

RENDERED: NOVEMBER 6, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-000169-WC

CHESTER DAVIS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-82591

WARRIOR COAL, LLC; HON. GRANT  
S. ROARK, ADMINISTRATIVE LAW  
JUDGE; WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE AND DIXON, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

ACREE, JUDGE: Chester Davis (Davis) appeals the decision of the Workers' Compensation Board affirming the Administrative Law Judge's (ALJ) decision overruling Davis's motions for additional interest and sanctions against Warrior

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<sup>1</sup> Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Coal, LLC (Warrior), pursuant to KRS 342.040 and 803 KAR 25.010(24), respectively. We affirm.

In June of 2004, Davis was injured when a canopy in a coal mine collapsed on him. He received total temporary disability (TTD) benefits from June 2006 to August 2007. The issue whether Davis was to receive permanent disability payments was tried before the ALJ on May 28, 2008. The ALJ found Davis was totally occupationally disabled and awarded him benefits of \$588 per week. This decision was rendered on July 28, 2008.

On September 8, 2008, Davis filed motions for additional interest and sanctions against Warrior Coal because he had not yet received benefits from Warrior as the ALJ had ordered. The ALJ overruled both motions on September 24, 2008. The Workers' Compensation Board affirmed the judge's ruling on December 31, 2008. This appeal followed.

Davis's primary argument is that Warrior's failure to pay the amount awarded by the ALJ by September 8, 2008, amounted to a delay without reasonable foundation; therefore, in accordance with KRS 342.040, he claims entitlement to eighteen percent interest on the delayed payments. Davis argues that Warrior should have continuously paid him from the time his TTD ended in August 2007, until the final judgment was entered by the ALJ, because only the duration of the weekly benefit payments was in dispute, not the amount.

We agree with the Board that "the issue of sanctions and entitlement to 18% interest on all past due benefits was not preserved as an issue to be decided

by the ALJ, either in the BRC [Benefits Review Conference on April 23, 2008] or at the [May 28, 2008] hearing.” Pursuant to 803 KAR 25:010, Section 13(14), “only contested issues shall be the subject of further proceedings.” Davis did not raise the issue of Warrior’s delay without reasonable foundation until September 8, 2008.

Davis contends the issue could not have been raised until the unreasonable delay in payment occurred, which could only occur after the final judgment was entered on July 28, 2008. This contention is somewhat disingenuous since Davis simultaneously argues that by the date of the BRC, he “had been without total temporary disability benefits for eight months[.]”

However, the Board acknowledged that there is authority for the ALJ’s grant of an award of attorney fees in KRS 342.310(1) and KRS 342.040. This suggests that failure to preserve this error by making it an issue at the BRC would not defeat Davis’s claim. Therefore, like the Board, we consider the merits of Davis’s argument.

The Board found that the ALJ’s decision denying Davis’s motions was supported by the record.

Davis’ own doctor, Dr. Beck, assessed a 15% whole person impairment and determined likewise Davis had reached MMI in November 2005. Thus, Warrior would have been justified, pursuant to KRS 342.0011(11)(a), in terminating Davis’ TTD benefits as of November 2005. . . [O]nce Dr. Beck determined Davis had reached MMI in November of 2005, he would have been disqualified from receiving additional TTD benefits.

(Workers' Compensation Board, Opinion Affirming, December 31, 2008, pp. 8-9).

This is substantial evidence supporting the ALJ's denial of Davis's motions.

When reviewing decisions of the Workers' Compensation Board, we will only reverse if the Board has "overlooked or misconstrued law or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797, 798 (Ky. App. 1995). In the case *sub judice*, the Board did not commit such error when concluding that there was no unreasonable delay by Warrior.

We agree with the Board that "it appears the sole reason for Davis' motion is the fact that a check was not received by Davis within a short period AFTER the award became final." (Workers' Compensation Board, Opinion Affirming, December 31, 2008, pp. 9-10; emphasis in original). However, the thirty-day window to file an appeal of the ALJ's decision closed only eleven days before Davis filed his motions. Before that time, Warrior was under no obligation to make any payments based upon the decision of the ALJ. Once the decision became final, Warrior began processing the checks to pay Davis his award. We cannot determine that the Board abused its discretion when, after giving due weight to the record, it determined that less than two weeks is not an unreasonable delay. Therefore, the Board's affirming of the ALJ's denial of Davis's motions was proper.

For the aforementioned reasons, we AFFIRM the Workers' Compensation Board's December 31, 2008 decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas Larry Hicks  
Edgewood, Kentucky

BRIEF FOR APPELLEE, WARRIOR  
COAL, LLC:

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