

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2002-CA-002155-WC

TERESA B. ROBINSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-96-95593

PIKE COUNTY BOARD OF EDUCATION;  
ROBERT L. WHITTAKER, DIRECTOR OF  
WORKERS' COMPENSATION FUNDS,  
SUCCESSOR TO SPECIAL FUND; HON.  
RONALD E. JOHNSON, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE. Appellant Teresa Robinson petitions for review from a decision of the Workers' Compensation Board (Board) which affirmed a finding by an Administrative Law Judge (ALJ) that appellant was totally occupationally disabled following her

motion to reopen her claim. Appellant's original injury resulted in a 40% permanent partial disability award by the ALJ. The basis of the reopening was a claim of psychiatric impairment resulting from her work injury which was not manifest at the time of the original proceeding. The ALJ found that appellant's psychiatric condition caused an increase in disability of 60%. The ALJ concluded that appellant was now totally disabled. The ALJ further concluded that one-third of the increase, or 20%, was the result of non-work-related causes and would have to be carved out of the award.

Appellant appealed to the Board, which determined that:

Since the ALJ's conclusion that 1/3 of the disability was the result of non-work-related causes, the award should be limited to the remainder of a 520 week period pursuant to KRS 342.730(1)(d) rather than for the remainder of Robinson's disability. Therefore, since 1/3 of the benefits should be excluded, the benefit rate should be 2/3 of \$311.96, or \$207.97. The award should be apportioned equally between the employer and the WCF, with proper credit granted during the period of overlap from the original award.

Appellant argues in her petition that the Board erred in calculating the amount of the carve-out of the award. Appellant states that since the ALJ only found that one-third of the increase of disability of the psychiatric condition was non-work-related, the percentage of the carve-out for non-work

disability was only 20% (1/3 of 60%) and not 33 1/3% (1/3 of 100%). Appellant, therefore, argues that the correct amount of the benefits under the Board's holding was 80% of \$311.96. The function of further review of the Workers' Compensation Board in this Court "is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). We believe that appellant's claim of miscalculation of benefits is a contention that the Board committed a flagrant error in assessing the evidence so as to cause gross injustice. However, we do not conclude that there was an error in this case.

The Workers' Compensation Funds (WCF) counters that the Board's assessment was correct. According to the WCF, in the original award appellant was awarded benefits of \$124.78 per week for a 425 week period. This period has not yet ended. For the remainder of the 425 week period, appellant will also receive benefits for the additional psychiatric occupational disability. During this overlap period, one-third of the addition is excluded as non-work-related, and the percentage of the total award which has been carved out is equivalent to 20%. However, when the period of overlap of the two awards ends, the Board's assessed exclusion of one-third is correct because the

award then only consists of the increase. We believe the Board correctly calculated the award.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE WORKERS'  
COMPENSATION FUND:

Joel D. Zakem  
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BRIEF FOR APPELLEE PIKE COUNTY  
BOARD OF EDUCATION:

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