

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000390-WC

ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-27664

JAMES C. HALL, SURVIVING
SPOUSE OF CYNTHIA K. HALL;
PEYTON'S INC.;
HON. SHEILA C. LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

AND

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ADMINISTRATIVE LAW JUDGE,
SHEILA C. LOWTHER, ADMINISTRATIVE
LAW JUDGE, DENIS S. KLINE, and
WALTER W. TURNER, COMMISSIONER,
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, Chief Judge, BUCKINGHAM and McANULTY, Judges.

BUCKINGHAM, JUDGE: This workers' compensation case involves separate petitions for review of an opinion of the Workers' Compensation Board (Board). The first petition for review was filed by the employer, and the second petition for review was filed by the Special Fund. We conclude that the Board ruled correctly on both matters and thus affirm.

The claimant, Cynthia K. Hall, was employed with Peyton's, Inc., for twenty-four years at the time of her injury. Peyton's was a food service vendor for the Kroger Company, and Hall was employed by Peyton's as a forklift operator on July 15, 1993, the date of her injuries. On that date, she was injured when another forklift struck her forklift. As a result of the incident, Hall suffered injuries to her hip and low back. Hall was off work for one week of rest following the accident. She then began a program of physical therapy that caused pain in her low back. In September 1993, Hall returned to work but continued to suffer pain from her injuries. The pain increased to the point that it became unbearable and, on October 29, 1993, Hall quit her job. On January 26, 1994, Hall underwent surgery on her back. From the time she quit her job in October 1993, until her death on October 7, 1999, due to a cause that was not work-related, Hall remained unemployed.

In an order entered on January 28, 1997, an administrative law judge (ALJ) determined that Hall was only fifty percent occupationally disabled and not totally disabled. Hall appealed to the Board, and the Board reversed and remanded the ALJ's decision. In a concurring opinion, one member of the Board noted that the opinion did not necessitate a finding of total occupational disability but rather required further findings of fact.

On petition for review, a panel of this court affirmed the Board's decision. The court held that "[o]n remand, the ALJ must consider all of the factors set forth in KRS 342.0011(11) and Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968)." On appeal, the Kentucky Supreme Court affirmed in part, reversed in part, and remanded. The court held:

We agree with the decisions below to the extent that the ALJ's opinion and the order denying the petition for reconsideration does not make it clear that the ALJ truly considered all of the factors enumerated in KRS 342.0011(11) and Osborne v. Johnson or that the ALJ considered only evidence which was material to the question at hand. When those factors are considered, it is apparent that a worker need not be unemployable in order to be totally occupationally disabled. Likewise, there is no requirement that a worker who is unable to return to her prior employment, or to similar employment, must be awarded a total occupational disability. We conclude that the claim must be remanded for more specific findings from the evidence which indicate an analysis of the extent of claimant's occupational disability under the law and for the entry of an award which is consistent with those findings. Keeping in mind that claimant had the burden to demonstrate that her occupational disability was total, we are not persuaded that the evidence was so overwhelming that it necessarily compelled a conclusion that she

was totally occupationally disabled and reverse the decision of the Court of Appeal to the extent that it might imply otherwise.

By the time this case had completed its travel through the first appeal and had been remanded to the ALJ, the ALJ who originally heard the case had returned to private practice. As a result, the case was assigned to the chief administrative law judge (CALJ).

In an opinion rendered on May 2, 2000, the CALJ noted that:

The Supreme Court of Kentucky ultimately ruled that this claim must be remanded to the Administrative Law Judge for a more specific findings from the evidence, indicating an analysis of the extent of the claimant's occupational disability under the law and for the entry of an award consistent with those findings.

The CALJ then concluded that Hall was totally and permanently occupationally disabled as a result of the accident. Further, the CALJ apportioned the total amount of benefits, to include those which were owed during the period from her injury until her death, equally between Peyton's and the Special Fund. In a subsequent order, the CALJ ordered that weekly benefits in the amount of \$253.34 were to be paid to Hall's estate for the period from October 29, 1993, through the date of her death on October 7, 1999. Further, the CALJ ordered that weekly benefits in the sum of \$126.67 be paid to James C. Hall, surviving spouse of Cynthia Hall, from October 8, 1999, and continuing thereafter for the remainder of Hall's life expectancy. The order directed all benefits to be apportioned equally between Peyton's and the Special Fund. On appeal by Peyton's and the Special Fund to the

Board, the Board affirmed the CALJ's orders as entered. These petitions for review by Peyton's and the Special Fund followed.

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In Peyton's petition for review, it argues that the CALJ was directed by the Kentucky Supreme Court in its opinion to find evidence to support the original ALJ's finding of fifty percent disability. It argues that the court's opinion precluded a finding by the ALJ on remand that Cynthia was totally occupationally disabled. Peyton relies on the language in the supreme court's opinion which stated that "we are not persuaded that the evidence was so overwhelming that it necessarily compelled a conclusion that she was totally occupationally disabled[.]"

We disagree with Peyton's argument. Once the case reached the Kentucky Supreme Court, it had two obvious options for resolving the dispute. First, it could have concluded that the evidence was so overwhelming as to require a different result from that reached by the ALJ. Had it elected to do so, it would have then merely remanded the case and instructed the ALJ to enter a finding of total occupational disability. The second alternative facing the court was to agree with the ALJ's order finding fifty percent occupational disability. Had the supreme court desired to do this, it would have merely ordered that the ALJ's opinion be reinstated. If the court had wished to reinstate the ALJ's original finding, there would have been no need for it to remand the case for further findings of fact to support the finding that Hall had a fifty percent occupational

disability. Although each of these options were available to the Kentucky Supreme Court, it elected to do neither.

It is clear from the language used by the court that while it did not believe the evidence "necessarily compelled" a finding of total disability, neither did it usurp the ALJ's role as a fact finder and set a predetermined level of disability. Rather, the court remanded the case for the reevaluation of the evidence, the entry of findings based on that evidence, and the entry of an award of disability consistent with the new findings. We agree with the Board's clear interpretation of the supreme court's directive:

Very simply, it was the directive of the Supreme Court that while the evidence may not have compelled a finding of total occupational disability, it remained incumbent upon an ALJ upon remand to again review the evidence of record and reach a conclusion as to the extent of occupational disability being experienced by Hall. This is precisely what the CALJ did.

The Board's opinion as it relates to Peyton's petition for review is affirmed.

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In its petition for review, the Special Fund argues that the CALJ incorrectly apportioned the award when she ordered that it was responsible for fifty percent of the known award value. This dispute arose because of the fact that Hall died from non-work related causes by the time the CALJ had entered her final order and prior to any payments being made. Hall's estate was entitled to the full weekly amount from the date she was injured till the date of her death. From the date of her death

through the remainder of her life expectancy, Hall's surviving spouse is entitled to receive fifty percent of the award. See KRS¹ 342.730(3). Because the CALJ could readily ascertain the full value of the award, she divided the total amount of benefits between the employer and the Special Fund who had stipulated liability on a 50/50 basis.

The Special Fund argues that because Hall died, the initial assessment of one hundred percent liability from the date of the injury until her death would have been during Peyton's payment period and that pursuant to Williamson v. Island Creek Coal Co., Ky. App., 899 S.W.2d 499 (1995), the CALJ erred in apportioning the benefits equally between Peyton's and the Special Fund. The Special Fund argues that instead of apportioning the ascertainable value of the award, the CALJ should have apportioned the life expectancy time period thus leaving each party responsible for the amount of the award during its respective time period.² In its brief to this court, the Special Fund acknowledged that "the issue presented herein is pending before the Supreme Court."

¹ Kentucky Revised Statutes. All statutes referenced in this opinion are to those in effect at the time of the claim.

² Under KRS 342.120 the employer is responsible for initial payments for the time period necessary to meet its respective obligation. Once the employer has met its obligation, the Special Fund takes over payments. Hall's death occurred during Peyton's payment period. Thus, under the Special Fund's argument, Peyton's incurred responsibility for a larger portion of the total ascertainable value of the award.

On September 27, 2001, the Kentucky Supreme Court rendered its opinion in the case of Whittaker v. Patrick, 2000-SC-1095-WC. Therein, the court held as follows:

We conclude, therefore, that where a worker dies before receiving an award of income benefits, the benefits that accrue before his death and any benefits that continue to his survivors after his death must both be viewed by the ALJ as parts of the same award. As a result, any benefits that are payable to the worker's estate and any remaining benefits that are payable to survivors must be treated as parts of a whole, and the sum of those benefits must be apportioned. By operation of KRS 342.120, the employer must then be ordered to pay its apportioned share of all benefits awarded, after which the Special Fund's payment period begins.

Based on the Patrick case, we conclude that the Board did not err in ordering the known value of the award to be apportioned equally between Peyton's and the Special Fund.

The opinion of the Board in this regard is also affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT, SPECIAL
FUND:

David R. Allen
Frankfort, Kentucky

BRIEF FOR APPELLANT, PEYTON'S,
INC.:

Walter E. Harding
Louisville, Kentucky

BRIEF FOR APPELLEE, JAMES C.
HALL, Surviving Spouse of
Cynthia Hall

Edward A. Mayer
Louisville, Kentucky