

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000759-WC

ROBERT L. WHITTAKER,
Director of Special Fund

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-93-27393

HOMER THORNSBERRY;
GOLDEN OAK MINING CO., L.P.;
ROGER D. RIGGS, Administrative
Law Judge; and WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION

REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: DYCHE, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: The Special Fund appeals a decision of the Workers' Compensation Board affirming an opinion and award by the Administrative Law Judge following multiple remands to the ALJ of Homer Thornsberry's injury and occupational disease claims. For our summary of the extensive facts in this appeal, we adopt first the relevant portions of the statement of facts presented in the Board's opinion of February 25, 2000 and then adopt relevant portions of the ALJ's opinion of September 24, 1999:

In the instant claim, the ALJ ordered the Special Fund to commence payments to the claimant, Homer Thornsberry ("Thornsberry") for its liability pursuant to a total occupational disability award to Thornsberry for the occupational disease of coal workers' pneumoconiosis previously rendered on November 12, 1993. The ALJ further ordered that the Special Fund's obligation for weekly benefits to Thornsberry shall commence on August 11, 1999. Credit was granted to the Special Fund for payments made to Thornsberry by Golden Oak Mining Company, L.P. ("Golden Oak") for temporary total disability ("TTD") benefits in injury Claim No. 93-27393 and by virtue of a settlement agreement between Thornsberry and Golden Oak in the injury claim as approved by the ALJ on July 12, 1994.

This is the third appeal to [the] Board by the Special Fund in Thornsberry's award. In the initial appeal, the Special Fund had argued that the evidence below compelled a finding of permanent occupational disability in connection with Thornsberry's work-related injuries, and that the ALJ's dismissal of Thornsberry's claim for permanent partial occupational disability in the injury claim was in error. Though the Special Fund was not successful on that issue in the ultimate appeal to the Supreme Court of Kentucky, the Court remanded the matter to the ALJ for purposes of correctly calculating Special Fund liability. To this end, the Court directed

that the injury claim be reinstated, even though for TTD only; that the injury claim be consolidated with the occupational disease claim; that the occupational disease claim be reopened; and, that the combined award of benefits, incorporating the earlier settlement agreement between Thornsberry and Golden Oak be affirmed.

In the ALJ's Opinion and Order on Remand, rendered September 28, 1998, Thornsberry's injury claim was dismissed on the merits. However, the ALJ declined to make further findings in connection with the periods of TTD, stating that there was no dispute as to any period of TTD. In the Special Fund's second appeal to the Workers' Compensation Board, we affirmed the ALJ's decision in concluding that Thornsberry did not sustain an injury of appreciable proportions and that the ALJ's dismissal of any permanent disability was supported by substantial evidence. However, we further concluded that the ALJ, under the evidence submitted, had failed to make an appropriate finding of fact in connection with the duration of TTD since [the] Board did not have the authority to make such findings.

Thus, [the] Board, in its Opinion rendered April 16, 1999, reversed on this sole issue and remanded Thornsberry's claim once again to the ALJ with directions to undertake his analysis of TTD within the standard established by our appellate courts, particularly W.L.

Harper Constr. Co. v. Baker, Ky. App., 858 S.W.2d 202 (1993).

The ALJ rendered his Final Order on Remand on June 11, 1999, and made corrections therein by way of subsequent orders on petitions for reconsideration from which the Special Fund has again appealed. On remand, the ALJ determined that Thornsberry was only entitled to the period of TTD for his injury claim which had been paid by Golden Oak from June 5, 1992 through July 12, 1992, and from August 10, 1992 through November 14, 1993. Relevant herein as to the present issue on appeal, was the fact that Thornsberry's last exposure to coal dust occurred on August 10, 1992.

In his finding of TTD, the ALJ relied on evidence from Dr. Robert P. Goodman, whose opinion reflected that maximum medical improvement had been achieved and that light work was possible for Thornsberry. We believe this was substantial evidence to support the ALJ's decision. W.L. Harper Constr. Co. v. Baker, supra.

This determination, however, did not resolve the issue raised by the Special Fund which it then requested by petition for reconsideration. Its primary problem since day one has been, when does the Special Fund have to commence payments on its 75% liability for the total occupational disease award? How many weeks of credit is the Special Fund entitled to as a matter of factual determination and as a matter of law from the TTD paid by

Golden Oak on Thornsberry's injury award and the settlement agreed to between Thornsberry and Golden Oak as approved by the ALJ in the injury claim on July 12, 1994? The Special Fund raised the question of whether the opinion on remand should be corrected to incorporate the entirety of the \$30,000.00 lump sum payment which Thornsberry and Golden Oak had entered into in full settlement of the injury claim, with the further agreement that the entirety of the lump sum settlement would apply and serve as credit for any and all payments of TTD and benefits which were owed under the injury claim which was ultimately dismissed.

The ALJ, in his first order on the Special Fund's petition for reconsideration, dated August 24, 1999, incorporated several erroneous findings. One finding had to do with the commencement date of TTD on June 2, 1991 through July 12, 1992 when, in fact, TTD initially had not commenced until June of 1992. However, since this amount was paid prior to the date of last exposure for the occupational disease award, the question remained of whether those weeks could be included for purposes of calculating the ultimate liability and commencement date for the Special Fund payments. In addition, an error as to the total amount of TTD paid was reflected as \$55,080.00 which was incorrect. Finally, the ALJ utilized a life expectancy of 30.7 years. Thornsberry was 46 years of age at the time of his last exposure in

August of 1992 and the life expectancy table was additionally in error. All parties filed petitions for reconsideration from the ALJ's order of August 24, 1999.

After the Board summarized the facts, it proceeded to adopt the opinion of the ALJ in full. The relevant portions of the ALJ's opinion follow:

9. On or about August 24, 1999 the Administrative Law Judge entered again a Final Order responding to the Special Fund's Petition for Reconsideration. In this last Order the Administrative Law Judge added together the two periods of temporary total disability paid voluntarily by the employer from June 5, 1992 through July 12, 1992 and from August 10, 1992 through November 14, 1993 with the calculated period of payments represented by the lump sum settlement of \$30,000.00 and concluded that to be the total of TTD period paid in this case. This was an error. The period of weeks represented by the \$30,000.00 lump sum payment which is 78.95 weeks is clearly not temporary total disability. Temporary total disability terminated on November 14, 1993 due to a finding of maximum medical improvement by Dr. Robert Goodman. The 78.95 weeks reflected by the \$30,000.00 lump sum payment by the employer on the "injury claim" must be considered as nothing more than gratuitous as to the "injury claim" as the Administrative Law Judge has found that the injury did not result in any permanent disability and that the plaintiff reached

maximum medical improvement pursuant to Dr. Robert Goodman, and temporary total disability terminated correctly on November 14, 1993. However, the \$30,000.00 lump sum payment which equals 78.95 weeks does apply to the employer's 25% liability under the occupational disease award.

10. Payment under the occupational disease award must begin on the date of last exposure which was August 10, 1992.

11. Further, the settlement agreement reflects that the \$30,000.00 will be as an offset against the occupational disease award and would be so even if it did not so reflect. With no injury award having been made, however, the employer's obligation was running from the date of last exposure whether paid or not. However, in this case the \$30,000.00 paid for the occupational disease award as well was only a "gratuitous" payment on the injury claim.

12. On the date of last exposure the plaintiff was 46 years of age giving him a life expectancy of 28.22 years (per table in effect at that time) which is 1,46[7].44 weeks. 25% of 1,467.44 weeks is 366.86 weeks. Employer voluntarily paid 66 weeks of temporary total disability and the \$30,000.00 lump sum equals 78.95 weeks of permanent and total disability payment under the occupational disease award. Given the total number of weeks paid at 144.95; leaving 221.91 weeks of

occupational disease award to be paid (beginning May 23, 1995) before the Special Fund's obligation begins. Therefore, the employer's 25% portion of this combined award should have been paid out on August 11, 1999.

. . .

14. The total value of the occupational disease award is \$557,627.20. The voluntary payment of temporary total disability on the injury claim was in the amount of \$25,080.00. This takes priority over the occupational disease award and equals 66 weeks of payment on the combined award. The lump sum payment of \$30,000.00 was intended in settlement of the injury claim against the employer but specifically is applicable to a 25% payment under the occupational disease award and equals 78.95 weeks of payment on the combined award. The employer is specifically credited as against its liability on the combined award all payments made by the time of its voluntary temporary total disability and the lump sum settlement, pursuant to Buale [sic] v. Robinson, Ky., 823 S.W.2d 856 (1992). The beginning time for the payment of the employer's percentage of liability is the date of last exposure, which is August 10, 1992; and payment made by the employer in whatever form must be credited against the 25% liability on a combined award.

15. To satisfy the Special Fund's continuing objection this Order specifically reopens the occupational disease claim, incorporates the settlement

agreement and enters a combined award of benefits to the extent stated herein and with the understanding that the Administrative Law Judge has by Order of September 25, 1998 dismissed the injury claim for the reasons stated therein, which reasons are hereby adopted in whole; and with the further understanding that the Administrative Law Judge has by Order dated June 11, 1999 determined that the plaintiff reached maximum medical improvement as found Dr. Robert Goodman and that the appropriate period of temporary total disability was as voluntarily paid for the reasons therein stated, which are hereby adopted as if set out in whole.

16. The employer's obligation ended August 11, 1999.

. . . .

It is further ORDERED that the period of benefits payable begins August 10, 1992 and the employer shall receive credit for all payments made as recited heretofore and the Special Fund's obligation hereinafter shall begin on the 11th day of August, 1999 and shall continue thereafter consistent with all applicable statutory and common law.

.

The issues raised on appeal by the Special Fund are twofold: (1) whether the Board erred in using the life expectancy table in effect at the date of Thornsberry's last exposure to coal dust, and (2) whether the Board erroneously calculated

Thornsberry's benefits which resulted in the Special Fund's obligation beginning earlier than it should have.

The Special Fund argues that the incorrect life expectancy table was used in determining the duration of Thornsberry's award. The life expectancy table in effect at the time of Thornsberry's exposure calculates that the life expectancy of a forty-six year old male is 28.22 years. Subsequent to Thornsberry's exposure, the Department of Workers' Claims adopted 803 Kentucky Administrative Regulation (KAR) 25:036, which provides that:

If an administrative law judge is required to compute the apportionment of benefits between the employer and the Special Fund pursuant to KRS 342.120(3), the portions shall be based on the life expectancies contained in the male or female mortality tables in Appendix A of this administrative regulation. If a claim is reopened, the table in effect on the date of the original opinion, award or order approving the settlement agreement shall continue to be utilized.

Appendix A calculates that the life expectancy for a 46 year old male is 30.2 years. The Special Fund urges that, since this is not a reopening, the table contained in Appendix A should be used instead of the table in effect at the time of the injury. Although the Special Fund is correct in that this case is not a reopening, the ALJ's use of the life expectancy table at the time of the injury was not in error. "[T]he award of benefits is, as always,

controlled by the law in effect at the time of the injury.”¹ Because Thornsberry’s award has yet to be made final, all calculations of his award date back to 1992, the year of the injury. Therefore, the more recent life expectancy table found in 803 KAR 25:036 should be ignored for purposes of determining Thornsberry’s life expectancy. The Board did not err in affirming the decision of the ALJ to use the life expectancy table in effect at the time of the injury that reflects a life expectancy of 28.22 years.

The Special Fund’s next argument is that the Board and the ALJ miscalculated Thornsberry’s award. In particular, the Special Fund contends that Golden Oak was obligated to make payments until August 7, 2000, whereas the ALJ calculated that Golden Oak’s obligation ended August 11, 1999. The Special Fund bases its argument on the Supreme Court’s decision in Beale v. Robinson.² In Beale, the claimant was awarded temporary, total disability for approximately nine months and 30% permanent, partial disability benefits for 425 weeks thereafter.³ The employer of the injured worker was liable for this entire award.⁴ The claimant was also awarded 50% permanent, partial disability benefits for 425 weeks as a result of pneumoconiosis which was apportioned 75% to

¹ Federal Materials Co. v. Baker, Ky., 885 S.W.2d 704, 705 (1994).

² Ky., 822 S.W.2d 856 (1992).

³ See id. at 856.

⁴ See id.

the Special Fund and 25% to the employer.⁵ The Supreme Court included the following chart in its appendix to illustrate its holding:

Injury Claim:

4/2/85	12/24/85	
38 wks.	425 wks.	⇒
Temp., total	30% perm., partial	disability
disab.		

Occupational Disease Claim

425 wks. - 50% permanent, partial disability		
4/2/85	12/24/85	
38 wks.	387 wks.	⇒
(Not paid because	(Paid)	
claimant receives		
total disability		
due to an injury) ⁶		

As the Supreme Court pointed out, Kentucky Revised Statute (KRS) 342.316(1) (b) provides that "the beginning of compensation payments shall be the date of the employee's last injurious exposure to the cause of the disease"

The circumstances in Beale are similar to the facts in the present claim. Here, we have two distinct claims, one for a disability and one for an occupational disease. Temporary, total disability benefits were paid to Thornsberry from August 10, 1992, to November 14, 1993, equaling 66 weeks.⁷ Also, \$30,000.00 was paid to Thornsberry by Golden Oak as a settlement for the

⁵ See id.

⁶ Id. at 858.

⁷ Although Thornsberry was compensated for temporary, total disability from June 5, 1992, through July 12, 1992, the ALJ correctly held that this period could not be used as a credit and offset for Golden Oak because the date of Thornsberry's last exposure to coal dust was subsequent to these dates, August 10, 1992.

disability claim.⁸ Converting the \$30,000.00 into weeks at \$380.00 a week⁹ equals 78.95 weeks, which equals 144.95 weeks when added with the 66 weeks paid by Golden Oak for TTD.¹⁰

Thornsberry's life expectancy at the time of his original claim was 28.22 years, which equates into 1,467.44 weeks. 1,467.44 weeks at \$380.00 equals a total award for Thornsberry of \$557,627.20. Because the injury award and the disability claims were ordered to be consolidated by the Supreme Court in its June 18, 1998, opinion, the Special Fund became liable for 75% of the total occupational disease award and Golden Oak became liable for 25% of the total occupational disease award.

The Special Fund argues that the percentages should not be calculated until the 66 weeks paid by Golden Oak for temporary, total disability are subtracted from the total 1,467.44 weeks owed to Thornsberry. According to the Special Fund, if Golden Oak's 25% is calculated from the 1,467.44 weeks after the 66 weeks paid for TTD are subtracted (leaving 1,401.44 weeks), Golden Oak's obligation to pay \$380.00 per week would extend for 350.36 weeks, with Golden Oak's obligation to pay extending until August 7, 2000. However, this analysis is not consistent with Beale.

⁸ The \$30,000.00 settlement, which was approved in June 1994, was characterized by the ALJ as a "gratuitous" payment on the injury claim because Thornsberry reached maximum medical improvement of his temporary injury on November 14, 1993.

⁹ The weekly benefit due to Thornsberry under the occupational disease award was \$380.00, an amount not in dispute.

¹⁰ Golden Oak paid \$25,080.00 for temporary total disability on Thornsberry's injury claim. When divided by \$380.00 a weeks, the total number of weeks paid is 66.

According to Beale, the percentages owed by Golden Oak and the Special Fund are to be calculated from the date of last exposure, not the date of termination of TTD.¹¹ Here, the date of Thornsberry's last exposure was August 10, 1992. Although Golden Oak was responsible for TTD until November 14, 1993, Golden Oak is to be given credit for this amount in regard to the occupational disease award. Hence, 25% of the total 1,467.44 weeks equals 366.86 weeks. The ALJ calculated Golden Oak's obligation to extend from August 10, 1992, until August 11, 1999. This calculation was slightly in error.

The ALJ correctly calculated 366.86 weeks to total 2,568.02 days or 7.04 years. The ALJ apparently rounded off the number of years to 7, hence ending Golden Oak's obligation on August 11, 1999. However, .04 years is equal to 14.6 days, or 2.1 weeks. Therefore, Golden Oak's obligation should not have ended until August 26, 1999. The following chart illustrates the compensation period for Thornsberry:

Injury Claim

8/10/92	11/14/93
_____ 66 wks. _____	

Occupational Disease Claim

1,467.44 wks. - 100% total occupational disability	
8/10/92	11/14/93
_____ 66 wks. _____ _____ 1,401.44 wks. _____ =>	
(Not paid because claimant receives total disability due to injury)	
(Paid)	

¹¹ See Beale, supra note 2, at 856.

This case is remanded to the Board with instructions to remand to the ALJ with instructions to enter an award consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

David R. Allen
Frankfort, Kentucky

BRIEF FOR APPELLEE GOLDEN OAK
MINING COMPANY:

Barkley J. Sturgill, Jr.
FITZPATRICK, OSBORNE &
STURGILL, P.S.C.
Prestonsburg, Kentucky

BRIEF FOR APPELLEE HOMER
THORNSBERRY:

Miller Kent Carter
BRANHAM & CARTER, P.S.C.
Pikeville, Kentucky