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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-13-08 EJA Grayson, DC.

2007-SC-000649-WC

SOUTH AKERS MINING — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2007-CA-000534-WC
WORKERS' COMPENSATION BOARD NO. 99-65703

TAMMY CHARLES, INDIVIDUALLY AND/OR
AS THE ADMINISTRATRIX OF THE ESTATE OF
RONNIE CHARLES;
HONORABLE DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal concerns the breadth of an Administrative Law Judge's (ALJ's) authority under Wheatley v. Bryant Auto Service, 860 S.W.2d 767 (Ky. 1993), to reopen a final award based upon an alleged mistake of law.

Following the decision in AIG/AIU Insurance Company v. South Akers Mining Company, LLC, 192 S.W.3d 687 (Ky. 2006), which concerned an unrelated matter, an ALJ granted the employer's motion to reopen in order to correct an alleged mistake in the calculation of survivors' benefits and the additional 15% compensation awarded for the employer's safety violation. The Workers' Compensation Board reversed, holding that the principle of res judicata barred a reopening on the ground of mistake after the

previous appeal. The Court of Appeals affirmed.

Appealing, the employer asserts that Wheatley v. Bryant, supra, and Whittaker v. Cecil, 69 S.W.3d 69, 72 (Ky. 2002), supported the decision to reopen because the ALJ corrected a mistake in applying the law as it existed at the time of the initial award. We disagree. The principle of res judicata barred a subsequent reopening on the ground of mistake because the effect of KRS 342.750(3) on calculating a survivors' award under KRS 342.750(1) was unresolved at the time of the initial proceeding. The parties disputed the method for calculating the survivors' award in the initial proceeding and the employer failed to appeal the unfavorable decision.

Ronnie Charles was killed in a roof fall on September 16, 1999, while working in the defendant-employer's coal mine. In September 2003 the claimants, his widow and dependent child, were awarded a combined $282.22 in weekly survivors' benefits as well as a 15% increase in compensation under KRS 342.165(1) due to the employer's safety violation. They asserted in a petition for reconsideration that KRS 342.750(1)(b) entitled them to combined survivors' benefits equal to 60% of Ronnie's average weekly wage or $369.40. The employer disagreed and responded as follows:

> [KRS 342.750] . . . provides at subsection 3 for a maximum benefits [sic] based on the state average weekly wage. The 1999 maximum for a widow and one child is $365.40. The average weekly wage was stipulated at $613.50, and 45% of that is $276.08 and 15% of that is $92.03. That amounts to a total of $368.11, which then reduces to the maximum payout based on the state's average weekly wage of $365.40. Therefore, benefits are capped at $365.40 . . . . (emphasis original).

Although the ALJ granted the claimants' petition and amended the award, the employer failed to appeal. The sole issue raised in AIG/AIU Insurance Co. v. South Akers Mining

Co., supra, concerned a carrier's liability for the additional 15% compensation under KRS 342.165(1).

On March 24, 2006, the employer filed a motion to reopen on the ground of mistake. Relying on a different portion of KRS 342.750(3) than in 2003, the employer asserted that survivors' benefits must be based on a percentage of the average weekly wage of the state rather than Ronnie's average weekly wage and that the combined survivors' benefit should have been $292.32. Relying on Wheatley v. Bryant, supra, the employer asserted that the method used to calculate the initial survivors' benefit was a mistake of law for which KRS 342.125 authorized reopening. The claimants argued that the employer's failure to appeal the initial calculation precluded reopening, but the ALJ agreed with the employer and amended the award.

In Wheatley v. Bryant, supra at 769, the court determined that an ALJ did not err by reopening a final award that was not appealed in order to correct his admitted mistake in applying the law. The decision relied in part on Stearns Coal & Lumber Co. v. Vanover, 262 Ky. 808, 91 S.W.2d 518, 519 (1936), which explains that a mistake of law may be corrected on reopening "unless the case has been passed on by the court on appeal." In Whittaker v. Cecil, 69 S.W.3d 69, 72 (Ky. 2002), the court addressed the doctrine of res judicata in the context of a reopening based on an alleged mistake of law in the initial award. The court explained that an ALJ may reopen a final award in order to correct a mistake in applying the law as it existed on the date of injury but not to consider a subsequent interpretation of the law. The court reasoned that a corollary to the res judicata doctrine prevents a party from splitting a cause of action. Thus, a final judgment precludes subsequent litigation not only of the issues on which the court

pronounced judgment but also of any sub-issues or other issues that could have been raised with the exercise of due diligence. The court explained that the application of these principles is grounded in the fact that there is an extensive procedure for taking appeals and that an award that is enforceable as a judgment under KRS 342.305 should not be disturbed absent a very persuasive reason.

This is not a case such as Wheatley v. Bryant, supra, in which the ALJ erred by applying a version of KRS 342.730(1) that no longer remained effective on the date of injury. The ALJ noted in the present case that no change in the law occurred after September 30, 2003, and granted the employer's motion, stating that it simply pointed out that the initial award was calculated incorrectly under KRS 342.750. What the ALJ failed to consider is that the effect of KRS 342.750(3) was unresolved in 2003 because no judicial decision had addressed the matter. Moreover, the parties disputed the effect of KRS 342.750(3) on the application of KRS 342.750(1) in the initial proceeding, but the employer failed to appeal the unfavorable decision. At reopening the employer focused on a different portion of KRS 342.750(3) than in the initial proceeding but, nonetheless, raised an argument that could have been raised in the initial proceeding. This is the type of reopening that Stearns Coal & Lumber Co. v. Vanover, supra, precludes and is not the type of reopening that Wheatley v. Bryant, supra, authorizes.

The decision of the Court of Appeals is affirmed.

Minton, C.J.; Cunningham, Noble, Schroder, Scott and Venters, JJ., concur. Abramson, J., not sitting.

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