

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000763-WC

HON. ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND

APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT
(2000-SC-001018-WC)

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-23949

GLENN O. MORGAN;
COSTAIN COAL, INC. (NOW LODESTAR ENERGY, INC.);
HON. DONALD G. SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION¹
AFFIRMING
** ** * * * * *

BEFORE: JOHNSON, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The Special Fund petitions for a review of a decision of the Workers' Compensation Board which reversed the Administrative Law Judge and remanded for calculation of the credit (pursuant to KRS 342.125(5) (b) and not pursuant to Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999)) to be granted for a previous settlement. We affirm the Board on the grounds

¹On October 20, 2000, we dismissed the appeal as having been taken from an interlocutory order. By opinion rendered August 23, 2001, our Supreme Court (2000-SC-1018-WC) remanded the case for a decision on the merits.

that KRS 342.125(5) (b) applies to pneumoconiosis awards, whereas Rowland applies to injury awards.

Glenn O. Morgan was a coal miner who settled a claim for coal worker's pneumoconiosis based on tier II benefits. The claim was later reopened due to an increase in pulmonary impairment. The ALJ ultimately determined that Morgan was totally occupationally disabled and awarded increased benefits without credit for the previous award. The last Board opinion rendered February 25, 2000, agrees with the award, but reversed on the credit issue for the previous settlement and remanded to the ALJ for calculation of credit for the previous settlement under KRS 342.125(5) (b).

The Fund's argument is that the credit must be calculated under Rowland, rather than under KRS 342.125(5) (b). We disagree. The methodology adopted in Rowland requires that the ALJ determine the claimant's actual occupational disability at the time of settlement which may be different than that estimated or compromised in the settlement. After determining actual occupational disability, the ALJ would then allow the employer and the Fund credit for what payments would have been for actual partial disability, regardless of the dollar amount paid under the settlement. (As the Rowland case pointed out, the rates and limitations on benefits for partial and total disability are different.)

Rowland dealt with an occupational injury and KRS 342.730(1) (a), (b), (c), and (d) benefits. KRS 342.730 generally covers benefits for both occupational injury and occupational

diseases. KRS 342.125 covers reopenings. KRS 342.125(4) deals with credit on all awards to the extent that sums previously paid cannot be altered, although the previous award may be ended, diminished or increased. However, KRS 342.125(5) is specific and only deals with occupational pneumoconiosis, allowing reviews of previous awards and statutorily applying a formula for credit for prior benefits. KRS 342.125(5)(b). There is no statutory credit formula for injury awards or other occupational disease awards. That fact distinguishes Rowland from our case. Rowland does not cover the pneumoconiosis statutory formula in KRS 342.125(5)(b). Since we do have a statutory formula for occupational pneumoconiosis and that statute is unambiguous, we must apply the statute (credit) as written. Griffin v. City of Bowling Green, Ky., 458 S.W.2d 456 (1970); Lincoln County Fiscal Court v. Dept. of Public Advocacy, Ky., 794 S.W.2d 162 (1990); Commonwealth v. Harrelson, Ky., 14 S.W.3d 541 (2000).

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed and the matter remanded to the ALJ for the calculation of credit - pursuant to KRS 342.125(5)(b) - for benefits previously paid.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Burrell
Frankfort, Kentucky

BRIEF FOR APPELLEE, GLENN O.
MORGAN:

John S. Sowards, Jr.
Lexington, Kentucky