

Commonwealth Of Kentucky

Court Of Appeals

No. 1998-CA-000231-WC

HON. ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-94-015665

PATRICIA T. ZACK;
SUBURBAN MEDICAL CENTER;
HON. SHEILA C. LOWTHER,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: BUCKINGHAM, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: The Special Fund petitions for review of a decision by the Workers' Compensation Board (Board) that Patricia T. Zack (Zack), in order to appeal the Administrative Law Judge's (ALJ) retroactive application of the tier down provisions in KRS 342.730, was not required to file a petition for reconsideration before the ALJ pursuant to KRS 342.281.

Zack filed a claim for benefits as a result of a work-related injury which occurred on February 20, 1994. The ALJ

found Zack to be permanently and totally disabled, and apportioned the award equally between the employer and the Special Fund. Further, the ALJ reduced Zack's income benefits by her sixty-fifth (65th) birthday according to the tier down provisions of KRS 342.730(4), effective April 4, 1994.

Subsequently, the Special Fund, noting that it had erroneously been directed to pay benefits while Zack was temporarily totally disabled, filed a petition for reconsideration before the ALJ. On May 1, 1997, the ALJ entered an order addressing the Special Fund's petition for reconsideration, and corrected her original award by ruling that the employer was solely responsible for temporary total disability benefits.

On May 12, 1997, Zack filed a petition for reconsideration of the ALJ's order entered May 1, 1997, asking the ALJ to correct the period within which temporary total disability benefits were to be paid. On September 17, 1997, the ALJ issued an order correcting the duration of those benefits.

On October 1, 1997, Zack filed a notice of appeal to the Board, raising as an issue whether her benefits should be reduced at her sixty-fifth (65th) birthday under KRS 342.730(4), since her injury date of February 20, 1994, predated the 1994 amendment to KRS 342.730(4), which provided for the reduction of benefits after the age of sixty-five (65). The Special Fund, before the Board, did not contest Zack's position that KRS 342.730(4) should not have been retroactively applied to reduce

Zack's benefits at sixty-five (65). Rather, the Special Fund argued that, since Zack did not raise that issue before the ALJ by filing a petition for reconsideration under KRS 342.281, Zack had failed to preserve that issue.

By opinion dated December 31, 1997, the Board ruled that "[a] party is not required under KRS 342.281 to file a petition for reconsideration before raising on appeal such an error of law. Such an error is not an error patent upon the face of the award, as contemplated by KRS 342.281."

The Special Fund argues that, considering KRS 342.281,¹ the retroactive application of KRS 342.730(4) constitutes a patent error appearing on the face of the award, so that Zack's failure to raise that issue before the ALJ by way of a petition for reconsideration bars her appeal of that issue to the Board. For that proposition, the Special Fund relies upon Eaton Axle

¹KRS 342.281 reads:

Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the arbitrator or administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make any corrections within ten (10) days after submission.

Corp. v. Nally, Ky., 688 S.W.2d 334 (1985),² where our highest Court held:

It is the decision of this court that prospectively, from the date of this opinion, no award, order or decision of the Workers' Compensation Board shall be reversed or remanded on appeal to any court because of failure of said Board to make findings of an essential fact unless such failure is brought to the attention of the Board by Petition for Rehearing pursuant to KRS 342.281.

Id. at 338.

In so holding, the Eaton Axle Court said:

It is our opinion that KRS 342.281 should be utilized as a statutory counterpart of CR 52.04 and that before beginning the appellate process which utilizes the court system, the claimant, employer or any other party involved in the case before the Workers' Compensation Board seeks an appeal on errors which are patent upon the face of the award, order or decision, he must first file a Petition for Reconsideration pursuant to KRS 342.281. (Emphasis added).

Id. CR 52.04 provides:

A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Because the Eaton Axle case equates KRS 342.281 with CR 52, we believe its holding that no decision of the Board shall be reversed for failure to make findings of an essential fact unless

²Eaton Axle was decided prior to the present statutory scheme.

a petition for reconsideration is filed with the Board is limited to instances where patent error exists with respect to findings of fact, as opposed to errors of law. Such an interpretation appears to us to be confirmed by our highest Court in Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991), a case decided under our current Workers' Compensation administrative scheme. There, the Court said:

When we decided *Eaton Axle*, the Workers' Compensation Board decided claims. Then, we held patent errors must be addressed to the Workers' Compensation Board via a petition for reconsideration. Now, under appropriate circumstances, a petition for reconsideration must bring patent errors on the face of an award to the attention of the administrative law judge. Absent a petition for reconsideration, the administrative law judge's findings shall be conclusive and binding on all questions of fact. KRS 342.285(2).

Id. at 645 (emphasis added).

In Smith v. Dixie Fuel Co., Ky., 900 S.W.2d 609, 612 (1995), our highest Court confirmed its ruling in Eaton Axle. Referring to the 1994 amendment to KRS 342.281, which provided that a party's failure to file a petition for reconsideration before the ALJ would not preclude an appeal to the Board on any issue, the Court said:

Furthermore, we conclude that the amendment had the effect of restating the principle of *Eaton Axle v. Nally*, *supra*, as it existed before the decision in *Osborne v. Pepsi-Cola*, *supra*, which principle is that a patent error or omission of fact in a workers' compensation decision which has not been preserved before the Board may not be the subject of judicial review.

We believe the foregoing authorities require the filing of a petition for reconsideration to review patent errors of fact or the omission of essential facts. However, in this case, the ALJ's erroneous retroactive application of KRS 342.730(4) appears to us to be an error of law. Since an error of law was involved, rather than a question of fact, we do not believe that KRS 342.281 requires filing a petition for reconsideration of that issue as a prelude to an appeal to the Board.

The Special Fund argues that Wells v. Beth-Elkhorn Coal Corp., Ky. App., 708 S.W.2d 104 (1986) stands for the proposition that, for purposes of KRS 342.281, patent errors include errors of law. However, we agree with Zack that the Court in Wells simply indicated that the Workers' Compensation Board, under the administrative scheme then in existence, had jurisdiction to correct errors of law. We do not read that case as holding a petition for reconsideration is required to be filed on an issue of law.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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