvement, any party could move to reactivate the claim.

On June 11, 1998, Hospital Specialty filed a request for a de novo hearing before an ALJ. The Chief ALJ denied the request on June 26, 1998, holding that the benefit review determination was not a final order from which an appeal could be taken. Hospital Specialty filed a petition for reconsideration of the June 26, 1998, order. This petition was denied on July 16, 1998.¹ Hospital Specialty then appealed the June 26, 1998,

¹A procedural oddity occurred at this point. The arbitrator who had made the benefit review determination was W. Bruce Cowden, Jr. In January 1998, Cowden, who had been appointed as an Administrative Law Judge pursuant to KRS 342.230 was assigned duties as an Arbitrator by the Commissioner in accordance with KRS 342.230(3). Thus, ALJ Cowden became, for all practical purposes, Arbitrator Cowden. The benefit review determination that Cowden rendered on May 21, 1998, was done in his capacity as an arbitrator. Hospital Speciality then sought a de novo
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order that had denied its request for a de novo hearing, and the July 16, 1998, order that had denied the petition for reconsideration to the Board. Hospital Speciality claimed that the May 21, 1998, award was a final and appealable order. The Board reversed the decision of the Chief ALJ and held that the May 21, 1998, award of TTD and medical benefits was not an interlocutory order and that Hospital Specialty could appeal it as a final order. This appeal followed.

The purpose of a review by this Court "is to correct the Board only where the the [sic] 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". Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

Hospital Specialty relies on the following language from KRS 342.275 and 803 KAR 25:010 sec. 12, for its argument that it is entitled to appeal the benefit review determination to the ALJ:

(1) Within thirty (30) days after the filing of the benefit review determination with the commissioner, any party may appeal

¹(...continued)

determination before an ALJ. Chief ALJ Donna Terry on June 26, 1998, in her capacity as an ALJ, dismissed Hospital Speciality's appeal. Hospital Speciality on July 8, 1998, timely filed a petition for reconsideration of the Chief ALJ's order of June 26, 1998. It was at this point that a procedure irregularity occurred. Cowden entered an order on July 16, 1998, that denied the petition for reconsideration and modified on his own motion his May 21, 1998, benefit review determination. Thus, the July 16, 1998, order is erroneous in two aspects: (1) Cowden, as an arbitrator, had no authority to rule on the petition for reconsideration that was before the ALJ; and (2) Cowden, as an arbitrator, had no jurisdiction to sua sponte modify the benefit review determination when the matter was at the ALJ level.

that determination by filing a request for hearing before an administrative law judge. Proceedings before the administrative law judge shall be de novo but subject to penalties for unreasonable proceedings under KRS 342.310.

KRS 342.275.

(1) Within thirty (30) days after the date of the filing of a written benefit review determination or ruling on petition for reconsideration from that benefit review determination by an arbitrator, any party aggrieved by the determination may appeal to an administrative law judge.

803 KAR 25.010 sec. 12²

However, the Supreme Court in KI USA, Corp. v. Hall, supra, held that an arbitrator's order granting interlocutory benefits was not a "benefit review determination" because it was not a "final order". The Supreme Court stated that "a 'benefit review determination' is a written document which resolves 'all matters at issue' with regard to a particular claim and, therefore, does not include an interlocutory award of TTD. KRS 342.270(4). An arbitrator's order granting interlocutory benefits is not a 'final order' as defined in 803 KAR 25:010, Section 13(1) and, therefore, may not be directly appealed to an ALJ." Id. at 359.³

²Effective July 13, 1998, after the Chief ALJ's decision to dismiss the appeal had been made, 803 KAR 25.010 sec. 12(1) was amended whereby the following sentence was added: "No appeal shall be taken from a written benefit review determination that does not grant or deny the ultimate relief sought as to all parties without the need for further steps to be taken."

³KRS 342.270(4) provides:

Except when compelling circumstances justify delay and except as provided in subsection (3)(b) of this section, the arbitrator shall render a written

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In the case sub judice, the arbitrator awarded temporary total disability benefits and ordered the claim held in abeyance until Fields had reached maximum medical improvement. No findings were ever made as to permanent impairment. The May 21, 1998, order did not resolve all matters at issue and did not grant or deny the ultimate relief sought, which was a full and complete resolution of the claim.

Hospital Specialty argues that if it is later determined that the surgery was not related to the 1995 injury, then there is no way that it can be returned to its former position after having paid for the benefits and the surgery, and it therefore would be permanently divested of a right. The Board apparently agreed with this argument. However, the Supreme Court has rejected this argument, and we are required to follow their precedent. Ramada Inn v. Thomas, Ky., 892 S.W.2d 593, 594

³(...continued)

determination upon all matters at issue within ninety (90) days of the assignment of the claim. Through written order, the arbitrator may grant or deny any benefit afforded by this chapter, including interlocutory relief.

803 KAR 25.010, sec. 13(1) provides:

Within thirty (30) days after the date of filing of a final order of an arbitrator other than a benefit review determination or ruling on a petition for reconsideration from that benefit review determination, any party aggrieved by the order may file a "Request for De Novo Review by an Administrative Law Judge". As used in this section "final order" means one that grants or denies the ultimate relief sought as to all parties without the need for further steps to be taken.

(1995); see also Transit Authority of River City v. Saling,
Ky.App., 774 S.W.2d 468 (1989).

Thus, the arbitrator's order was interlocutory in nature, and the appeal was properly dismissed by the ALJ. The Board is reversed and this matter is remanded for further proceedings consistent with this Opinion.

KNOX, JUDGE, CONCURS.

MILLER, JUDGE, DISSENTS.

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