IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: January 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 2-12-04 ELAG Grant, D.C.

2002-SC-1093-WC

BIG BOTTOM COAL COMPANY — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1346-WC
WORKERS' COMPENSATION BOARD NOS. 87-13854 & 87-4696

LESTER HATFIELD; ROBERT L. WHITTAKER, DIRECTOR OF SPECIAL FUND; HON. RICHARD H. CAMPBELL, JR., ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's second motion to reopen on the ground that he failed to show an increase in occupational disability since he settled his initial claim. In a decision that was affirmed by the Court of Appeals, the Workers' Compensation Board (Board) vacated and remanded the matter for additional findings of fact and conclusions of law. We affirm.

The claimant was born in 1951. Although he completed the eighth grade, a vocational evaluation indicated that he performed at the fourth-grade level in reading and mathematics and at the second-grade level in spelling. He had no specialized or vocational training and had worked for 20 years as an electrician and mechanic in underground coal mines. On November 2, 1986, he injured his back while working and missed nine days of work as a result. On April 28, 1987, he injured his back again.

Lower back surgery was performed in October, 1987, but failed to alleviate his symptoms. Likewise, an April, 1998, surgery failed to do so. Convinced that he was unable to work, the claimant filed applications for workers' compensation benefits. The claims were consolidated, and the parties settled the claims for 83 weeks of temporary total disability and a 50% permanent partial disability. Under the terms of the agreement, the employer agreed to pay a lump sum, and the Special Fund agreed to make periodic payments. It was approved on May 23, 1989.

On April 19, 1991, the claimant moved to reopen on the ground that his condition and occupational disability had worsened since the settlement. The opinion and order by ALJ McDermott noted that although the claimant alleged that his present disability was total, the defendants maintained that he was no more disabled than he had been at the settlement. Then, it stated as follows:

> In summary, we have an individual who, previous to his agreement as to compensation, had had two surgeries performed upon his back and who had not worked since his second work-related incident occurring on April 28, 1987. On January 4, 1989, Dr. Goodman felt that the plaintiff would be unable to return to his former work, although he felt that the plaintiff was capable of eventually being able to work at a supervisory duty or a lighter-type job. As the defendant-employer has pointed out, the plaintiff was also contending, at that point in time, that he could not do any work, and Dr. Shafer had testified before the agreement as to compensation that the plaintiff could not do heavy work or sedentary work for more than a short period of time. Since the agreement as to compensation, the plaintiff has not worked and has also not had any additional surgery. The only diagnostic test apparently taken since the agreement as to compensation was an MRI that Dr. Shafer testified to. This MRI was dated September 21, 1990, and as mentioned above, showed a herniated disc at the L5 and S1 and a desiccated disc at the L4 and L5. This was not attached to her deposition.
>
> 10. After reviewing the lay and medical evidence of record, and exercising the prerogative of the trier of fact to pick and choose amongst the conflicting testimony of the witnesses, Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977), and of drawing reasonable inferences from that evidence which has been introduced, Jackson v. General

> Refractories, Ky., 582 S.W.2d 10 (1979), it shall be my decision that the plaintiff has failed in his burden of proof to show that he has suffered an increase in occupational disability pursuant to KRS 342.125 and applicable case law. The record reflects that the plaintiff alleged he was totally disabled previous to his settlement agreement, and there is medical evidence to also support this position. The defendant-employer's medical evidence, namely that from Dr. Goodman, could have also supported a total award and I am convinced that the plaintiff has not suffered an increase in his occupational disability subsequent to the agreement as to compensation dated April 19, 1989.
>
> Although there has been testimony of a psychological condition, it is my opinion that same has not resulted in an increase in the plaintiff's occupational disability. This conclusion is based upon the testimony of Dr. William Weitzel.
>
> The claimant appealed the decision, but it was affirmed by the Board.

The Board noted that the evidence was conflicting and that it was for the ALJ to determine which evidence to believe. In denying the motion, the ALJ relied upon Dr. Goodman, who testified that the claimant's condition had not changed since the settlement, and upon Dr. Weitzel, who testified that the claimant could return to his former occupation from a psychiatric standpoint. The Board was not convinced that the evidence was such that it compelled a different result.

On December 11, 2000, the claimant filed a second motion to reopen the claim. He alleged that his back pain had increased and that he and his physician had discussed another surgery. He also indicated that he was receiving social security disability benefits. The accompanying medical report indicated that there were degenerative disc changes at L4-5 and L5-S1 and bilateral neural foraminal narrowing at both levels. Although the employer asserted that the claimant was receiving social security disability at the time of the initial motion and that there was no prima facie

showing of increased occupational disability, the motion was sustained to the extent that the taking of further proof was ordered.

The merits of the motion were considered by ALJ Campbell, who determined that the claimant failed to prove a worsening of condition that would permit a permanent total disability award. The opinion stated that ALJ McDermott's decision to deny the first motion implied a finding that the claimant was totally disabled when he settled his claim. ALJ Campbell noted that the decision to deny the first motion was supported by the proof that was presented both at settlement and at the time of the motion. Likewise, it was supported by the claimant's failure to return to work since the injury and his belief that he was totally disabled at that time. Although acknowledging that the claimant's physical condition had worsened due to spinal fusion surgery and to pain, which required him to take "extremely potent analgesic medications," ALJ Campbell concluded that his present disability was no greater than it had been at settlement.

Appealing, the claimant maintained that his occupational disability was 50% at settlement and 100% at the second reopening. In the alternative, he maintained that if the evidence indicated that his disability was total when he settled the claims, an ALJ should not have approved the agreement to settle for a 50% disability. The Board determined that although ALJ McDermott had acknowledged that some of the evidence would have supported a finding of total disability at settlement, nothing in his decision to deny the prior motion amounted to such a finding. Instead, the actual decision was that the claimant failed to meet his burden of proof. Therefore, because ALJ Campbell also failed to make a specific finding concerning the extent of the claimant's occupational

disability at the time of the settlement, the Board vacated the decision and remanded the matter for additional findings of fact and conclusions of law.

Although the employer maintains on appeal that no additional analysis of the evidence was required, we disagree. There is no requirement that "two different methods of analysis" be used at the reopening of settled and fully litigated claims. However, the figure for which a claim is settled is the product of negotiation and may or may not equal the worker's occupational disability at the time. Consistent with this reality, KRS 342.125 provides that no admission of fact in a settlement agreement is binding at reopening. Thus, the difference between a settled and fully litigated final award is that the former contains no judicial findings; whereas, the latter contains findings of fact that are binding at reopening. For that reason, when a settled claim is reopened upon an allegation of increased occupational disability, the ALJ must determine the worker's actual occupational disability at settlement in order to determine whether it has increased. Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999); Newberg v. Davis, Ky., 841 S.W.2d 164 (1992).

ALJ McDermott's opinion acknowledged that the evidence would have supported a total disability award at settlement but contained no clear finding to that effect. Furthermore, the evidence did not compel such a finding. The stated ground for denying the motion was the claimant's failure to meet his burden of proving a post-settlement increase in occupational disability, a ground that did not necessarily imply a finding that the claimant was totally disabled at settlement. Nonetheless, when denying the second motion to reopen, ALJ Campbell determined that the prior decision implied a finding of total disability at settlement and determined that such a finding was

supported by the evidence. He did not make such a finding, himself, or determine that such a finding was compelled. Although the ultimate finding may well be the same on remand, we are persuaded that the Board was correct in concluding that additional findings of fact and conclusions of law are required. Whittaker v. Rowland, supra; Newberg v. Davis, supra.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

A. Stuart Bennett
175 E. Main Street
P.O. Box 2150
Lexington, KY 40588

COUNSEL FOR APPELLEE,
LESTER HATFIELD

Ralph Roland Case
P.O. Drawer 1410
Pikeville, KY 41502

COUNSEL FOR APPELLEE,
ROBERT L. WHITAKER, DIRECTOR OF
SPECIAL FUND:

David W. Barr
Workers' Compensation Funds
1047 U.S. Hwy. 127 South, Suite 4
Frankfort, KY 40601