

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-003094-WC

CAROLYN ESTERLE

APPELLANT

v.

PETITION FOR REVIEW  
OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
WC-88-006773

AMERICAN STANDARD;  
ROBERT SPURLIN, Director of  
Special Fund;  
WALTER BEDFORD, Arbitrator;  
J. LANDON OVERFIELD,  
Administrative Law Judge;  
and WALTER W. TURNER,  
Commissioner, Workers'  
Compensation Board

APPELLEES

**OPINION**  
**AFFIRMING**

\* \* \* \* \*

BEFORE: BUCKINGHAM, GUIDUGLI, and HUDDLESTON, Judges.

BUCKINGHAM, JUDGE. Carolyn Esterle (Esterle) petitions for review of an opinion of the Workers' Compensation Board (Board) which affirmed a decision of an administrative law judge (ALJ) denying Esterle's petition for reconsideration. Finding no error, we affirm.

Esterle was injured in 1985 and again in 1987. In February 1991, the ALJ awarded Esterle seventy-five percent permanent partial disability benefits for injuries suffered while she was employed by American Standard. The combined award of \$181.23 per week was apportioned seventy-five percent to American Standard and twenty-five percent to the Special Fund. American Standard was allowed credit against its obligation for employer-funded disability retirement benefits. As Esterle received \$650 per month, which is the equivalent of \$150 per week, from American Standard's disability benefits plan, American Standard filed a petition for reconsideration, contending that its liability (which it calculated to be \$135.92 per week for 425 weeks or seventy-five percent of \$181.23 per week for 425 weeks) was exceeded by its credit for the disability plan benefits, whether it received credit for the total pretax amount of \$150 or the post-tax amount of \$136.85. The ALJ denied the petition, stating that the previous Opinion and Award "covers the contingency mentioned in the employer's Petition for Reconsideration and requires no further order or finding."

Esterle then filed a motion to require acceleration of the Special Fund's liability, which was granted by the ALJ. In reversing the ALJ upon appeal, the Board directed that American Standard was liable for the full amount of \$181.23 per week for 318.75 weeks (seventy-five percent of 425 weeks) but would receive a credit of \$150 per week for disability plan benefits. The Board explicitly stated in its opinion that the issue of

whether American Standard was entitled to credit for the pretax or post-tax amount was not preserved for review. American Standard filed an appeal to this court, which it later withdrew, but Esterle never filed a cross-appeal of the Board's opinion.

The 318.75-week period for which American Standard was ordered to pay Esterle workers' compensation benefits ended in September 1996. In February 1997, Esterle filed a Petition for Reconsideration/Motion to Modify Award in which she alleged that American Standard should have been allowed credit only for the post-tax amount of disability plan benefits (\$136.85 per week rather than \$150 per week) and that she was therefore entitled to \$13.15 per week for 318.75 weeks from American Standard. An arbitrator, the ALJ, and the Board all agreed that Esterle's motion was untimely and should be dismissed. Esterle then petitioned this court for review of the Board's opinion affirming the dismissal of her motion.

Esterle's motion was clearly untimely. Analyzed as a petition for reconsideration, as it was styled, the motion would have had to have been filed within fourteen days of the award or order at issue to be timely. KRS 342.281.<sup>1</sup> The last order before Esterle's motion was entered in March 1996. Thus, as the motion was filed in February 1997, it was far outside the fourteen-day time limit.

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<sup>1</sup> As the petition/motion was filed in February 1997, all references to statutes regarding this petition/motion are to those which took effect on December 12, 1996.

If Esterle's petition/motion is characterized as a motion to reopen her award on the ground of mistake (see KRS 342.125) rather than as a petition for reconsideration, then KRS 342.125(4) is applicable. That statute provides that "[r]eopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of the filing of the motion." As American Standard's obligation ceased in September 1996, Esterle's February 1997 motion cannot affect the sums already paid. Thus, no error occurred in denying the motion.

As Esterle's petition /motion was untimely filed, the opinion of the Board is affirmed.

All CONCUR.

BRIEF FOR APPELLANT:

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