

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2004-CA-001707-WC

DONNIE MORRIS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-97088

W.A. KENDALL & COMPANY, INC.;
HON. W. BRUCE COWDEN, ADMINISTRATIVE
LAW JUDGE AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR, JUDGE.¹

EMBERTON, SENIOR JUDGE: Donnie Morris filed a petition for review of an opinion and order of the Workers Compensation Board affirming the decision of the Administrative Law Judge. The issue raised concerns the procedural authority of the ALJ to revise and amend an original decision rendered prior to ruling on a motion for extension of proof time.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Morris filed a claim alleging two separate work-related injuries to his back incurred while performing his duties within the scope of his employment with W.A. Kendall and Company, Inc. Because there were two separate injury dates, two different insurance companies were involved resulting in Kendall being represented by more than one carrier and more than one attorney. Each carrier alleged that the other was responsible for Morris's disability.

Prior to the final hearing, Morris settled with the carrier that insured Kendall at the time of the first injury leaving only the claim for the second injury to be litigated. At the hearing, the parties discussed and agreed that the deposition of Dr. Gregory Gleis, the independent medical examiner, filed by the first carrier would not be considered. However, after the case was briefed and submitted, in August 2003, the ALJ issued an order stating that Dr. Gleis' deposition would be considered and sua sponte permitted Kendall thirty days additional proof time to expire on September 17, 2003. An evaluation was scheduled to be performed by Dr. Frank Wood but since Dr. Wood was unable to provide the report within the thirty days allotted, Kendall filed a motion for an extension of the proof time. No objection was made by Morris.

Without ruling on the extension motion, on September 30, 2003, the ALJ rendered an opinion, finding Morris to be 13%

permanently disabled as a result of the second injury and approving the settlement related to the first injury.

Kendall filed a timely petition for reconsideration on the basis that the ALJ had made a patent error when it decided the case prior to ruling on the motion for extension. On November 14, 2003, the ALJ ordered that its prior opinion be withdrawn and that Kendall be given until December 1, 2003 to complete proof and Morris be given thirty days thereafter to submit rebuttal proof. On January 30, 2004, relying in part on the report of Dr. Wood, the ALJ rendered a revised opinion finding the entire disability attributable to the first injury.

A petition for reconsideration is limited to errors patently appearing on the face of the award, order, or decision.² The scope of the ALJ's authority when considering the petition is discussed in Wells v. Beth-Elkhorn Coal Corp.:

KRS 342.281 sets out the procedure by which an aggrieved party can petition the Board to correct its findings if there is an error "patently appearing" on its face. Ordinarily, the petition is made in cases where a mathematical mistake or error in computation of certain time periods or dates appears. However, the statute is to be liberally construed and is not intended merely to address clerical errors but all patent errors. The Board is limited in granting of the petition in one respect, however. The petition may not be granted if it appears that the Board has reconsidered

² Kentucky Revised Statutes, 342.281.

the case on its merits and/or changed its factual findings.³

The Board properly noted that the limitations on the ALJ's determination do not permit the consideration of new evidence.⁴

In this case, the ALJ considered evidence submitted after the Opinion, Award, and Order and reconsidered the merits of the claim. And it did so well beyond the requirement in the statute that a decision on a petition for reconsideration be made within ten days after its submission.⁵ We agree with the Board that the ALJ's opinion was improperly revised pursuant to a petition for reconsideration.

The Board, however, found that the ALJ properly revised the opinion pursuant to KRS 342.125, the re-opening statute. That statute provides that either upon the ALJ's own motion or upon the motion of any party, the ALJ may reopen and review any award or order on one of four grounds including mistake. The ALJ's authority has been interpreted to include the power to correct mistakes of fact and of law contained in an award or order that has not been appealed.⁶ The purpose of the statute is to provide a means to rectify mistakes made by the

³ 708 S.W.2d 104, 106 (Ky.App. 1985)(citations omitted).

⁴ Garrett Mining Co. v. Nye, 122 S.W.3d 513 (Ky. 2003).

⁵ KRS 342.281.

⁶ Wheatley v. Bryant Auto Service, 860 S.W.2d 767 (Ky. 1993).

fact finder so that any injustice to the parties can be resolved.⁷ The ALJ considered the merits of the case without ruling on Kendall motion for extension of time, an act the ALJ admitted was an over-sight. By the ALJ's own admission, had the motion been considered it would have been granted and the result the same as it now exists. Certainly the purpose of KRS 342.125 is served by the ALJ's consideration of all available proof.

The Opinion and Order of the Workers Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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⁷ Id. at 768-769.