

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000179-WC

FRESHPACK, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
CLAIM NO. 94-16035

HELEN SATTERFIELD;  
HON. THOMAS A. NANNEY,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AND ORDER  
DISMISSING APPEAL  
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BEFORE:, BUCKINGHAM, GARDNER, AND KNOFF, JUDGES.

KNOFF, JUDGE: This is a petition for review of an opinion and order by the Workers' Compensation Board (Board) following remand to the Administrative Law Judge (ALJ) for further findings. Finding that the appeal is prematurely brought to this Court, we dismiss the petition.

The appellee, Helen Satterfield, filed a claim for workers' compensation benefits after leaving her employment with the appellant, Freshpack, Inc. On May 28, 1997, the Administrative Law Judge (ALJ) entered an opinion and order

finding Satterfield, to be one hundred percent (100%) occupationally disabled as a result of her carpal tunnel syndrome and from a psychiatric disorder aroused into disabling reality by her work-related injury. The Board affirmed in part, reversed in part and remanded for further findings, stating:

In our opinion, the medical evidence as to Satterfield's psychological condition either partially preexisting her work injuries or not being totally related to those injuries was uncontradicted. The ALJ has given no explanation for rejecting that uncontradicted medical testimony. Mengel v. Hawaiian Tropic Northwest & Central, Ky. App., 618 S.W.2d 184 (1981); Elizabethtown Sportswear Center v. Stice, Ky.App., 720 S.W.2d 732 (1986); Commonwealth v. Workers' Comp. Bd., Ky.App., 697 S.W.2d 540 (1985). On remand, the ALJ must either find part of Satterfield's occupational disability as noncompensable, being either preexisting active, or nonwork-related, or explain why he rejects the uncontradicted medical evidence on this issue.

Board Opinion, September 12, 1997, p. 10.

On remand, the ALJ set out his reasons for disregarding the medical testimony. In an order dated December 27, 1997, the ALJ reaffirmed his previous award. On January 20, 1997, Freshpack filed a notice of appeal of the ALJ's decision to the Board. Simultaneously, Freshpack filed a petition for review of the Board's decision in this Court.

On February 3, 1998, this Court entered an order directing Freshpack to show cause why the petition for review should not be dismissed as untimely. Following Freshpack's response, the matter was passed to this panel on the merits. In the meantime, the Board is holding its appeal of the ALJ's order in abeyance, pending a decision by our Court.

Freshpack states that it filed its petition for review in response to a footnote in an unpublished decision by this Court.<sup>1</sup> We appreciate that Freshpack took this step out of an abundance of caution and to preserve its rights in a situation which it perceived to be ambiguous. Notwithstanding CR 76.28(4)(c), this Court does not find any indication that Freshpack's motives in filing this appeal or in referencing the unpublished opinion were not in good faith. Moreover, the law regarding finality, as well as the time to appeal a decision of the Board, has been in a state of flux. Thus, Freshpack's caution in this area is understandable.

The Supreme Court of Kentucky recently modified and clarified the law regarding finality of Board decisions. Davis v. Island Creek Coal Co., Ky., 969 S.W.2d 712 (1998). In Davis, the employer appealed to the Board after an ALJ awarded Retraining Incentive Benefits (RIB) to the employee. The Board reversed the award and remanded the claim to the ALJ to determine whether there was good cause for the employer's failure to file a timely notice of resistance.

The employee appealed the Board's order to the Court of Appeals. This Court held that the Board's reversal of the ALJ's award was not a final and appealable order because it did not finally dispose of the claim. Citing: Stewart v. Lawson, Ky., 689 S.W.2d 21 (1985). As a result, this Court dismissed the appeal.

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<sup>1</sup> Inland Container Corporation v. Rogers, No. 95-CA-3139-WC (August 1, 1997).

On further appeal, the Supreme Court explained the test for determining when an order of remand by an appellate court is final and appealable to a higher appellate court. If the Board's order either set aside the ALJ's award or authorized the ALJ to enter a different award, then the order deprived a party of a vested right and was final and appealable. On the other hand, if the Board's order only remanded the case to the ALJ with directions to comply with statutory requirements without authorizing the taking of additional proof or the entry of a different award, the order was interlocutory and not appealable. Davis, 969 S.W.2d at 713.

In addition, the Supreme Court distinguished Stewart v. Lawson, supra, stating that the issue in Stewart "should not have been whether the employer was required to appeal from the first circuit court order, but whether it was entitled to appeal from the second circuit court order which affirmed the board's award after remand. Thus viewed, the issue was not whether the first order was final and appealable, but whether the second appeal was precluded because the first order was 'law of the case' [Citations omitted]" Davis, 969 S.W.2d at 714

Turning to the case before it, the Supreme Court concluded:

In the case sub judice, the board's order set aside an award in favor of Appellant and remanded the case with directions to determine whether the employer's failure to file a timely notice of resistance was for "good cause," and, presumably, if so, to take additional proof and enter a new order. Since this order allowed the ALJ on remand to divest Appellant of his vested right to a RIB award, it was

final and appealable to the Court of Appeals. To the extent that Stewart v. Lawson, supra, holds otherwise, it is overruled.

Id.

In the present case, the Board's first order partially set aside the ALJ's order and remanded it for further factual findings. However, the Board's order did not deprive Freshpack of an adjudication in its favor. While the Board's order authorized the ALJ to enter a different award on Satterfield's psychiatric impairment, Freshpack's rights were not affected. Indeed, Freshpack could not have filed an appeal on the psychiatric impairment issue, because its obligations had not been conclusively adjudicated. Furthermore, it would be absurd to require Freshpack to take a piecemeal appeal from one portion of the Board's first order. Consequently, under Davis v. Island Creek Coal Co., supra, the Board's decision of September 12, 1997 was not a final and appealable order.

Nonetheless, this Court does not find any authority which would permit Freshpack to bring a petition for review directly from the ALJ's order on remand. Neither KRS 342.290 nor CR 76.25 authorize a direct appeal from an ALJ decision on remand to this Court. Instead, an appeal from an ALJ decision must be taken to the Board. KRS 342.285. In the present case, the Board must be given the first opportunity to review the ALJ's findings upon remand. While the Board may be precluded from reconsidering its previous ruling on the remaining issues, the doctrine of law of the case will not bind this Court on a subsequent appeal. Therefore, Freshpack's appeal is premature and must be dismissed.

