RENDERED: September 22, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000653-MR

COMMONWEALTH OF KENTUCKY,
LABOR CABINET, DIVISION OF
SPECIAL FUND, ROBERT WHITTAKER,
DIRECTOR — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 99-CI-00221

ROY GENE KING — APPELLEE

AND

NO. 1999-CA-002237-WC

ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND — APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
NO. WC-96-07486

ROY GENE KING; GREEN COAL
COMPANY, INC.; SHEILA C. LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

* * * * * *

OPINION
VACATING AND REMANDING
AS TO APPEAL NO. 1999-CA-000653-MR
AND
REVERSING AND REMANDING
AS TO APPEAL NO. 1999-CA-002237-WC

BEFORE: GUDGEL, Chief Judge; EMBERTON and TACKETT, Judges.

TACKETT, JUDGE: In these consolidated cases, Commonwealth of Kentucky, Labor Cabinet, Special Fund (Special Fund) appeals from the March 15, 2000, judgment of the Daviess Circuit Court enforcing Roy Gene King's (King) workers' compensation award. The Special Fund also petitions this court for review of a decision of the Workers' Compensation Board (Board) vacating two orders of the Chief Administrative Law Judge (ALJ) entered April 22 and May 17, 1999. Having carefully considered the records and the briefs filed by the parties in both actions, we agree with the arguments raised by the Special Fund. Therefore, we reverse and remand in the workers' compensation action and vacate and remand in the Daviess Circuit Court action.

The facts of this case are not in dispute. King worked for Green Construction Company primarily as a heavy equipment operator from 1951 until 1974 and continued to work for them under its new name, Green Coal Company (Green Coal) until April 29, 1994, when he was laid off.

King filed claims for retraining incentive benefits and for work-related hearing loss against Green Coal in 1996, listing April 29, 1994, as his last date of exposure. In an opinion and award entered May 29, 1998, the ALJ found that King established his entitlement to benefits in both claims. The retraining incentive benefits were the responsibility of Green Coal, and the

ALJ apportioned 25% of the hearing loss award to Green Coal and 75% to the Special Fund. The hearing loss award was ordered to begin retroactively on April 30, 1994, a few months prior to King's sixty-fifth birthday, and was to continue for 425 weeks. No appeal was taken and the opinion and award became final, whereupon King's attorney successfully filed a motion for attorney fees. The opinion and award did not contain the required tier down language found in Kentucky Revised Statute (KRS) 342.730(4)[1] and the attorney fee award did not take the statutory tier down provision into consideration.

When the payment of its portion of the award began in May 1996, the Special Fund reduced its payments for both the attorney fee and the application of the tier down provision. King eventually filed an action against the Special Fund in Daviess Circuit Court in February 1999 to enforce the ALJ's original opinion and award. The Special Fund filed its response and the judge entered an order enforcing the ALJ's award without taking into account the tier down provision. On March 22, 1999, the Special Fund filed its notice of appeal to this court.

Futher on March 22, 1999, the Special Fund filed a motion to reopen the workers' compensation action to correct the award to include the tier down language. With no mention of the Special Fund's pending motion, the ALJ, sua sponte, reopened the action on April 22, 1999, and corrected the original award to include the tier down language, relying on Wheatley v. Bryant

[1]That statute provides that benefits for occupational disability are to be tiered down by 10% each year beginning with the claimant's sixty-fifth birthday as long as the injury or date of last exposure occurs prior to the sixty-fifth birthday.

Auto Services, Ky., 860 S.W.2d 767 (1993). The ALJ then denied King's petition for reconsideration. King appealed to the Board. Apparently because of the pending enforcement action, the Board vacated the ALJ's orders dealing with the correction of the award pending a ruling by this court in the appeal of the circuit court's enforcement order. The Special Fund then filed its petition for review. This court consolidated the two cases for consideration on the merits.

We first note the applicable standard of review. In workers' compensation actions, "[t]he function of further review of the WCB in the Court of Appeals is to correct the Board only where the . . . court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992).

The Board in its opinion stated that "while we cannot reach the issue of whether the ALJ has the appropriate authority according to Wheatley, supra, in issuing the order correcting the award, we certainly can reach the conclusion that neither the ALJ nor the Workers' Compensation Board has jurisdiction in King's case." This court can perceive of no reason why the ALJ should not be able to correct an error in an opinion and award while the enforcement action is on appeal. Pursuant to KRS 342.305, which provides for circuit court enforcement of awards, an enforcement order must be modified to conform to any decision of the ALJ ending, diminishing, or increasing any weekly payment under KRS

342.125. Therefore, we must reverse. Western Baptist Hospital, supra.

We next address the question of whether the ALJ had the authority to correct sua sponte the opinion and award to include the statutory tier down language. In Wheatley v. Bryant Auto Service, Ky., 860 S.W.2d 767 (1993), the supreme court addressed the issue of whether the ALJ had the authority to correct an error in the opinion and award which was not appealed and had become final. In Wheatley, thirty-five days after the opinion and award was issued and five days after it became final, the ALJ, sua sponte, amended his opinion and award to apply correct duration of benefits language. In reinstating the order of the ALJ, the supreme court stated that:

> Here we believe that the ALJ was acting properly and in the interest of justice when he availed himself of the statutory remedy set out in KRS 342.125 to correct his admitted mistake in applying the law in the compensation proceeding . . . . Since the authority for correcting this mistake was statutory, there was no prohibition by reason of the finality of the decision against making the correction, such as there would be had there been a court decision where finality had attached.

Wheatley, 860 S.W.2d at 769.

In the present appeals, the mistake the ALJ sought to correct was the failure to include the tier down language in KRS 342.730(4). As stated previously, King's benefits commenced a few months before his sixty-fifth birthday, so the tier down provision would apply. Everyone agrees that the tier down provision is applicable and should have been included in the opinion and award. As Wheatley states "in the interest of

justice," the ALJ should be permitted to amend the opinion and award to comply with the applicable law. Id. at 769.

Finally, King argues that, as amended, the reopening section, KRS 342.125, negates the exception to the finality rule in Wheatley and the ALJ should be prevented from amending the original opinion and award. King's argument is without merit in that its result would allow an erroneous award to stand uncorrected, permitting King to receive more benefits than he is statutorily entitled to receive.

The opinion of the Workers' Compensation Board vacating the two orders of the ALJ is reversed and remanded. The order of the Daviess Circuit Court is vacated and remanded for entry of an order enforcing the corrected opinion and award of the ALJ.

GUDGEL, CHIEF JUDGE, AND TACKETT, JUDGE CONCUR.

EMBERTON, JUDGE, CONCURS BY SEPARATE OPINION.

EMBERTON, JUDGE, CONCURRING. I concur in result, and for the most part I concur with the discussion of the majority. However, it seems to me that since KRS 342.730(4) is mandatory it does not matter whether such language is included either in the ALJ's order or the Board's order. The absence of the language, of course, does create confusion which certainly ought to be clarified by an amended order. The matter of finality is of no consequence.

BRIEFS FOR APPELLANT:	BRIEFS FOR APPELLEES:
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