

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002758-WC

ROBERT L. WHITTAKER, Director of
WORKERS' COMPENSATION FUNDS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-94022

RICHARD KELLER; THOMAS A. NANNEY,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
and ORDER DISMISSING
** **

BEFORE: EMBERTON, CHIEF JUDGE; HUDDLESTON AND MCANULTY, JUDGES.

EMBERTON, CHIEF JUDGE: The Workers' Compensation Funds appeals from an order by the Workers' Compensation Board. Richard Keller sustained a work-related injury on January 26, 1996, and on February 10, 1997, the parties entered into a settlement agreement whereby Keller received a lump sum equal to a 30% occupational disability, 15% of which was to be paid by the employer and the remaining 15% to be paid by the Workers' Compensation Funds. In January 1999, the claim was reopened after Keller sought temporary total disability benefits as a

result of surgery. The case was eventually assigned to an ALJ who concluded that Keller was permanently totally occupationally disabled.¹ The only issue on appeal concerns the Workers' Compensation Funds' argument regarding the proper date of the commencement of Keller's permanent partial disability and the credit it seeks for any overlap between the permanent partial disability represented by the settlement and the award upon reopening.

The Workers' Compensation Funds successfully argued to the Board that the ALJ was required to make findings of fact regarding the degree of occupational disability that existed at the time of the settlement and Keller has not filed a cross-appeal on this issue. The second issue before the Board, and that which is the subject of the present appeal, is whether it was incumbent on the ALJ to specifically identify the start date of the 425 week period of permanent partial disability so that an appropriate credit could be given to the Workers' Compensation Funds and, more particularly, the evidence the ALJ could consider when making its findings. The Workers' Compensation Funds argued to the Board that the ALJ must use the date specified in the SF3-A, in this case, April 30, 1996, while Keller contended the only appropriate date in this case is the date specified in the original settlement agreement, February 12, 1996. Confronted with these two arguments the Board held that neither document is

¹ During the pendency of the reopening, Keller and his employer entered into a settlement of the claim with the issue of the Workers' Compensation Funds' liability remaining open.

controlling but that the ALJ could discern reasonable inferences from either. We quote from its opinion:

Considering the remainder of the evidence and the fact that the date of February 12, 1996, appears to be when Keller first began missing work based upon the evidence of record, the ALJ could use this date to determine the beginning of the 425 week period as a reasonable inference to be drawn from the remainder of the evidence in conjunction with this document [the settlement agreement]. While we have thoroughly reviewed this record, we admit other dates might exist that would constitute the start date for the 425 week period, although those dates are much less than clear. Since neither the SF nor M & C provide any evidence that temporary total disability benefits were actually paid, even the existence of an SF3-A would not mandate the use of that date as the beginning date but, like February 12, 1996, would call for a reasonable inference on the part of the ALJ.

Ultimately, upon remand, the ALJ must make a finding as to the degree of occupational disability that existed at the time of settlement based upon the evidence that existed at the time of settlement and further must specifically identify the date upon which permanent partial disability became due and payable, thus constituting the beginning date for the 425 weeks. (Citations omitted).

Contrary to the assertions made by the Workers' Compensation Funds and Keller on appeal, the Board did not direct that the ALJ make findings in accordance with either the SF3-A form or the date specified in the settlement agreement. In fact the only final determination it made was that the ALJ is required to make additional findings. Only a final order of the Board is subject to judicial review. As stated in King Coal Co. v. King:²

² Ky. App., 940 S.W.2d 510, 511 (1997).

Pursuant to SCR 1.030(5) and 803 KAR 24:012 §14, a final decision of the Board may be appealed to this court. An order of the Board is appealable only if it terminates the action itself, acts to decide the matter litigated by the parties, or operates to determine some rights in such a manner as to divest the Board of power. An action which is remanded only for further findings of fact and not to make a disposition that would terminate the action, as in the case *sub judice*, is not a final and appealable order within the meaning of CR 54.01. (Citations omitted).

The opinion and order of the Board made no determination as to the date upon which permanent partial disability became due and payable, but remanded the case to the ALJ for such findings. The arguments made to this court by both parties are properly made before the ALJ on remand.

The order of the Board remanding the case to the ALJ for further findings is not a final and appealable order and the petition is dismissed.

ENTERED: August 2, 2002

/s/ Thomas Emberton
JUDGE, COURT OF APPEALS

ALL CONCUR.

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