RENDERED: July 31, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-2026-WC

ZACHARY BRYANT — APPELLANT

V.

PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-32718

STAR DRYWALL OF LOUISVILLE;
RON CHRISTOPHER, Director
of SPECIAL FUND; W. BRUCE
COWDEN, JR., Administrative
Law Judge; and WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; GARDNER and KNOPF, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (board) affirming a decision of an Administrative Law Judge (ALJ) which determined that appellant, Zachary Bryant, is 100% occupationally disabled and directed that the Special Fund's liability for the award commenced on the date a unilateral settlement between appellant and his employer, appellee Star Drywall of Louisville

was approved. On appeal, appellant contends that the board erred by determining that the 1994 amendment of KRS 342.120 effected a change in the commencement date of the Special Fund's liability in cases where the claimant and the employer enter a unilateral settlement agreement, that the board erred by applying the 1996 amended version of KRS 342.120(3) to his claim, and that the 1996 amendments of the Workers' Compensation Act are unconstitutional. We disagree with all of appellant's contentions. Hence, we affirm.

Appellant was employed as a drywall finisher for appellee Star Drywall of Louisville from September 1969 until his doctor took him off work in April 1994 due to the condition of his neck and back. He subsequently filed a workers' compensation claim respecting the back condition against his employer and the Special Fund which was practiced as a wear and tear type of injury claim involving repetitive work-related trauma. Eventually, appellant and his employer entered into a unilateral settlement whereby the employer agreed to pay him total disability benefits with appellant reserving a right to proceed against the Special Fund. The ALJ thereafter determined that appellant was 100% occupationally disabled and directed that the Special Fund's liability for payment of its portion of the award should commence as of August 22, 1996, the date upon which the settlement agreement between appellant and his employer was approved. Appellant appealed to the board arguing that the Special Fund's liability should have commenced as of the date he

ceased working in April 1994. The board disagreed and affirmed the ALJ's decision. This appeal followed.

First, appellant contends that the board erred by failing to find that the Special Fund's liability for total disability commences on the date of the worker's injury. We disagree.

Appellant argues that on the date he quit work in April 1994, KRS 342.120(8)(b) stated that if a claimant settles with his employer and the Special Fund's liability on the claim is subsequently adjudicated, "the special fund portion of the benefit rate shall be paid over the maximum period provided for by statute for that disability, unless otherwise agreed by all parties." Since he is totally occupationally disabled, appellant contends that the "maximum period provided for by statute" for which the Special Fund is liable must be fixed as of the date of his injury.

However, KRS 342.120(8)(b) was amended in 1994 prior to the date appellant quit work. The supreme court in Duty v. Double Eagle Co., Ky., 939 S.W.2d 874 (1997), held that the legislative "intent of KRS 342.120(8)(b) was to overrule Chumley [Newberg v. Chumley, Ky., 824 S.W.2d 413 (1992)] to the extent that Chumley had required the Special Fund to pay the entire award for its proportionate number of weeks." Duty, 939 S.W.2d at 877. Rather, the Duty court held that under the amended statute the Special Fund's liability for payment of compensation commences on the date the settlement between the claimant and the

employer is approved. Thus, under the amended version of the statute, the liability of the Special Fund for the "maximum period provided for by statute" for total occupational disability commences on the date of approval of the settlement between the claimant and the employer and continues for the claimant's lifetime.

Next, appellant urges that the 1996 amendment to KRS 342.120(3) should not be retroactively applied to his claim as the statute effects a substantive, rather than a remedial change. We disagree.

KRS 342.120 was amended effective December 11, 1996, prior to the ALJ's decision on December 23, 1996, and states in part as follows:

> Where the employer has settled its liability for income benefits and thereafter a determination has been made of the special fund's liability, the special fund portion of the benefit rate shall be paid over the maximum period provided for by statute for that disability, with the period of payment beginning on the date settlement was approved by an administrative law judge or arbitrator. This provision is remedial and shall apply to all pending and future claims.

The ALJ concluded that this provision controls the issue as to the commencement of the Special Fund's liability for payments. Indeed, the applicable statute expressly states that the 1996 amendment to KRS 342.120(3) applies to all pending and future claims as of its effective date of December 12, 1996. Moreover, the 1996 amendment of KRS 342.120(3) did not effect a change in

policy, but rather, clarified the intent of the 1994 amendment to KRS 342.120(8)(b). Duty, supra. Further, it is clear that the payment provisions of KRS 342.120 are remedial as they operate to effectuate a remedy and have been so interpreted. Miracle v. Riggs, Ky. App., 918 S.W.2d 745 (1996).

Appellant also contends that Duty does not apply to his claim because it concerned an award of partial disability. However, neither the 1994 version of KRS 342.120(8)(b) nor KRS 342.120(3) as amended in 1996 distinguish between partial and total disability awards. Likewise, the court's reasoning in Duty compels a conclusion that it applies to both partial and total disability awards. Indeed, the court looked to the legislature's express purpose of enacting legislation to address the Special Fund's unfunded liability and the fact that the 1994 legislation left intact the sequential payment scheme set forth in KRS 342.120(6) and (7) which pertained to both partial and total disability awards. Moreover, in Spurlin v. Woods, Ky., 954 S.W.2d 309 (1997), a total occupational disability award was made subsequent to the claimant's settlement with his employer and although the Special Fund maintained that is liability for payments commenced upon the cessation of the settlement's periodic payments, the court held that KRS 342.120(8)(b) dictated that the Special Fund commence payments on the date the settlement was approved. Thus, in our opinion, the holding in Duty, the 1994 amendment to KRS 342.120(8)(b), and the 1996 version of KRS 342.120(3) mandate that the liability of the

Special Fund should commence on the date a settlement is approved between the employer and the claimant both as to both partial and total disability awards.

Further, appellant's assertion that he had a vested right to the benefits he would have received between the dates he ceased working and date the settlement with his employer was approved is without merit. The 1994 version of KRS 342.120, in effect on the date of appellant's injury, provided that the Special Fund's liability for payment of benefits commenced on the date of approval of the settlement with his employer. Further, appellant's claim was not adjudicated before the 1996 amendment to KRS 342.120(3) became effective. Thus, appellant clearly did not have a vested right to received benefits commencing on the date he ceased working. See Miracle v. Riggs, 918 S.W.2d at 747.

Finally, appellant contends that the December 1996 amendments to the Workers' Compensation Act are unconstitutional. We disagree.

Appellant argues that the 1996 amendments unconstitutionally deprive him of approximately $25,000. However, since the supreme court has held that the 1996 amendment of KRS 342.120 did not effect a substantive change in the law, but rather, merely clarified the legislative's intent in amending the statute in 1994, appellant's argument in this vein is unavailing. The Special Fund's liability for the payment of its share of the total benefits herein commenced on the date the

settlement with the employer was approved under both the 1994 and the 1996 versions of KRS 342.120.

The board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward A. Mayer
Terry E. Fox
Louisville, KY

BRIEF FOR SPECIAL FUND:

Benjamin C. Johnson
Louisville, KY