

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-001902-WC

DANA CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-95433

MARTIN ROBERTS;  
HONORABLE GREGORY ALLEN,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

CLAYTON, JUDGE: The Dana Corporation appeals from the decision of the Workers' Compensation Board entered on October 24, 2014, which affirmed the Administrative Law Judge's (ALJ) award of permanent total disability to Martin

Roberts. After a review of the record and consideration of the arguments of counsel, we affirm the decision of the Workers' Compensation Board.

## BACKGROUND

On September 24, 2001, while working as an employee at Dana Corporation ("Dana"), Appellee Martin Roberts suffered an injury to his back. He settled his claim with Dana based upon twenty-three (23) percent whole person impairment. The settlement was approved on February 5, 2004.

On or about February 1, 2011, Roberts filed a Motion to Reopen the claim for temporary total disability ("TTD") and medical benefits. Dana did not object to this reopening. The benefits were awarded and Roberts underwent additional treatment. Later, Dana filed a motion to terminate TTD benefits based upon the finding of maximum medical improvement and an impairment rating of eighteen (18) percent.

Roberts objected to the motion to terminate and filed a separate "Motion to Reopen for Increased Impairment, Changed and Worsening of Condition, and Total Occupational Disability." Dana objected to this Motion to Reopen. However, the ALJ awarded Roberts TTD benefits at the rate of \$530.07 per week beginning November 21, 2011, until May 16, 2013. Additionally, \$530.07 per week was awarded for one hundred percent (100%) permanent total disability beginning April 23, 2013, and continuing for so long as Roberts was disabled.

Dana filed a Petition for Reconsideration arguing that Kentucky Revised Statutes (KRS) 342.125(3) prohibits any reopening that is more than four (4) years from the date of the original order awarding benefits. The Petition was overruled. Dana then appealed to the Workers' Compensation Board. The Board affirmed the award (one member dissented) holding that the Kentucky Supreme Court's decision in *Hall v. Hospitality Resources Inc.*, 276 S.W.3d 775 (Ky. 2008), controlled.

### STANDARD OF REVIEW

On appeal, our standard of review of a decision of the Workers' Compensation Board "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).

The burden of persuasion is on the claimant to prove every element of a workers' compensation claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). The issue before us in this case is whether Roberts's April 23, 2013 "Motion to Reopen for Increased Impairment, Changed and Worsening of Condition, and Total Disability" is barred by the four- (4) year statute of limitations period set forth in KRS 342.125 (3).

### ANALYSIS

Dana argues that KRS 342.125(3) did not allow the reopening of the claim in April 2013. Dana did not object to the February 2011 reopening even

though it was filed more than four (4) years from the date of the February 2004 settlement because that motion concerned a request for TTD and medical benefits, which fell within the exceptions to the limitation period. Specifically, KRS 342.125(3) states:

Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

The Workers' Compensation Board determined that *Hall, supra*, was controlling in this case. Dana argues that either *Hall* should be reversed or it should be narrowly applied to cases with similar facts and where a motion to reopen for TTD benefits has been filed within four (4) years of the initial award or order granting or denying benefits. Dana believes that to read KRS 342.730(3) to allow recovery when no motion to reopen was filed within four (4) years of the original award or order leads to an absurd conclusion; this interpretation would render the four (4) year statute meaningless. According to Dana, a claimant could then move to reopen for permanent partial disability or permanent total disability in perpetuity, which is contrary to the intent of the Legislature.

The Kentucky Supreme Court, in *Hall*, held:

That the reference to the “original award or order granting or denying benefits” was intended to encompass orders granting benefits other than the “original award,” is established by several additional uses in the same statute. For example, KRS 342.125(1) allows an ALJ to “reopen and review any award *or order*” on stated grounds. (emphasis added). It is uncontested that the reference to “order” in KRS 342.125(1) encompasses an order different than the original award, otherwise there could be no reopenings of awards changed subsequent to the original award, increasing or decreasing benefits, as all must concede is the practice. For example, KRS 342.125(1)(d) specifically allows a “reopening and review” upon 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*.” (emphasis added). If the word “order” was interpreted to refer only to the original award, a “review and reopening” of a subsequently increased or decreased award or order could simply not occur. And, [KRS 342.125\(4\)](#) acknowledges that the “[r]eopening shall not affect the *previous order* or award as to any sums already paid thereunder.” (emphasis added). Meaning simply, that the *new* award or order will operate prospective only for the remaining term of the award.

Given our further analysis, the conclusion that an “order granting or denying benefits” was tended to encompass an order granting benefits *different* than an original award or settlement is compelling. Thus, the reference in [KRS 342.125\(3\)](#) to the “the original award or order granting or denying benefits,” must necessarily refer not only to the original award, but to any *subsequent* order granting or denying benefits.

*Hall*, 276 S.W.3d. at 784-85.

Dana asks that we reverse the Kentucky Supreme Court. We cannot.

We agree with the Workers’ Compensation Board that *Hall* is controlling. The previous order awarding benefits was issued in 2011. The latest motion to reopen

was filed in 2013. The motion was filed within four (4) years in accordance with *Hall*. Dana has not appealed any other aspect of the award. There was no error by the Workers' Compensation Board.

### CONCLUSION

Based upon the foregoing, we affirm the Opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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