RENDERED: AUGUST 18, 2000; 10:00 a.m.
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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002023-WC

KIAH CREEK MINING — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-97-76965

ALLEN KEITH STEWART; HONORABLE RICHARD H. CAMPBELL, JR., ADMINISTRATIVE LAW JUDGE; AND, WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 1999-CA-002239-WC

ALLEN KEITH STEWART — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTON NO. WC-97-76965

KIAH CREEK MINING; HONORABLE RICHARD H. CAMPBELL, JR., ADMINISTRATIVE LAW JUDGE; AND, WORKERS' COMPENSATION BOARD — APPELLEES

OPINION AND ORDER
AFFIRMING IN 1999-CA-002239-WC
&
DISMISSING IN 1999-CA-002023-WC
** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Allen Keith Stewart, and his employer, Kiah Creek Mining, seek our review of two opinions of the Workers' Compensation Board, one rendered July 30, 1999, and a modified opinion rendered September 3, 1999. Both of these appeals address the issue of the proper construction of the statutory provisions outlining the method for computing benefits for permanent partial disability for a claimant who lacks the physical capacity to return to his previous work, KRS[1] 342.730(1)(b)-(d), as amended in 1996. Stewart's petition for review raises the additional issue of the Board's authority to withdraw an opinion once it has been entered.

The facts necessary for an understanding of the issues in these appeals are not in dispute. Stewart, an underground mine foreman, sustained an injury to his lower back in February 1997. Although Stewart claimed to be totally disabled, the ALJ determined that Stewart had sustained only a 15% functional impairment. However, the ALJ agreed with Stewart's contention that he did not retain the physical capacity to return to the sort of work he had been performing at the time of his back injury. In his opinion and award of March 29, 1999, the ALJ calculated the amount of Stewart's award in the following manner:

> It having been determined that the work injuries of February[] 1997, rendered [Stewart] substantially, but not totally, disabled, his compensable permanent disability must be assessed in accordance

[1]Kentucky Revised Statutes.

> with the table set forth in KRS 342.730(1)(b); and, because [Stewart] is precluded from returning to the type work in which he was engaged when injured, application of the enhancement factor provided in KRS 342.730(1)(c) is warranted as well. Therefore, utilizing the various multiplication components, [Stewart] is deemed entitled to benefits for a permanent partial disability rating of 28.125% (15% x 1.25 = 18.75 x 1.5). Such benefits amount to $125.73 per week [662/3% of [Stewart's] average weekly age, $784.00, reduced to the maximum of $447.03[2] x 28.125% per KRS 342.730(1)(d)].

Kiah appealed to the Board and argued that the ALJ erred in calculating Stewart's award by using the maximum permanent total disability rate (100% of the state average weekly wage, $447.03), instead of the maximum permanent partial disability rate (75% of the state average weekly wage, $335.27). On July 30, 1999, the Board, in a split decision, rendered its opinion affirming the ALJ's award.

On August 13, 1999, the Board entered an order withdrawing its July 30 opinion. In a separate order of the same date, the Board consolidated the case sub judice with another pending case which also contained the issue of the proper construction of KRS 342.730(1)(b)-(d), and scheduled both cases for oral argument. Stewart filed a petition for reconsideration and a motion to set aside the order withdrawing the opinion on the grounds that there is no statute or regulation allowing the Board to withdraw an opinion once it has been entered.

Kiah did not object to the withdrawal of the Board's opinion. Nevertheless, the employer filed a timely petition for

[2]$447.03 was the state average weekly wage for 1997.

review of the original opinion in this Court[3] as a protective measure in the event it was later determined that the Board was acting without authority in the withdrawal of its opinion. On September 3, 1999, the Board entered an order denying Stewart's motion to reconsider. The Board recognized that its action was "unusual," and agreed that there was no express statute or regulation authorizing the withdrawal of its opinion. However, the Board concluded that

> because of its statutory and judicially defined nature, [it] retains certain implied powers inherent in any court to exercise authority to manage its own affairs so as to achieve the orderly and expeditious, accurate and truthful disposition of causes and cases. As such, these powers are governed not by statute or rule, but by the control vested in the Workers' Compensation Board to so manage its own affairs. Clearly, the Workers' Compensation Board retains the inherent authority to enter orders protecting the integrity of its own proceedings. Our actions in withdrawing the initial opinion in the instant action, and subsequently scheduling oral arguments, is an implied power inherent in the Workers' Compensation Board's appellate function. Our present adjudication system depends on the adversarial presentation of evidence and arguments of law. The purpose of our actions is to secure additional information by way of argument on the subject matter at hand and to thoroughly address a significant issue that will affect a multitude of cases decided after December 12, 1996.

On the same day, the Board rendered its modified opinion on the merits and concluded that the ALJ's interpretation

[3]Kiah's appeal, No. 1999-CA-002023-WC, was placed in abeyance by order of this Court on November 17, 1999, pending the disposition of Stewart's appeal. Because we have concluded that the Board was empowered to withdraw its original opinion, Kiah's appeal is now moot.

of KRS 342.730(1)(b)-(d) was erroneous and that Stewart's award should have been computed by applying his disability rating against 75%, and not 100%, of the state average weekly wage. Stewart's petition for review questions both the Board's authority to withdraw its original opinion and its interpretation of KRS 342.730(1)(b)-(d).

With respect to the procedural issue, Stewart criticizes the Board for comparing itself to an appellate court, and points out that the authority of this Court and the Supreme Court to withdraw opinions is specifically addressed by CR[4] 76.30(2). He further argues that since 803 KAR[5] 25:010 §23 specifically prohibits motions for reconsideration, then "[b]y implication" the Board cannot itself reconsider an opinion "once it has been entered." Finally, Stewart points out that KRS 342.285, the statute which sets out the Board's appellate authority, does not make any provisions for the action of the Board in withdrawing its opinion. Stewart contends that the Board simply exceeded its authority in withdrawing its original opinion and that the opinion rendered on September 3, 1999, "is a complete nullity."

The Board chose to file a brief in this matter and states that its "essential purpose" is "to define, narrow, and illuminate the issues raised by the parties on appeal," and "to allow for thoughtful deliberation of legal issues unburdened by the responsibility to simultaneously make findings of fact." It

[4]Kentucky Rules of Civil Procedure.

[5]Kentucky Administrative Regulations.

points to the deference to which the Supreme Court of Kentucky has held its opinions are entitled[6] and suggests that "to be worthy" of this deference, it "must be empowered with the appropriate tools to reach the 'right result'."[7]

The Board has cited numerous cases from other state and federal jurisdictions which hold that administrative agencies acting in a quasi-judicial capacity, have "an inherent or implied power to reconsider decisions still under their control." However, we do not believe it is necessary to look beyond the established precedents in our own jurisdiction to resolve this issue. It is axiomatic that the Board, an administrative agency created by statute, has no inherent powers. The Board has only those powers expressly granted or necessarily implied from the statute.[8] It has long been recognized that statutes defining the powers of administrative agencies "seldom, if ever, define with precise accuracy the full scope of such powers and duties," thus

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[6]See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). In the seminal case concerning the standard of review to be utilized in appellate review of the Board's decisions, the Supreme Court of Kentucky stated that the Board "is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of Kentucky Court of Appeals decisions in cases that originate in circuit court".

[7]The Board's reference to the "right result" is taken from Bookman v. United States, 453 F.2d 1263, 1265 (Ct.Cl. 1972)("the public's interest in a 'right result' is consonant with the expanding application of the decision either in terms of the number of individuals directly or presently affected, or its future precedent value").

[8]Ashland-Boyd County City-County Health Dept v. Riggs, Ky., 252 S.W.2d 922, 923 (1952).

requiring some powers to "arise by implication."[9] "It is a general principle of law that where the end is required, the appropriate means are implied."[10] Stewart is correct in stating that KRS 342.285 does not expressly give the Board authority to withdraw and/or reconsider its opinions. However, the Board makes a compelling argument that such authority is necessarily implied by the nature of the work it was created to perform and in order to protect the integrity of its decisions.

Fortunately, we are guided by case law in this jurisdiction which specifically addresses an agency's power to change its decisions made in a quasi-judicial capacity. In Union Light, Heat & Power Co. v. Public Service Commission,[11] our highest court stated:

> [W]e know of no rule of law that denies to a court the right to revoke an order and substitute in lieu thereof a new and different one, provided that court has not lost jurisdiction over the case involved. An administrative agency unquestionably has the authority, just as has a court, to reconsider

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[9]Board of Education of Boyd County v. Trustees of Buena Vista School, 256 Ky. 432, 76 S.W.2d 267, 268 (1934).

[10]Ashland-Boyd, supra.

[11]Ky., 271 S.W.2d 361, 365-66 (1954). See also, Travelodge International, Inc. v. Kentucky Unemployment Insurance Commission, Ky.App., 710 S.W.2d 232, 234 (1986) (commission had authority to reconsider original decision until decision became final twenty days after rendition, although "controlling regulations did not provide for reconsideration at that time"); but cf. Phelps v. Sallee, Ky., 529 S.W.2d 361, 365 (1975) ("an administrative agency does not have any inherent or implied power to reopen or reconsider a final decision"). We do not believe the holding in Phelps to be controlling in the instant case as the agency action involved in that case was not quasi-judicial in nature, but purely ministerial, a distinction recognized in Western Kraft Paper Group v. Department for Natural Resources and Environmental Protection, Ky.App., 632 S.W.2d 454 (1982).

> and change its orders during the time it retains control over any question under submission to it.

Accordingly, we agree with the Board that it "retains control" over an opinion it has rendered, and thus may withdraw that opinion, until such time as a party has filed a petition for review in this Court, or until the time for seeking review in this Court has expired, that is, within thirty days of the entry of the Board's opinion.[12] In the case sub judice, neither of those events had occurred on the date the Board withdrew its original opinion. Accordingly, we hold that the Board acted appropriately and well within the authority implied by KRS 342.285 when it further reviewed the ALJ's decision.

Thus, we will now address the substantive controversy in this appeal, which concerns the proper application and interplay of KRS 342.730(1)(b),(c) and (d). There statutes read in relevant parts as follows:

> (1) Except as provided in KRS 342.732, income benefits for disability shall be paid to the employee as follows:
>
> (a) [this portion of the statute concerns temporary or permanent total disability]
>
> (b) For permanent partial disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by the permanent impairment rating caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, times the factor set forth in the

[12] See KRS 342.290; CR 76.25; and Staton v. Poly Weave Bag Co. Inc./Poly Weave Packaging, Inc., Ky., 930 S.W.2d 397 (1996).

table that follows:

AMA Impairment	Factor[13]
0 to 5%	0.75 [0.65]
6 to 10%	1.00 [0.85]
11 to 15%	1.25 [1.00]
16 to 20%	1.50 [1.00]
21 to 25%	1.75 [1.15]
26 to 30%	2.00 [1.35]
31 to 35%	2.25 [1.50]
36% and above	2.50 [1.70]

. . . .

(c) 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be one and one-half (1-1/2) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability otherwise payable under paragraph (b) of this subsection shall be reduced by one-half (½) for each week during which that employment is sustained.

. . .

(d) For permanent partial disability, if an employee has a permanent disability rating of fifty percent (50%) or less as a result of a work-related injury, the compensable permanent partial disability period shall be four hundred twenty-five (425) weeks, and if the permanent disability rating is greater than fifty percent (50%), the compensable permanent partial disability period shall be five hundred twenty (520) weeks from the date the impairment or disability exceeding

[13]The figure in the bracket represents changes made by the 2000 Legislature, effective April 21, 2000.

> fifty percent (50%) arises. Benefits payable for permanent partial disability shall not exceed ninety-nine percent (99%) of sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage as determined under KRS 342.740 and shall not exceed seventy-five percent (75%) of the state average weekly wage, except for benefits payable pursuant to paragraph (c)1. of this subsection, which shall not exceed one hundred percent (100%) of the state average weekly wage, nor shall benefits for permanent partial disability be payable for a period exceeding five hundred twenty (520) weeks, notwithstanding that multiplication of impairment times the factor set forth in paragraph (b) of this subsection would yield a greater percentage of disability.[14]

In applying these subsections to determine Stewart's award for permanent partial disability, the ALJ first multiplied the degree of permanent partial impairment, 15%, by a factor of 1.25, the factor contained in the table in KRS 342.730(1)(b), which resulted in an 18.75% disability rating. Then, because Stewart was not able to return to his former work, the ALJ multiplied the disability rating by the 1.5 multiplier contained in subsection (c) 1. Next, the ALJ applied the result of the former calculation, 28.125%, against $447.03, 100% of the state average weekly wage, which resulted in a weekly benefit awarded of $125.73. The ALJ was convinced that his use of 100% of the state average weekly wage was required by the language in KRS

[14]Although the Legislature further refined this statue in the 2000 session by reducing the (1)(b) factors, increasing the 1.5 multiplier in (1)(c) 1. to 3.0, eliminating the .5 multiplier in (1)(c)(2)., and adding an education and age factor, (1)(c)3., the methodology for computing income benefits for permanent partial disability was unchanged.

342.730(1)(d) that benefits "shall not exceed seventy-five percent (75%) of the state average weekly wage, except for benefits payable pursuant to paragraph (c)1. of this subsection, which shall not exceed one hundred percent (100%) of the state average weekly wage . . ."[emphasis added].

In its review, the Board agreed with the ALJ's use of the factor in subsection (1)(b). However, it viewed the process designed by the statute's remaining subsections somewhat differently. It concluded that after the 18.75% "impairment rating" was determined, the ALJ should have multiplied that amount by 66 2/3% of the employee's average weekly wage but not more than 75% of the state average weekly wage. "At this point the base 'benefit' [would have] been established." The Board further concluded:

> Once the dollar figure for the benefit has been found, it is incumbent upon the adjudicator to factually determine first whether or not an individual retains the physical capacity to return to the same type of work. If the worker has not, then (c)1. is applicable. The adjudicator must then determine whether the individual has returned to work at an average weekly wage equal to or greater than the average weekly wage being earned at the time of the injury. If so, then (c) 2. will be applicable. If neither of these apply, then the benefits equate to the amount found under subsection (b). Otherwise, the benefit is multiplied times either 1.5 or .5, or conceivably both, to determine the benefit available. None of the multipliers contained in subsection (c) alter the permanent disability rating. While the reality is that using these multipliers as against the "percentage of disability" might lead to the same dollar figure, it is important to understand that these multipliers do not alter the disability rating but simply alter the benefits available on a weekly basis. It is, we

believe, this step in the process that has caused some confusion. We have in the past through concurring opinions noted the significance of the understanding that the subsection (c) multipliers do not change the percentage of the "permanent disability rating." The focus of these concurring opinions was primarily concerned with whether an individual receives 425 weeks of benefits or 520 weeks. When it is recognized that subsection (d) addresses the issue of the payment of benefits for permanent partial disability, it can be seen that only after the multiplication of the 1.5 factor in (c) 1. is 100% of the state average weekly wage an issue. It is no different from the fact that an individual who, for instance, has an impairment rating of 26 to 30% multiplied times the 2 grid factor is entitled to 520 weeks of benefits. That individual is entitled to 520 weeks even if he returns to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury. The "permanent disability rating" has not changed but the weekly benefits have changed. They may be reduced to .5 of the dollars available but would still be payable for 520 weeks. For computation purposes and as a formula to be followed, we would offer the following:

(1) Permanent impairment rating x .730(1)(b) factor = permanent partial disability rating (payable for 425 weeks if 50% or less or 520 weeks if greater than 50%).

(2) Permanent partial disability rating x 66 2/3% of employee's average weekly wage or 75% of the state average weekly wage (whichever is less) = weekly benefit.

(3) Weekly benefit x 1.5 (if (1)(c) 1. is applicable) and/or .5 (if (1) (c)2. Is applicable).

(4) If (1)(c)1. is applicable, weekly award may not exceed 99% of 66 2/3% of employee's average weekly or 100% of the state average weekly wage (whichever is less).

As a practical matter, the "exception" at issue in subsection (1)(d) only impacts high wage earners with an impairment rating greater than 30% (or disability rating

greater than 66.67%) [emphases added].

Applying this formula to the case sub judice would result in weekly benefits of $94.29.[15]

To discern the legislative intent of the 1996 amendments to KRS 342.730(1), we are guided by familiar and settled principles of statutory construction. Our primary task in construing a statute is to give effect to the intent of the General Assembly by looking first at the language it employed.[16] We must construe a statute as a whole to give it and its subsections consistent and harmonious effect.[17] When the plain language of a statute is clear and unambiguous, there is no need to resort to interpretive rules of statutory construction.[18]

We have quoted at length from the Board's opinion as we believe that the Board correctly interprets the statute and the Legislature's intent in its formula for calculating permanent partial disability benefits. KRS 342.730(1)(b) clearly and plainly provides that the percentage of permanent partial

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[15]This figure was arrived by using the Board's interpretation as follows: 15% x 1.75 [(1)(b) factor] = 18.75 x $335.27 (75% of state average weekly wage of $447.03) = 62.86 x 1.5 [(1)(c) 1. factor to be applied to the benefit] = $94.29. Stewart's average weekly wage was $784. Thus, his benefit comports with the limits in subsection (1)(d) as it does not exceed 99% of 66 2/3% of Stewart's average weekly wage ($517.46), or 100% of the state average weekly wage ($447.03).

[16]Gurnee v. Lexington-Fayette Urban County Government, Ky.App., 6 S.W.3d 852, 856 (1999).

[17]Commonwealth ex rel. Morris v. Morris, Ky., 984 S.W.2d 840, 841 (1998).

[18]Kentucky Unemployment Insurance Commission v. Kaco Unemployment Ins. Fund, Inc., Ky.App., 793 S.W.2d 845, 847 (1990).

disability arrived at by multiplying the degree of impairment by the listed factor should be applied against the lesser of 66-2/3% of the claimant's average weekly wage, or 75% of the state average weekly wage. Just as plainly, the multipliers contained in subsection (1)(c) are to be applied against the "benefits," not the disability rating.

It is the Board's interpretation of subsection(1)(d) as providing a mere cap, and not comprising an alternate method for computing benefits, which most concerns Stewart. He insists that the Legislature intended to use a multiplier in cases of permanent partial disability of 75% of the state average weekly wage except where (1)(c) 1. applies, in which event, he insists the Legislature intended the multiplier to be 100% of the state average weekly wage, the same as for temporary and permanent total disability. We believe the Board rejected this reasoning because the plain language of KRS 342.730(1)(b) provides that the benefits for permanent partial disability "shall be paid" at either 66 2/3% of the worker's average weekly wage, or 75% of the state average weekly wage, whichever is lower. From this point, subsection (1)(c) of the statutory scheme either enhances the benefit, depending on the worker's current physical capacity to return to the same type of work, and/or reduces the benefit depending on his current wages. We agree with Stewart's argument that the Legislature intended to further enhance the benefits of those workers who sustain high levels of impairment and/or injuries that prevent them from returning to their former work by its enactment of (1)(d), albeit not in the way Stewart envisions.

There is nothing in the language employed in subsection (1)(d) to support the ALJ's interpretation of the statute, that is to alter the initial formula contained in (1)(b) by replacing 75% of the state average weekly wage with 100% of the state average weekly wage for all workers entitled to the (1)(c) 1. enhancements. Rather, this subsection extends the benefit for a greater number of weeks for injured workers whose permanent partial disability exceeds 50%. Next, the statute's language that the benefits "shall not exceed" certain percentages of the state average weekly wage plainly provides caps for all permanent partial disability awards. The Board's interpretation of these words as a cap is logical and achieves harmony with KRS 342.730(1)(a), as otherwise a worker with a high degree of permanent partial impairment could, by virtue of the application of the factor in (1)(b) and/or the (1)(c) 1. multiplier, obtain an award in excess of that for permanent total disability, a result obviously not intended by the Legislature.

However, the statute further provides that the worker who cannot return to his former job can pierce the maximum limit for permanent partial disability (75% of the state average weekly wage) and obtain an award up to 100% of the state average weekly wage, the limit for permanent total disability.[19] Although the

[19]For example, a worker who earns $500 per week with a permanent impairment under the AMA Guides of 35%, would be entitled to weekly income benefits of $264.03 (35 x 2.25 [the (1)(b) factor] x $335.27 [75% of the 1997 state average weekly wage]). If that worker is not able to return to his former type of work, the benefit is then multiplied by 1.5, enhancing the benefit to $396.05 per week. If not for the language in (1)(d) that allows such a worker to be awarded benefits up to 100% of (continued...)

Board's interpretation of (1)(d) as providing two caps, but not as impacting the (1)(b) computations does not enure to Stewart's benefit, it does further the goals Stewart argues the Legislature intended. Seriously impaired workers who are not able to return to the same type of work they performed when injured can receive awards that approach, or equal, those awarded to totally disabled workers. In summary, the interpretation articulated by the Board is the one which best respects the words employed and the sequence of the subsections as enacted by the Legislature in its scheme to compensate permanently impaired workers.

Accordingly, the September 3, 1999, opinion of the Workers' Compensation Board from which appeal No. 1999-CA-002239-WC, has been taken, is affirmed. Appeal No. 1999-CA-002023-WC is hereby DISMISSED as MOOT.

ALL CONCUR.

Entered: AUGUST 18, 2000 /s/ Rick A. Johnson
Judge, Court of Appeals

[19](...continued)
the state average weekly wage of $447.03 the $396.05 would exceed, and would be capped by, the maximum for permanent partial disability of $335.27.

BRIEF AND ORAL ARGUMENT FOR APPELLANT, ALLEN KEITH STEWART:

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