

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001405-WC

SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-93-02074

EARL BRIAN GARY; NATIONAL HOUSING  
PARTNERSHIP; DENNIS S. KLINE,  
Administrative Law Judge; and  
WORKERS' COMPENSATION BOARD

APPELLEES

AND

No. 1999-CA-001587-WC

NATIONAL HOUSING PARTNERSHIP

APPELLEE/CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-93-02074

EARL BRIAN GARY; DENIS KLINE,  
Administrative Law Judge;  
SPECIAL FUND; and WORKERS'  
COMPENSATION BOARD

APPELLEES/CROSS-APPELLEES

OPINION  
AFFIRMING IN PART;  
REVERSING IN PART; and REMANDING  
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BEFORE: DYCHE, EMBERTON AND HUDDLESTON, JUDGES.

EMBERTON, JUDGE: This appeal and cross-appeal from an opinion of the Workers' Compensation Board challenge the propriety of an award of increased occupational disability benefits on reopening. In its appeal, the Special Fund focuses upon the failure of the Administrative Law Judge to make a finding as to the actual percentage of the claimant's disability at the time he settled his claim before determining the increase in occupational disability to which the claimant may be entitled upon reopening. The employer, while adopting the argument of the Special Fund, also maintains that there are insufficient findings to support reopening the claim and that the conclusions of the ALJ are based upon an incorrect statement of the law. In light of the analysis set forth by the Kentucky Supreme Court in Whittaker v. Rowland,<sup>1</sup> we agree with the Special Fund that it was entitled to a finding as to the actual percentage of the claimant's disability at the time he settled his original claim prior to a determination of the amount of increase in that disability. Accordingly we reverse the opinion of the Board and remand the claim for further proceedings before the ALJ.

The claimant, Earl Gary, suffered a low back injury in the course of his employment with National Housing Partnership on September 30, 1992. After undergoing three surgeries in 1992 and 1993, he was returned to light duty work in April 1994. A workers' compensation claim was filed as a result of his injury and was settled on September 15, 1994, for \$35,000 lump sum

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<sup>1</sup> Ky., 998 S.W.2d 479 (1999).

payment representing, according to the parties' agreement, an occupational disability of "approximately 35%." Gary subsequently moved to Florida, and for about four to six months, did some light maintenance in exchange for rental on the lot on which his mobile home was located. Gary testified that he had to stop this work because of surgery to remove rods which had previously been implanted in his spine in 1993, replacing them with artificial bone. Gary stated that following this surgery, the pain in his back increased dramatically and that he was no longer able to do things that he could previously do. He also stated that although he had undergone several nerve blocks, he was having to take increased dosages of Vicodin and Soma for pain.

In a proceeding to reopen Gary's claim, the ALJ entered the following finding:

The initial issue to be addressed is whether the Plaintiff's occupational disability has increased since September 15, 1994. Clearly it has. At that time, he had been released to return to light duty work by his treating physician. On the basis of his opinion, the Plaintiff sought and received a settlement for permanent partial disability. Subsequent to the settlement of September 15, 1994, the Plaintiff has undergone a fourth, and very expensive, low back surgery. The restrictions placed upon his activities have increased substantially by his initial treating physician, Dr. Changaris, and it does not appear that Plaintiff will be returning to gainful employment in the near future. He has sustained his burden of establishing an increase in his occupational disability, and I will conclude that he is, at least at this time, totally occupationally disabled.

In its appeal to the Board, the Special Fund argued that the ALJ erred in not making a specific finding as to the percentage of Gary's disability at the time he settled his claim. It was the Fund's position that if a claimant settles his claim for a percentage of disability that is less than his actual percentage of disability, he is not entitled on reopening to the difference between the settlement figure and the percentage of disability. Although acknowledging that there was some logic in the Fund's argument, the Board nevertheless affirmed the ALJ's decision as to the amount of increase in Gary's percentage of disability.

In this appeal we have the benefit of the opinion of the Supreme Court in Whittaker v. Rowland,<sup>2</sup> which settles the question of the percentage to be utilized in determining the amount of any increase in occupational disability on reopening:

The figure for occupational disability contained in a settlement agreement represents a compromise and might or might not equal the worker's actual occupational disability at the time; therefore, additional benefits are authorized at the reopening of the settled claim only to the extent of an actual increase in the worker's occupational disability. See Newberg v. Davis, Ky., 841 S.W.2d 164, 166 (1992); Newberg v. Chumley, Ky., 824 S.W.2d 413, 416 (1992). For that reason, of greater significance than the figure contained in the agreement to settle the claim were the ALJ's findings that claimant's actual disability at settlement was 40% and that his disability at reopening was 100%. (Emphasis added).

Here, there is no finding as to Gary's actual percentage of disability at the time he settled his claim. We

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<sup>2</sup> Ky., 998 S.W.2d 479 (1999).

therefore reverse the portion of the Board's opinion that is to the contrary and remand the case for further proceedings.

Turning our attention to the employer's cross-appeal, we find no merit in the contention that the ALJ's award of increased occupational disability is based upon erroneous findings of fact and conclusions of law. There is ample evidence in this record to support the ALJ's conclusion that Gary's percentage of occupational disability had increased since the time he settled his claim. Although the employer complains that the Board ignored its arguments when it rendered an opinion in this case, we find implicit in the opinion as a whole a rejection of the employer's contentions that the evidence was insufficient to support increasing Gary's award. In any event, our review of the record convinces us that Gary satisfied his burden of demonstrating a change in occupational disability as that concept was explained by the Supreme Court in Peabody Coal v. Gossett.<sup>3</sup> Not only did he support his motion to reopen with medical evidence, but Gary's own testimony supported the finding that his occupational disability had increased. Therefore, aside from the failure to make the requisite finding as to the actual extent of disability at the time of settlement, we find absolutely no error in the decision of the ALJ or the opinion of the Board upholding that decision.

The opinion of the Workers' Compensation Board is reversed in part and the case remanded for a specific finding as to the extent of Gary's occupational disability as of the date he

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<sup>3</sup> Ky., 819 S.W.2d 33 (1991).

settled his original claim. In all other respects, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-  
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BRIEF FOR APPELLEE/CROSS-  
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