

RENDERED: December 24, 1997; 2:00 p.m.
TO BE PUBLISHED

NO. 97-CA-684-WC

GLEND A K. WRIGHT

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-4980

TRANSITIONAL HEALTH SERVICES;
SPECIAL FUND; DONNA H. TERRY,
Chief Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION REVERSING AND REMANDING

* * * * *

BEFORE: GUDGEL, Chief Judge; GUIDUGLI and SCHRODER, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an order entered by the Workers' Compensation Board (board) dismissing an appeal as nonfinal. We reverse and remand.

On December 17, 1996, the Chief Administrative Law Judge (ALJ) rendered an opinion awarding appellant temporary total and permanent partial disability benefits, as well as medical expenses. On December 20 appellant's employer, appellee Transitional Health Services, filed a timely petition for reconsideration. However, before this petition was ruled upon, appellant appealed to the board from the ALJ's opinion and award.

On January 17, 1997, appellee Special Fund filed a motion to dismiss the appeal on the ground that since a petition for reconsideration was pending, the ALJ's opinion and award was not yet final and appealable. Thereafter, on January 23 the ALJ ruled on the petition for reconsideration. On February 7, apparently unaware that the petition for reconsideration had been ruled upon, the board ordered appellant's appeal dismissed as having been taken from a nonfinal order. This appeal followed.

True enough, under a traditional analysis it would be said that the filing of the employer's petition for reconsideration destroyed the finality of the ALJ's opinion and award. See Commonwealth v. Robertson, Ky., 447 S.W.2d 857 (1969). However, in the instant proceeding the ALJ ruled upon the pending petition for reconsideration before appellant's appeal was dismissed as having been taken from a nonfinal order. Thus, the ALJ's opinion and award actually became final and appealable before the board dismissed the appeal as premature. See Yocom v. Payne, Ky., 512 S.W.2d 517 (1974).

Recently, our supreme court followed the lead of the federal courts by holding in Johnson v. Smith, Ky., 885 S.W.2d 944 (1994), that a civil appeal should not be dismissed simply because it is premature due to the filing of a postjudgment motion by another party. Instead, such an appeal is now treated and construed as relating forward, and it will be deemed filed upon entry of the final judgment. In adopting this rule the court noted that because, unlike tardy notices of appeal,

premature notices of appeal "put appellees on notice of the intent to appeal before expiration" of the applicable time limits, they serve "the essential purpose of the rule" and are "adequate to protect the needs of the appellees." Id. at 949.

In our view, Johnson has impliedly overruled Robertson and its progeny to the extent those cases rely upon the civil rules of procedure as a basis for dismissing premature workers' compensation appeals. Indeed, given the widespread application of the civil rules to administrative proceedings, see generally, 803 KAR Chapter 25, as well as Johnson's interpretation of those rules as they relate to premature appeals, we fail to perceive that there is any basis for treating the instant administrative appeal any differently from a prematurely filed civil appeal. In neither instance would any party suffer prejudice if the appeal were abated, nor would anything be gained by requiring the appellant to file another notice of appeal. See Johnson, supra. This is especially true here, since the ALJ's order actually became final before the appeal was dismissed as being premature. Hence, we conclude that the board erred by dismissing the appeal as having been taken from a nonfinal order.

For the reasons stated, the board's order is reversed and remanded for further proceedings consistent with our views.

ALL CONCUR.

BRIEF FOR APPELLANT:

Miller Kent Carter
Pikeville, KY

BRIEF FOR TRANSITIONAL
HEALTH SERVICES:

Kimberly D. Newman
Lexington, KY

BRIEF FOR SPECIAL FUND:

Judith K. Bartholomew
Louisville, KY