

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NOT TO BE PUBLISHED

NO. 96-CA-2719-WC

ROBERT E. SPURLIN,  
DIRECTOR OF SPECIAL FUND

APPELLANT

V.                   PETITION FOR REVIEW FROM A DECISION OF  
                      THE WORKERS' COMPENSATION BOARD  
                      ACTION NOS. WC-94-5243  
                                  WC-95-26872  
                                  WC-95-26870

JERRY FRANCIS, COSTAIN  
COAL, THOMAS A. NANNEY  
(ADMINISTRATIVE LAW JUDGE)  
and WORKER'S COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: GARDNER, GUDGEL and KNOPF, Judges.

GARDNER, JUDGE: Robert E. Spurlin, Director of the Special Fund (Special Fund), appeals from an opinion of the Workers' Compensation Board (the board) affirming the ruling of an Administrative Law Judge (ALJ) which denied the Special Fund's motion to submit a medical report into evidence during the prehearing conference. After reviewing the record below and the applicable law, we affirm the board's opinion.

Jerry Francis (Francis) was employed by Costain Coal Company (Costain). Francis pursued three workers' compensation claims based upon an injury, an occupational hearing loss and occupational pneumoconiosis. He settled with Costain. His claims against the Special Fund were decided by the ALJ. The only issue currently before this Court stems from the occupational pneumoconiosis claim.

In support of his pneumoconiosis claim, Francis submitted reports from two physicians, both of whom found that he was suffering from category two pneumoconiosis. Prior to the date of the prehearing conference, neither Costain nor the Special Fund filed any medical proof in defense of Francis's pneumoconiosis claim. In early January 1996, Costain moved for an extension of time from January 9, 1996, until February 8, 1996, in order to present proof. The motion noted that Costain had scheduled Francis for an examination by Dr. Bruce Broudy on January 3, 1996. On February 1, 1996, Francis's counsel received a copy of a report by Dr. Broudy, and a copy was apparently also forwarded to the Special Fund. This report was not filed into evidence by any of the parties prior to the prehearing conference. At the prehearing conference held on February 13, 1996, the Special Fund moved to submit Broudy's report into evidence. This motion was denied by the ALJ. The Special Fund appealed to the board which affirmed in an opinion dated September 6, 1996. The Special Fund has now brought a petition for review to this Court.

The Special Fund argues to this Court that the ALJ erred in not allowing it to introduce the medical report of Dr. Broudy into evidence at the prehearing conference, and that the board erred in affirming the ALJ's ruling. We have uncovered no error.

803 KAR 25:010 § 5(5) provides that the prehearing conference shall be scheduled no earlier than fifteen days after the last day of discovery and proof time. 803 KAR 25:010 § 8(6) states, "[u]pon motion, the ALJ may order additional discovery or proof to be taken between the prehearing conference and the hearing." Further, 803 KAR 25:010 § 8(2) provides that at the prehearing conference, the ALJ may limit the witnesses and exhibits to be presented at the hearing. The rules contained in 803 KAR 25:010 make it clear that only in the most unusual circumstances will an extension of time to take proof be tolerated, and then only after a detailed explanation of why the extension is essential. Cornett v. Corbin Materials, Inc., Ky., 807 S.W.2d 56, 58 (1991). The ALJ has the power to compel the taking of evidence before him within reasonable time limits, and this power should not be subject to the control of courts unless the ALJ acts in an arbitrary or unreasonable manner such as to indicate any abuse of discretion. Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228, 231 (1939).

In the case at bar, the ALJ did not abuse his discretion by declining to permit the Special Fund to enter Dr. Broudy's report into evidence at the prehearing conference. The applicable regulations and case law clearly show that it is within an ALJ's

discretion to permit evidence into the record following termination of the discovery period and proof time and in the period from the prehearing conference to the hearing. The record here shows that the Special Fund attempted to introduce the report outside the regular proof time and following the expiration of an extended proof time. The information contained in the report was apparently prejudicial to Francis's case. The Special Fund also offered no reason as to why it waited until the prehearing conference to introduce this report into evidence. The Special Fund's reliance on Kleinjohn v. Special Fund, (95-CA-257-WC) is misplaced. The Kentucky Supreme Court reversed this Court's decision in that case and ordered this Court's opinion depublished. The Supreme Court ruled that this Court erroneously reversed the ALJ's decision not to allow the claimant to introduce a doctor's medical report into evidence at the prehearing conference. Thus, the Special Fund's argument in the instant case fails.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Judith K. Bartholomew  
Louisville, Kentucky

BRIEF FOR APPELLEE JERRY  
FRANCIS:

Rebecca Baylous  
John Sowards, Jr.  
Lexington, Kentucky