

RENDERED: FEBRUARY 14, 2003; 2:00 p.m.  
TO BE PUBLISHED

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2002-CA-000580-WC

DINGO COAL COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-79-52015

MCQUADE TOLLIVER; DIVISION OF WORKERS'  
COMPENSATION FUNDS; Successor to  
SPECIAL FUND; DONALD G. SMITH,  
Administrative Law Judge; and WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

EMBERTON, CHIEF JUDGE. Two questions are advanced in this appeal from an opinion of the Workers' Compensation Board: (1) whether the Administrative Law Judge erred in failing to conclude that the December 12, 1996, amendments to KRS<sup>1</sup> 342.125 are remedial, thus falling under the retroactive application criteria set out

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<sup>1</sup> Kentucky Revised Statutes.

in Peabody Coal Company v. Gossett;<sup>2</sup> and (2) whether substantial evidence supported the finding of a change in the claimant's occupational disability. We affirm.

While in the employ of appellant, Dingo Coal, on October 12, 1979, appellee Tolliver sustained a work-related injury that resulted in an award of benefits for an occupational disability of fifteen percent. Tolliver's December 11, 2000, motion to reopen that claim resulted in an increased award of benefits for total occupational disability. Dingo appealed that decision to the Board, which affirmed the increased award in a thorough and well-reasoned opinion.

The employer's primary argument in this appeal centers upon its contention that the ALJ erred in refusing to apply the 1996 amendments to Tolliver's claim. Application of the 1996 amendments would have required Tolliver to show a change in disability by objective medical evidence, rendering it more difficult for him to succeed upon reopening. However, we are convinced that when the purpose of the reopening statute is considered in light of appellant's arguments, it is clear that the 1996 version of the statute cannot legitimately be applied in resolving Tolliver's motion.

As the Board correctly notes, proceedings to reopen focus on the establishment of a change in condition. In

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<sup>2</sup> Ky., 819 S.W.2d 33 (1991).

Stambaugh v. Cedar Creek Mining Company,<sup>3</sup> the court observed that the authority for reopening an otherwise final claim is predicated upon compliance with statutorily prescribed conditions. Therefore, in examining the question of the appropriate version of KRS 342.125 to be applied, we necessarily commence our discussion with the general rule that the law in effect on the date of the injury is controlling.<sup>4</sup> Furthermore, KRS 446.080(3) directs that "[n]o statute shall be construed to be retroactive, unless expressly so declared." Thus, because the legislature did not specifically declare that the 1996 amendments relating to the grounds for reopening set out in KRS 342.125(1) were to be given retroactive effect, they could not be applied to Tolliver's motion unless it can be determined that statutory modification was "remedial" in nature.<sup>5</sup>

Although Dingo argues that it would be patently inconsistent under Gossett to allow Tolliver the benefit of the 1987 amendments to KRS 342.125 and to deny the employer the benefit of the 1996 changes, we cannot agree. There is a clear distinction to be drawn between the purpose of the 1996 amendments to that statute and the 1987 amendments. In

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<sup>3</sup> Ky., 488 S.W.2d 681 (1972).

<sup>4</sup> See Maggard v. International Harvester, Co., Ky., 508 S.W.2d 777 (1974).

<sup>5</sup> See Gossett, supra, and Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109 (1995).

explaining its rationale for holding the 1987 amendments to be remedial and entitled to retroactive effect, the Gossett court emphasized that the purpose underlying the 1987 changes was an effort to bring the standards for reopening in line with the standards utilized in original awards. In other words, they were intended to correct imperfections in the prior law by enacting a procedure which would more effectively accomplish the purpose of existing legislation.<sup>6</sup> The same cannot be said of the 1996 amendments which were part of a general overhaul of the benefits system created by sweeping legislation. They simply do not fit into the Gossett analysis. We, therefore, find no error in the Board's conclusion that the 1996 amendments are not entitled to retroactive application and thus the ALJ applied the proper criteria in considering Tolliver's motion.

As to Dingo's contention that the evidence before the ALJ does not support his finding of increased occupational disability, we are in complete accord with the Board's discussion of the substance of the evidence before the ALJ and his authority in determining the weight, credibility, substance, and inferences to be drawn therefrom.<sup>7</sup> At the very least, the evidence in this case is conflicting and thus, we, like the

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<sup>6</sup> See Zielinski Construction Company v. Burden, Ky., 62 S.W.3d 14, 15 (2001).

<sup>7</sup> Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

Board, must defer to the ALJ's assessment.<sup>8</sup> In sum, our review of this record convinces us that the Board's opinion is not patently unreasonable nor flagrantly implausible, nor is there any indication that the decision will result in a gross injustice.<sup>9</sup>

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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<sup>8</sup> Id.

<sup>9</sup> Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).