

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001586-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-93-27664

CYNTHIA K. HALL, DECEASED;
JAMES C. HALL, SURVIVING
SPOUSE OF CYNTHIA K. HALL;
PEYTON'S INC.;
HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE;
HON. SHELIA C. LOWTHER, CHIEF
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. Robert L. Whittaker, Director of Workers' Compensation Funds, Successor to Special Fund (hereinafter "the WCF") has petitioned this Court for review of the Workers' Compensation Board's June 26, 2002, opinion affirming two decisions of the Administrative Law Judge. As set out in the WCF's brief, the two issues on appeal are whether the Board had

jurisdiction to rule upon Peyton's, Inc.'s motion for clarification and to reopen the case and whether the WCF should be responsible for the payment of benefits when the surviving spouse remarries after an award but before the expiration of the employer's payment period. We affirm.

Our standard of review in workers' compensation actions is well-settled. In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court addressed its role and that of the Court of Appeals in reviewing decisions in workers' compensation actions. "The 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." Id., at 687-88. We have reviewed the Board's decision and have determined that it did not overlook or misconstrue controlling statutes or precedent. Because we cannot improve upon the Board's excellent opinion, we shall adopt it as our own.

This matter is before this Board for a third time. Workers' Compensation Funds ("WCF") appeals from the Administrative Law Judge's determination finding it responsible for payment of benefits when a surviving spouse remarries after an award but before the expiration of the employer's payment period (the first half of the actuarial life expectancy). WCF first argues the ALJ lacked jurisdiction to consider Peyton's, Inc. ("Peyton's") motion for clarification and/or motion to reopen. It further contends the ALJ's apportionment of benefits pursuant to KRS 342.730(3)(e) was erroneous as a matter of law.

This case has a long procedural history before this Board and the appellate courts.

Issues of extent and duration of liability and payment of the award have previously been decided by this Board and the appellate courts. A short review of the facts and procedures is necessary for determination on the issues before us.

Cynthia Hall sustained work-related back and hip injury on July 15, 1993 in the course of her employment with Peyton's. On January 28, 1997, ALJ Denis Kline awarded Hall a 50% permanent partial disability. Benefits were apportioned equally between the employer and the Special Fund. Hall appealed to the Board and we determined remand was necessary. The supreme court, in an opinion rendered September 23, 1999, remanded the claim to ALJ Kline for a determination of the extent of Hall's occupational disability.

On October 7, 1999, Hall died of nonwork-related causes. Her husband, James C. Hall, was substituted as a party by order of March 16, 2000. On May 2, 2000, Chief ALJ Shelia C. Lowther awarded total disability benefits. Benefits were apportioned equally between the employer and the Special Fund commencing October 29, 1993.

In an order rendered July 24, 2000, the CALJ corrected her award, taking into consideration that Hall was deceased. Benefits were ordered payable to Hall's estate from October 29, 1993 to October 7, 1999. Hall's husband was awarded 50% survivor's benefits from October 8, 1999 for the "remainder of Mrs. Hall's life expectancy period." The order also provided, "[i]n the event that Mr. Hall remarries prior to the expiration of the compensable period, benefits are to be paid pursuant to KRS 342.730(3)(e)."

Thereafter, the WCF filed a petition for reconsideration and the CALJ, in an order rendered September 20, 2000, directed that all benefits awarded were to be apportioned equally between the employer and the WCF. Peyton's was ordered to pay all benefits initially subject to its proportionate share.

Both Peyton's and the WCF appealed once more to the Board. In an opinion rendered January 24, 2001, we affirmed the ALJ's award

of total disability benefits. We also held the ALJ correctly apportioned the award based upon reality (knowledge of date of death) rather than speculation (life expectancy). On October 26, 2001, the court of appeals affirmed this Board, holding the ALJ did not err in apportioning the ascertainable value of the award. The court of appeals specifically stated:

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. In its brief to this court, the Special Fund acknowledged that 'the issue presented herein is pending before the Supreme Court.'

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.¹

No appeal was taken from the court of appeals decision, which became final November 25, 2001.

On January 4, 2002, Peyton's filed a motion for clarification wherein it stated that Hall's widower remarried on May 26, 2001 during the pendency of this appeal. Peyton's requested that the court give clarification so that the WCF and the employer could resolve their respective responsibilities to Hall since they knew that Hall was remarried and the total amount of liability of the claim would be ascertained. The WCF responded, arguing that the ALJ had lost jurisdiction of the claim and pursuant to the final award, the WCF was not obligated to pay benefits until April 20, 2010. It argued that since the widower had remarried before that date, it had no liability for payment, citing Pennwalt Corporation v. Beale, Ky.App., 840 S.W.2d 830 (1992). Thereafter, Peyton's filed a "Motion to Reopen and for Clarification."

This matter was transferred from the CALJ to ALJ Donna H. Terry who entered an

¹We note for the record that the Supreme Court's decision in Whittaker v. Patrick was unpublished, and therefore is not binding upon this Court or any other administrative body.

order on January 28, 2002, directing the parties tender position papers documenting the amount of the award and calculating the amount to be paid by each defendant. She overruled the WCF's objection to the employer's motion for clarification on procedural grounds. She noted that from the record, it was clear the parties had been unable to agree upon apportionment of the award given the unforeseen circumstances following its rendition and the motion for clarification was treated as a motion to reopen. Therefore, ALJ Terry ordered the matter reopened pursuant to Wheatley v. Bryant Auto Service, Ky., 860 S.W.2d 767 (1993), for the purpose of rendering a more explicit award. ALJ Terry specifically stated:

3. The undersigned Administrative Law Judge finds that the Fund is liable for payment of half of the total benefit awarded, including those benefits paid in lump sum to James C. Hall pursuant to KRS 342.730(3)(e). While the Fund has vigorously argued that it has little or no liability in this claim because of Mr. Hall's remarriage during the defendant-employer's proof period, the Administrative Law Judge finds that the Fund is liable for one-half of all benefits awarded. This is based upon not only its stipulation of liability for half of any award, but also the award rendered by Judge Lowther, which was eventually affirmed by the Court of Appeals, that the Special Fund should be liable for one-half of all permanent benefits awarded. It is noted that the court of appeals did not accept the Fund's similar argument following plaintiff's death and held that the Fund was liable for one-half of the known value of the award. There is no discernible legal distinction between the question presented to the Court of Appeals and the issue raised by the Fund herein. Like the Court of Appeals, the undersigned Administrative Law

Judge finds that Whittaker v. Patrick, 2000-SC-1095-WC (Kentucky Supreme Court, Rendered September 27, 2001), is controlling precedent for equal apportionment of all known benefits in this workers' compensation claim.

Thereafter, the WCF filed a petition for reconsideration on February 12, 2002, again contending that ALJ Terry had lost jurisdiction and the employer was required to pay benefits in accordance with the award. Meanwhile, the parties had complied with ALJ Terry's order regarding proof of remarriage and payment of benefits. ALJ Terry rendered an order on March 4, 2002, overruling WCF's objections on the jurisdictional grounds and sustaining the motion for clarification. She noted the WCF cited unpublished opinions of the Board and the supreme court. ALJ Terry, in her March 4, 2002 order, again addressed the issue before her, stating:

While the Administrative Law Judge must remind the Funds that these decisions cannot be cited as authority, she has read same and finds that they are not applicable to the instant workers' compensation claim. The Funds are reminded that Judge Lowther has already ruled that it has liability for one-half of all permanent benefits awarded and that the Court of Appeals did not accept the Funds' similar arguments following the death of plaintiff Cynthia K. Hall. There simply is no discernible legal distinction between the question presented to the Court of Appeals regarding apportionment of an award and the issue raised by the Fund herein. Like the Court of Appeals, the undersigned Administrative Law Judge finds that Whittaker v. Patrick, 2000-SC-1095-WC, ___ SW3d ___, (Kentucky Supreme Court, rendered September 27, 2001) controls the issue of equal apportionment of all known benefits in this claim. Because the Funds' petition for reconsideration and

amended petition for reconsideration merely seek to reargue the arguments previously presented to Chief Administrative Law Judge Lowther and to appellate bodies, and which were previously presented to this Administrative Law Judge, the petition and amended petition are **OVERRULED**.

On March 20, 2002, Hall's widower filed a copy of his marriage license. Peyton's has paid all benefits pursuant to the ALJ's order and the issue remaining concerns liability for the second half of the award.

In this third appeal to the Board WCF now maintains, as it did below, that the ALJ lacked jurisdiction to consider Peyton's motion for clarification and/or motion to reopen. It further contends, pursuant to KRS 342.730(3)(e), and the ALJ's apportionment of benefits was erroneous as a matter of law.

The WCF's position is that the ALJ's award became final with the finality of the court of appeals opinion on November 25, 2001. It argues that the motion for clarification did not fall within one of the four statutory grounds of reopening: fraud; new discovered evidence; mistake; and change in disability. It further contends that the ALJ erred in considering it a motion to reopen pursuant to Wheatley v. Bryant Auto Service, supra.

In support of its argument, the WCF cites to numerous unpublished opinions of this Board, the court of appeals, and supreme court. It argues that the issue of the widower remarrying was foreseen and the appeal could have been placed in abeyance and the claim remanded to the ALJ for consideration of apportionment of the two year lump sum payment pursuant to KRS 342.730(3)(e).

In response, Peyton's first counters the WCF's petition for reconsideration from the ALJ's order rendered January 28, 2002 was untimely filed. Regardless, the ALJ rendered an order on March 4, 2002, sustaining Peyton's motion for clarification and the

WCF's appeal filed April 2, 2002 was timely filed.

Peyton's also argues that no "legal vested rights" of the WCF were adversely affected by the motion for clarification and the court of appeals decision in the herein matter set the rights of Hall's widower, as well as the obligation of Peyton's and the WCF.

Hall, in his response, requests costs pursuant to KRS 342.310.

After having reviewed the ALJ's decision and arguments of the parties and applicable law, we determine the ALJ did not err in ruling on Peyton's motion for clarification/motion to reopen and ultimately holding the WCF liable for half the ascertainable award.

In Wheatley v. Bryant Auto Service, supra, the supreme court held that an Administrative Law Judge's own motion under KRS 342.125 to correct a mistake in the award was proper. There, the ALJ originally limited a lifetime duration to 425 weeks instead of a lifetime award as authorized by statute. The court stated:

[W]e 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 this compensation proceeding, just as could have been done under CR 60.02 had it been a civil 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, Id. at 769.

We believe the significant impact of Wheatley is to emphasize that in certain circumstances, form should not take

precedence over substance. In the case sub judice, the court of appeals opinion held that the WCF was liable for one-half of the known value of the award based on the reality of the claimant's death. The court, as did the ALJ, determined that Whittaker v. Patrick, 2000-SC-1095-WC (rendered September 27, 2001, and ordered not to be published), was controlling precedent for equal apportionment. Contrary to the WCF's implication, nothing would have been gained by Peyton's appealing the court of appeals decision in the herein claim. Instead, the contingency of the widower's remarriage necessitated a reopening so that the award could conform with reality. Thus, applying the logic of the court of appeals decision based on Whittaker v. Patrick, the award required modification so as to conform with the reality of the widower's remarriage. As pointed out by Peyton's, contrary to the WCF's argument that its period of payment for benefits would not commence until the year 2010, the court of appeals clearly held that the ALJ "did not err in ordering the known value of the award to be apportioned equally between Peyton's and the Special Fund."

In conclusion, now that we know the total amount of the award due to the fact the widower remarried, the ALJ did not err in apportioning payment of benefits equally between Peyton's and the WCF. Thus, we disagree with the WCF's second argument that the ALJ erred as a matter of law in apportioning benefits equally pursuant to KRS 342.730(3)(e). The WCF relies on the case of Pennwalt Corporation v. Beale, supra, for the proposition that the employer owes all of the benefits because the WCF's payment period was never reached.

As explained above, the court of appeals determined, based on the supreme court's decision in Whittaker v. Patrick, supra, that the apportionment of the award must be based on reality knowing that the claimant had died. Thus, we agree with the ALJ's determination that "[t]here is no discernible legal distinction between the question presented to the Court of Appeals and the issue raised by the Fund herein." Therefore, we conclude the ALJ did not err in ordering

the WCF be liable for one-half of all permanent benefits awarded.

Hall has urged this Board to impose sanctions on the WCF pursuant to KRS 342.310 on the grounds he has been forced to defend this action without reasonable grounds. Although we have not been persuaded by WCF's arguments on appeal and we acknowledge that Hall's entitlement to benefits is not at issue, we believe that the WCF was acting in good faith in prosecuting its appeal. Therefore, we decline to impose sanctions. See, Roberts v. Estep, Ky., 845 S.W.2d 544 (1993).

Accordingly, the decision by Hon. Donna H. Terry, Administrative Law Judge, is hereby **AFFIRMED** and the appeal by Robert L. Whittaker, Director of the Division of Workers' Compensation Funds, is hereby **DISMISSED**.

We further add that the "law of the case" doctrine clearly applies in this case to the apportionment of the award. In Siler v. Williford, Ky., 375 S.W.2d 262, 263 (1964), the former Court of Appeals held that "[w]hen an appellate court decides a question concerning evidence or instructions, the question of law settled by the opinion is final upon a retrial in which the evidence is substantially the same and precludes the reconsideration of the claimed error on a second appeal." This Court later applied this doctrine in a workers' compensation action, Pennwalt Corp. v. Beale, Ky.App., 840 S.W.2d 830 (1992). In Pennwalt, we were prohibited from further reviewing a question that had previously been resolved in a final decision. Here, an earlier panel had already issued an opinion addressing the apportionment of the known value of the award after the claimant's death, holding that the value should be split equally between the employer and the Special Fund. Therefore, we are

bound by our prior final decision and are precluded from reviewing the issue any further.

For the foregoing reasons, the Board's opinion affirming the decisions of the ALJ is affirmed.

ALL CONCUR.

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