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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001375-WC
&
NO. 2010-CA-001485-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00270

JESSE ROGERS d/b/a QUALITY EXTERIORS;
WILLIAM WILLIS BALLARD; HON. EDWARD D.
HAYS, Administrative Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

and

WILLIAM WILLIS BALLARD and JESSE
ROGERS d/b/a QUALITY EXTERIORS

CROSS-APPELLANTS

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00270

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND; HON.
EDWARD D. HAYS, Administrative Law Judge,
and WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, THOMPSON, AND VANMETER, JUDGES.

COMBS, JUDGE: The Commonwealth of Kentucky, Uninsured Employers' Fund (the Fund), appeals from the decision of the Workers' Compensation Board that vacated in part and remanded this matter to the Administrative Law Judge for further proceedings. William Ballard, the injured employee, cross-appeals. Following our review, we affirm the decision of the Workers' Compensation Board.

On February 27, 2009, Ballard fell about nine or ten feet onto a concrete sidewalk from a roof that he was helping to install. He suffered injuries to his right wrist, hand, knee, and ankle. He was taken to Bardstown Ambulatory Care Center. Physicians at University of Louisville Hand Clinic immobilized Ballard's fractured wrist with a cast. On March 13, 2009, he filed this workers' compensation claim against Jesse Rogers d/b/a Quality Exteriors.

On June 10, 2009, Ballard underwent an Independent Medical Evaluation with Dr. Mark Henderson, who diagnosed him with a right scaphoid fracture. Dr. Henderson noted decreased grip strength in the right hand and decreased range of motion in the wrist. He recommended occupational therapy to increase strength and range of motion and to help relieve pain. Dr. Henderson found no indication

of any pre-existing condition and assigned Ballard a 13% whole person impairment rating attributable to the work injury of February 27, 2009.

After reviewing the medical records and reports and other evidence, the administrative law judge made an award of benefits. The ALJ determined that Ballard had suffered a work-related injury on February 27, 2009. He also determined that Ballard had been an employee of Quality Exteriors on the day that he suffered the injuries and that the employer had had no workers' compensation insurance in effect at that time. The ALJ noted that Ballard had worked for Quality Exteriors for only three hours before he sustained the work-related injury and that the employer had not participated in the defense of the claim until Jesse Rogers arrived shortly after the final hearing had begun.

Rogers denied that Ballard had been his employee, but the ALJ discounted his entire testimony, concluding that Rogers was not credible at all. The ALJ found that Rogers agreed to pay Ballard at a rate of \$10.00 per hour. The ALJ accepted the unrefuted opinion of Dr. Henderson that Ballard suffered a 13% whole person impairment as a result of his work-related injury, but he rejected Ballard's contention that he was unable to return to his former job or similar work activities. The ALJ awarded Ballard temporary total disability benefits for the period February 27, 2009 - June 10, 2009.

Since Ballard had worked for Rogers for only three hours before he sustained the work-related injury, the ALJ determined that his average weekly wage must be calculated in accordance with the provisions of Kentucky Revised

Statute[s] (KRS) 342.140(1)(e). This statute requires the fact-finder to ascertain how much money the injured employee “*would have earned* had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation[.]” KRS 342.140. (Emphasis added.) In making this computation, the ALJ specifically rejected the Fund’s contention that roofing is “exclusively seasonal” and found that Ballard’s wages were to be calculated on the basis of a regular forty-hour work week. Ballard was awarded medical benefits and the sum of \$34.67 per week for the 425-week period following June 10, 2009.

The Fund filed a petition for reconsideration regarding the ALJ’s computation of Ballard’s average weekly wage. It particularly challenged the ALJ’s findings that roofing is *not* a seasonal occupation and that Ballard could have expected to earn wages beyond what amounted to a short-term roofing project. Additionally, the Fund contended that the ALJ’s calculation of Ballard’s average weekly wage was erroneous as a matter of law. The ALJ rejected the Fund’s calculation of Ballard’s average weekly wage at \$0.38 per week as inconsistent with the intention of the Workers’ Compensation Act. The ALJ denied the petition.

The Fund appealed to the Workers’ Compensation Board. The Board concluded that under the circumstances of this case, the ALJ correctly concluded that Ballard’s average weekly wage should be calculated pursuant to the provisions of KRS 342.140(1)(e). However, it also concluded that the ALJ’s calculation of

Ballard's average weekly wage based upon a forty-hour work week (uninterrupted for thirteen weeks) did not provide a realistic estimate of what he would have expected to earn during a normal period of employment. The Board concluded that the ALJ was unable to determine Ballard's average weekly wage properly since "there is insufficient evidence contained in the record to permit such a calculation." Board Opinion at 9.

Thus, the Board vacated the ALJ's calculation of Ballard's average weekly wage and remanded the matter to the ALJ for additional proceedings. The Board instructed the ALJ to reopen proof time for thirty days for the sole purpose of revisiting the average weekly wage issue. It advised as follows:

During that period, the parties may submit relevant proof concerning the amount Ballard would have earned had he been so employed by Quality for the full 13 calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

Board Opinion at 11-12.

Anticipating the Fund's objection to the remand, the Board observed as follows:

On a number of occasions, as in this instance, we have been called upon to address issues related to the calculation of wages where the proof has not been adequately developed. In such instances we have routinely disagreed that claimants such as Ballard, who have proven permanent disability due to work-related injuries to the satisfaction of an ALJ, should be denied the permanent partial disability awards to which they are otherwise entitled simply because insufficient proof has been introduced up to that point in the administrative

proceedings to permit a proper [average weekly wage] calculation. In so ruling we have remained mindful that the general purpose of KRS Chapter 342 is to wholly compensate injured workers whenever possible. As noted by the Kentucky Supreme Court in Beale v. Shepherd, 809 S.W.2d 845, 849 (Ky. 1991), “[t]his principle of protecting the interests of the injured worker is a basic tenet of workers’ compensation law.”

Board Opinion at 9-10. This appeal (and Ballard’s cross-appeal) followed.

On review, we must show considerable deference to the Workers’ Compensation Board. Our function “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.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

On appeal, the Fund contends that the Board lacked any authority whatsoever to remand this matter to the ALJ for additional proof. Referring to the doctrine of *res judicata* and the concept of issue preclusion, the Fund argues that the computation of Ballard’s average weekly wage must be based solely upon the proof in the record as it stood before the ALJ. It also contends that Ballard’s average weekly wage should have been calculated in accordance with the provisions of KRS 342.140(2) pertaining to exclusively seasonal occupations. On cross-appeal, Ballard contends that he introduced sufficient evidence from which his average weekly wage could be (and was) properly determined and,

consequently, that there was no basis for the Board's decision to remand this matter to the ALJ for recalculation.

The calculation of a workers' compensation benefits award is controlled by statute. It is a question of law and can be decided by the Board. *Whittaker v. Reeder*, 30 S.W.3d 138 (Ky. 2000). Here, the Board was fully within its authority to determine that the ALJ's computation of Ballard's average weekly wage failed to provide a realistic estimate of his earning capacity in accordance with the provisions of KRS 342.140. KRS 342.285(2)(c).

It is also within the Board's authority to modify an award to insure that it complies with the provisions of the Workers' Compensation Act. *Whittaker, supra*. Under the circumstances of this case, where insufficient proof had been introduced to permit a proper calculation of Ballard's average weekly wage under the unique requirements of KRS 342.140(1)(e), we believe that the Board was within its authority to remand the matter to the ALJ for further proceedings. In so doing – despite the Fund's contentions, the Board has not ignored or excused the employee's obligation to present the required proof. Instead, the Board has insisted that Ballard provide to the ALJ the proof necessary to calculate correctly the value of his award. Remand was not a misuse of the Board's power but a wholly proper and necessary procedural decision.

Workers' compensation proceedings are administrative rather than judicial in nature. The proceedings retained their administrative character while under the Board's review. *Id.* Under these circumstances, and keeping in mind the

beneficent purpose of KRS Chapter 342 to wholly compensate injured workers whenever possible, we conclude that the Board did not act outside its authority by remanding the matter for additional proof.

Nor are we persuaded that the Board erred as a matter of law by determining that the provisions of KRS 342.140(2) (pertaining to occupations which are exclusively seasonal) are irrelevant to a determination of Ballard's average weekly wage. The question of whether particular work is seasonal depends on the facts and circumstances of each case. *Pike County Bd. of Educ. v. Mills*, 260 S.W.3d 366 (Ky.App. 2008). While roofing projects may have been intermittent in this area around the time of Ballard's injury, the ALJ's finding of fact that roofing is not an exclusively seasonal occupational was adequately supported by the record. It cannot be set aside.

The judgment of the Kentucky Workers' Compensation Board is affirmed.

VANMETER, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE
OPINION.

THOMPSON, JUDGE, CONCURRING: I concur with the well written opinion of the majority. However, I am concerned that since the Supreme Court's decision in *Davis v. Island Creek Coal Company*, 969 S.W.2d 712 (Ky. 1998), this Court has repeatedly reviewed appeals from orders remanding to the ALJ for further findings. I believe such appeals are frivolous.

Under the post-1987-Workers' Compensation Act, the Board's role is appellate and CR 54 has no application to its orders. *Id.* at 713. Subsequently, the Supreme Court reaffirmed *Davis*, stating that:

It matters not whether the Board directs the ALJ to take further evidence on remand or to reach a factual conclusion based on the evidence of record. A decision by the Board is final and appealable if it sets aside the ALJ's decision and either directs or authorizes the entry of a different award on remand because such a decision divests the party who prevailed before the ALJ of a vested right.

Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman, 233 S.W.3d 710, 713 (Ky. 2007).

I concede that as a result of the Supreme Court's interpretation of the Act, an order remanding the case to the ALJ is appealable. However, an appeal is inevitably futile because the Workers' Compensation Board has the absolute discretion to remand a case to the ALJ for further findings of fact. *Campbell v.*

Hauler's Inc., 320 S.W.3d 707, 708 (Ky.App. 2010). Thus, an appeal from an order remanding for findings of fact is invariably affirmed and results only in additional expense and delay. Moreover, the potential for a second appeal following the order entered on remand compounds the inefficiency. I am convinced that orders such as in the present case should be deemed interlocutory and not appealable until after remand and the opinion and order is entered.

I am not suggesting that this Court has the authority to ignore our Supreme Court's directive and dismiss this appeal. However, in view of the discretionary authority of the Workers' Compensation Board to remand a case to the ALJ for findings of fact, I do suggest that it is frivolous.

BRIEF FOR APPELLANT/CROSS-
APPELLEE UNINSURED
EMPLOYERS' FUND:

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BRIEF FOR APPELLEE/CROSS-
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