

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2006-CA-000673-WC

SIDNEY COAL COMPANY, INC./CLEAN  
ENERGY MINING COMPANY

APPELLANT

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
v. ACTION NOS. WC-2003-86201 AND WC-2003-96804

JERRY HUFFMAN; HON. LAWRENCE F. SMITH,  
ADMINISTRATIVE LAW JUDGE; WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; ACREE AND JOHNSON, JUDGES.

ACREE, JUDGE: Sidney Coal Company, Inc./Clean Energy Mining Company (Sidney Coal) appeals from an order of the Workers' Compensation Board (Board) remanding a case involving Jerry Huffman (Huffman), an injured former employee, to the Administrative Law Judge (ALJ) for further findings of fact. Sidney Coal argues that the factual findings requested by the Board involve matters that were not properly contested issues before the ALJ. Huffman responds that the Board's order was not

final and appealable within the meaning of Kentucky Rule of Civil Procedure (CR) 54.01. Although Huffman incorrectly relies on CR 54.01, we nevertheless affirm the Board's decision that the issues involved were, in fact, properly preserved.

Huffman was employed as a coal miner from 1978 until his second work-related injury at Sidney Coal in May 2003. He sustained an injury to his finger on January 18, 2003, which required him to miss several weeks of work at Sidney Coal. After returning to work, Huffman was injured again on May 1, 2003, when a 1,000 pound drive belt fell from its hanger plate onto his foot. Despite wearing new safety boots, his foot was crushed.

He was first treated at Williamson Memorial Hospital and then transferred to Cabell-Huntington Hospital in West Virginia. After being released from the hospital, Huffman was referred to physical therapy. When that failed to alleviate his pain, he sought treatment at the University of Kentucky Medical Center where he learned that several of his toes were still broken. Huffman was referred to a pain management specialist who implanted a nuerostimulator attached to his spine in June 2004. He was advised that his pain symptoms are permanent and, as a result, developed depression due to his inability to work. Huffman has difficulty walking and has been prescribed a cane.

In addition, he receives counseling and medication for his mental health problems.

Huffman has not returned to work since his May 2003 injury. He filed a claim for workers' compensation benefits. After a hearing, the ALJ entered an order on July 19, 2005, which concluded that Huffman was permanently partially occupationally disabled, that he was not permanently impaired by his finger injury, and that he was entitled to an award of benefits for his injured foot and psychiatric impairment.

Huffman filed a petition for reconsideration, requesting determinations concerning the level of impairment and his entitlement to temporary total disability (TTD) from his finger injury, a determination of when he reached maximum medical improvement (MMI) from his foot injury, a finding whether he was totally occupationally disabled, and contesting the method used by the ALJ to determine his impairment rating for the foot injury. After the ALJ denied his petition, Huffman appealed to the Board, raising the same issues. The Board partially affirmed the ALJ's order, but remanded the case for additional factual findings.

Regarding Huffman's finger injury, the Board directed the ALJ to make findings as to his impairment, entitlement to TTD and medical expenses. In addition, the Board instructed the ALJ to determine whether Huffman suffered permanent total

disability as that term is defined by Kentucky Revised Statute 342.0011(11)(a). Finally, the Board instructed the ALJ to determine the date on which Huffman reached maximum medical improvement from his foot injury. Sidney Coal appealed from the Board's decision.

On appeal, Sidney Coal argues that the Board improperly remanded the case for additional findings of fact. The employer contends that the issue of Huffman's entitlement to additional temporary total disability benefits was not preserved as a contested issue to be determined by the ALJ. In addition, Sidney Coal claims that the ALJ was not required to make a determination as to whether Huffman was totally occupationally disabled because the ALJ's award of permanent partial disability benefits constituted a de facto finding on the issue.

Huffman responds that the Board's order is not properly subject to appeal under CR 54.01, which reads as follows:

A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term "judgment" as used in these rules shall be construed "final judgment" or "final order".

This court previously determined that orders which do not "adjudicate the rights of any of the parties, [require] additional evidence to be taken, [or] terminate the action or operate to divest any party of some right" are not final and appealable orders. *Wagoner v. Mills*, 566 S.W.2d 159 (Ky.App. 1977); see also: *King Coal Co. v. King*, 940 S.W.2d 510 (Ky.App. 1997).

However, the Kentucky Supreme Court more recently recognized the statutory amendment of the Board's function from that of a fact-finding tribunal to one of appellate review. Thus, CR 54.01 no longer applies to the Board's orders. *Davis v. Island Creek Coal Company*, 969 S.W.2d 712 (Ky. 1998). Currently, in order to determine whether or not the Board has issued an interlocutory, nonappealable order, we are directed to perform the following analysis:

[W]here a decision of the Board sets aside an ALJ's decision and either directs or authorizes the ALJ to enter a different award upon remand, it divests the party who prevailed before the ALJ of a vested right and, therefore, the decision is final and appealable to the Court of Appeals.

*Whitaker v. Morgan*, 52 S.W.3d 567, 569 (Ky. 2001). With regard to Huffman's request for a determination on the issue of total occupational disability, the Board's order states as follows:

This Board is without [fact-finding] function and our opinion should not be

interpreted to reflect any particular result. Nonetheless, Huffman is entitled to findings which appropriately address his theory of the case.

The Board's order does not direct the ALJ to take additional evidence. Rather the ALJ is instructed to reach a factual conclusion based on the evidence already before him. Thus, this portion of the Board's order is not appealable under the precedents outlined in *Davis* and *Whitaker*.

The second issue before us concerns the portion of the Board's order requiring the ALJ make additional findings regarding temporary total disability benefits for both the finger and the foot injury. The Board's order specifically directed the ALJ to make

additional findings regarding the January 18, 2003, finger injury, with respect to impairment, TTD and medical expenses.

. . .

[and] to determine the period of TTD – the date from injury to MMI [from the May 1, 2003, foot injury]. This finding will determine whether there is an overpayment or underpayment of benefits voluntarily paid by Sidney.

Clearly, this portion of the Board's order is appealable under *Davis* and *Whitaker* since it could result in a change in benefits awarded by the ALJ. Nevertheless, the employer argues that Huffman lacked standing to appeal this issue to the Board since entitlement to additional TTD benefits was not preserved as a contested issue.

Sidney Coal points to language in 803 Kentucky Administrative Regulation 25:010P, Section 13, which requires the parties to sign a stipulation listing contested and uncontested issues prior to the final hearing in front of the ALJ. The regulation limits further proceedings to contested issues. After the benefits review conference, the parties listed extent and duration and overpayment of temporary total disability as contested issues. Thus, the employer claims that the issue of Huffman's entitlement to additional TTD benefits was not preserved. In addressing Sidney's argument, the Board's stated as follows:

This Board has consistently held that questions regarding the appropriateness and duration of TTD are encompassed within the question of extent and duration, which was preserved as an issue in Huffman's claim.

Sidney Coal has cited no authority contradicting the Board's assertion that the issue was properly preserved for review. Thus, we agree with the Board's determination to allow Huffman's appeal of the ALJ's lack of findings regarding his entitlement to temporary total disability benefits for his finger and foot injuries.

For the foregoing reasons, the judgment of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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HUFFMAN:

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