

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002387-WC

ROBERT L. WHITTAKER, Acting  
Director of SPECIAL FUND

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-86-17989

CARL R. GILL; PEABODY COAL  
COMPANY; SHELIA C. LOWTHER,  
Administrative Law Judge;  
and WORKERS' COMPENSATION BOARD

APPELLEES

AND NO. 1998-CA-002511-WC

PEABODY COAL COMPANY

CROSS-APPELLANT

V. CROSS PETITION FOR REVIEW OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-86-17989

ROBERT L. WHITTAKER, Acting  
Director of SPECIAL FUND;  
CARL R. GILL; SHELIA C. LOWTHER,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION REVERSING AND REMANDING

\* \* \* \* \*

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

GUDGEL, CHIEF JUDGE: This matter is before us on a petition and cross petition for review of an opinion of the Workers' Compensation Board (board). The board remanded this claim to the Administrative Law Judge (ALJ) with directions to make a finding as to the degree of appellee Carl R. Gill's occupational disability and to award him benefits accordingly. The sole issue before us concerns the appropriate duration of the award of such benefits. For the reasons stated hereafter, we reverse and remand.

The facts are essentially undisputed. In 1988 appellee, Carl R. Gill, was found to be totally occupationally disabled as a result of a January 29, 1986, work-related injury to his back, and he was awarded total disability benefits. In 1996, appellant Special Fund and cross-appellant Peabody Coal Company moved to reopen the award, alleging that Gill had returned to work and that his occupational disability had decreased. After evidence was adduced, the ALJ found that Gill's occupational disability was indeed less than 100% and the ALJ ordered his benefits terminated.

Gill appealed to the board, asserting that his physical condition had not changed. The board found that there was substantial evidence to support the ALJ's finding that Gill's

occupational disability had decreased. Citing Whittaker v. Allen, Ky., 966 S.W.2d 956 (1998), the board reversed the ALJ's order terminating his benefits and remanded the claim to the ALJ with directions to make a finding as to the degree of Gill's occupational disability and to award him benefits "based upon that percentage for a period of 425 or 520 weeks beginning from the filing of the motions to reopen." This petition and cross petition for review followed.

The Special Fund and Peabody contend that the board erred by failing to apply the law in effect on the date of Gill's original injury. We agree.

The issue raised by the Special Fund and Peabody pertains to whether the 1994 amendment to KRS 342.730(1) is applicable to the reopening of Gill's total occupational disability award. Prior to the 1994 amendment, KRS 342.730(1)(b) provided that the maximum duration of an award of permanent partial disability benefits was 425 weeks. In 1994 KRS 342.730(1) was amended, inter alia, to provide that in claims where the worker's partial occupational disability exceeds fifty percent and results from a work-related injury and a prior work-related active disability, benefits shall be paid for 520 weeks. 1994 Kentucky Acts, Ch. 181, Part 7, §25. The issue before us, therefore, is whether the 1994 amendment of the statute which became effective April 4, 1994, applies to the reopening proceeding involving Gill's January 29, 1986, injury.

It is well settled that the law in effect on the date of an injury controls the rights and obligations of the parties to a workers' compensation claim. Maggard v. International Harvester Co., Ky., 508 S.W.2d 777 (1974). However, a statutory amendment enacted subsequent to a claimant's injury may apply to a pending compensation claim if the legislation is remedial or procedural in nature or is expressly declared retroactive. Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991); KRS 446.080. In Spurlin v. Adkins, Ky., 940 S.W.2d 900, 902 (1997), the supreme court stated as follows:

[I]n instances where the amendment at issue has affected the level of income benefits payable for a worker's occupational disability, the Court has consistently determined that the amendment was substantive in nature and that the law on the date of injury or last injurious exposure controls. An amendment which becomes effective after that date is considered to be substantive in nature and may not be applied to claim which arose before the amendment's effective date. For example, workers whose claims arose before the effective date of benefit increases have not been permitted to receive the increased benefits since to do so would increase the liability of the employer and the Special Fund.

See also Leeco, Inc. v. Crabtree, Ky., 966 S.W.2d 951 (1998).

The supreme court further held in Spurlin v. Adkins, 940 S.W.2d at 904, that "[c]learly, the legislature intended the law on the date of injury to determine whether the amended version of KRS 342.730(1) controls the duration of a reopened award." The court found evidence of this legislative intent in the 1994 amendment to KRS 342.125. Effective April 4, 1994, KRS

342.125(3) (now KRS 342.125(6)) provides that upon the finding of additional permanent partial disability exceeding 50%, "the awarded period shall not exceed five hundred twenty (520) weeks, from commencement date of the original disability previously awarded. The law in effect on the date of the original injury controls the rights of the parties." 1994 Kentucky Acts, Ch. 181, Part 6, §27 (emphasis added). Although this statute does not directly control this claim because it applies to the reopening of a permanent partial disability award, and the instant claim involves the reopening of an award of total occupational disability benefits, it is clear that the 1994 amendment to KRS 342.125 evinces a legislative intent that the law in effect on the date of the original injury determines the duration of a reopened award.

Here, the vested rights and responsibilities of the parties were fixed as of the date of Gill's original injury, January 29, 1986. Clearly, the 1994 amendment to KRS 342.730 pertaining to the duration of permanent partial disability benefits affects the substantive liability of the Special Fund and the employer. Hence, the 1994 amendment to KRS 342.730 is not applicable to the instant claim. It follows that the period of any award of permanent partial disability benefits upon reopening must be limited to maximum of 425 weeks.

Gill's reliance upon two nonfinal opinions from this court is misplaced. Nonfinal appellate decisions cannot be cited as authority. CR 76.30(2); Kohler v. Commonwealth, Transp.

Cabinet, Ky. App., 944 S.W.2d 146 (1997). The reason for the rule is that a workers' compensation opinion by this court may be appealed to the supreme court. CR 76.25(12). In fact, one of the nonfinal opinions cited by Gill has already been reversed by the supreme court. See Breeding v. Colonial Coal Co., Ky., 975 S.W.2d 914 (1998).

The board's opinion is reversed and this claim is remanded for proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

BRIEF FOR SPECIAL FUND:

Benjamin C. Johnson  
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BRIEF FOR CARL R. GILL:

Stephen M. Arnett  
Morganfield, KY

BRIEF FOR PEABODY COAL  
COMPANY:

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