

RENDERED: October 3, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2185-WC

CURTIS RUSSELL

APPELLANT

V. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 93-34354

C P & G COAL COMPANY,
SPECIAL FUND, DONNA
TERRY/ADMINISTRATIVE
LAW JUDGE and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
VACATING AND REMANDING

* * * * *

BEFORE: COMBS, EMBERTON and GARDNER, Judges.

GARDNER, JUDGE: Curtis Russell (Russell) has brought a petition for review from an order of the Workers' Compensation Board dismissing his appeal. After reviewing the record in this case, we vacate and remand.

Russell filed an occupational disease claim in August 1993. Following this filing, the Special Fund filed a notice of resistance and had Russell examined by a physician. In December 1993, counsel for Russell filed a motion to dismiss his claim, because counsel contended that he had just learned that Russell had filed a previous occupational disease claim. The Special Fund

apparently contested the dismissal unless reimbursement was ordered for the evaluation of Russell by a physician and related costs.¹

On March 11, 1994, Administrative Law Judge (ALJ) Lloyd Edens stated that the filing of the second occupational disease claim was not an attempt to defraud but was a mistake, so the objection by the Special Fund was denied. The Special Fund on March 28, 1994, filed a renewed motion for costs. No action was apparently taken so the Special Fund filed a second renewed motion for costs on October 3, 1995. Russell did not respond to these motions. In an order of November 11, 1995, Chief ALJ Donna Terry found that Russell did file an unreasonable proceeding pursuant to Kentucky Revised Statute (KRS) 342.310 and granted the Special Fund's motion for costs totalling \$417.56.

On February 6, 1996, Russell filed a document entitled "Notice" wherein he argued that because the Special Fund did not appeal from ALJ Edens' order, the order became final. ALJ Terry, on May 13, 1996, construed Russell's "Notice" filing as a petition for reconsideration and ordered that Russell's petition be denied as untimely. Russell on June 10, 1996, filed a notice of appeal from ALJ Terry's May 13, 1996 order. The Special Fund moved for dismissal of Russell's appeal, on grounds that it was untimely. In an order dated July 12, 1996, the Workers' Compensation Board (the board) granted the Special Fund's motion and dismissed Russell's appeal. Russell has appealed from the board's order.

¹We have been unable to locate a copy of the Special Fund's response in the record.

Russell argues that ALJ Edens' March 11, 1994 order controls in the instant case, because he had ruled that the Special Fund's request for costs was unwarranted, and the Special Fund failed to file a petition for reconsideration within the required fourteen day period. The Special Fund, on the other hand, maintains that ALJ Edens' order did not specifically address the Special Fund's request for costs and that Russell later did not file a timely petition for reconsideration following ALJ Terry's decision or make a timely appeal to the board. After reviewing the record, we have concluded that ALJ Edens' order did address the matter at issue and that the Special Fund failed to file a timely petition for reconsideration or appeal from ALJ Edens' order.

KRS 342.310(1) provides,

If any administrative law judge, the board or any court before whom any proceedings are brought under this chapter determines that such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted, or defended them.

In the instant case, ALJ Edens in his March 11, 1994 order dismissed Russell's claim and noted that the motion to dismiss was filed timely by Russell's counsel as soon as it became apparent that the claim was the second filed by Russell. ALJ Edens concluded that the filing of the second occupational disease claim

was not an attempt to defraud but was a mistake, and as a result, he denied the objection by the Special Fund. Thus, ALJ Edens' order while not explicitly stating that he was denying the exact costs sought by the Special Fund, clearly found that Russell's action had not been brought without reasonable grounds as required by KRS 342.310(1) in order to assess costs. No timely appeal or petition for reconsideration was brought by the Special Fund. See KRS 342.281 and 342.285. The later motions for costs brought by the Special Fund were not proper or timely. Thus, ALJ Edens' order controlled the case.

Chief ALJ Terry's order finding that Russell had filed an unreasonable claim directly contradicted ALJ Edens' earlier order concluding that Russell's claim was a mistake, not an attempt to defraud. While Russell's pleading entitled "Notice" and his later notice of appeal from Chief ALJ Terry's order were untimely and procedurally flawed, these matters are essentially academic because ALJ Edens' order controlled the case as there was no timely petition for reconsideration or appeal taken from it. Thus, we must vacate the board's order of dismissal. The board's order did not provide specific reasons for dismissing; however, based upon the Special Fund's motion, it appears that the appeal was dismissed as untimely. We believe the issue of timeliness of the appeal was at that point academic, because ALJ Edens' earlier order was the law of the case and must control since a timely appeal or petition for reconsideration had not been taken from it. Therefore, we vacate the board's order and remand this case. Upon remand, we

direct the board to enter an order vacating ALJ Terry's order of November 11, 1995, which awarded costs to the Special Fund.

For the foregoing reasons, this Court vacates the order of the Workers' Compensation Board and remands for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Drew Anderson
Prestonsburg, Kentucky

BRIEF FOR APPELLEE SPECIAL
FUND:

Joel D. Zakem
Louisville, Kentucky

NO BRIEF FOR APPELLEE C P & G
COAL COMPANY