

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000534-WC

SOUTH AKERS MINING

APPELLANT

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

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

DIXON, JUDGE: South Akers Mining has petitioned this Court for review of a decision of the Workers' Compensation Board reversing and remanding an administrative law judge's (ALJ) award on reopening. The ALJ reduced the amount of death benefits owed

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the widow and child of South Akers's deceased employee, Ronnie Charles. On appeal, the Board reversed the ALJ and remanded for reinstatement of the original award. South Akers contends the Board erred by reversing the ALJ's award on reopening. After an extensive review of the record, we affirm.

Ronnie Charles was killed in a mining accident on September 16, 1999, during the course of his employment with South Akers. Ronnie's widow, Tammy, and their minor son (collectively "the Estate") received voluntary income benefits from South Akers. The Estate requested an increase in income benefits pursuant to KRS 342.165, alleging South Akers intentionally violated a safety regulation which contributed to Ronnie's death. South Akers denied an intentional safety violation, and its workers' compensation insurer, AIG Insurance, separately responded that it was not liable for payment of a statutory safety penalty. The ALJ determined an intentional safety violation occurred and issued an opinion on September 30, 2003, awarding enhanced benefits to the Estate.

The Estate petitioned the ALJ for reconsideration of the award, arguing there was an error in the ALJ's calculation of benefits. The Estate claimed the award should have been calculated based on Ronnie's average weekly wage at the time of his death, for an aggregate award of \$423.33 per week. South Akers argued KRS 342.750(3) limited death benefits based on the average weekly wage of the state, which was \$365.40 in 1999. The ALJ issued an order on reconsideration modifying the award pursuant to the Estate's calculations, which also included the 15% safety violation enhancement

under KRS 342.165. South Akers did not appeal this issue to the Board; however, AIG Insurance appealed and argued it was not liable for payment of the safety enhancement. The decision of the ALJ finding AIG Insurance responsible for the safety enhancement was affirmed by the Board, by a panel of this Court, and ultimately by the Kentucky Supreme Court in *AIG/AIU Ins. Co. v. South Akers Mining Co., LLC*, 192 S.W.3d 687 (Ky. 2006).

On March 24, 2006, South Akers filed a motion to reopen the award on the basis of mistake pursuant to KRS 342.125(1)(c). South Akers argued the ALJ's award to the Estate in excess of the average weekly wage of the state contravened the plain directive of KRS 342.750(3). Over the objection of the Estate, the ALJ granted reopening and modified the award based on South Akers's calculations. The Estate appealed, and the Board reversed the ALJ's order, finding the issue was *res judicata*. This appeal followed.

South Akers contends that *res judicata* does not bar reopening the award in this case, and the Board's decision reversing the ALJ misconstrued the law.

It is well-settled that the doctrine of *res judicata* applies in the context of workers' compensation awards:

A basic part of our legal system is the doctrine of finality of judgments or awards. Once the claims or rights of a litigant have been determined, the matter should end. We have an extensive appeal procedure which allows, as a matter of right, the review of any judgment. When that judgment then becomes final, it should remain final unless there was fraud, mistake or a very persuasive reason why the judgment should be disturbed.

Keefe v. O. K. Precision Tool & Die Co., 566 S.W.2d 804, 805 (Ky. App. 1978).

However, KRS 342.125 vests the ALJ with authority to reopen a final award in certain enumerated circumstances, including on the basis of “mistake.” KRS 342.125(1)(c).

South Akers cites *Wheatley v. Bryant Auto Service*, 860 S.W.2d 767 (Ky. 1993), for the proposition that, where the original award contains an erroneous calculation of benefits, the ALJ has the authority to reopen the award and correct the error of law. *Wheatley* held,

[h]ere we believe that the ALJ was acting properly and in the interest of justice when he availed himself of the statutory remedy set out in KRS 342.125 to correct his admitted mistake in applying the law in this compensation proceeding, just as could have been done under CR 60.02 had it been a civil proceeding.

Id.

In the case before us, however, we are unable to reconcile the ALJ's authority to reopen with the undisputed fact that, in its response to the Estate's petition for reconsideration, South Akers argued that the calculation was erroneous. The ALJ's order on reconsideration interpreting KRS 342.750 to allow benefits greater than the average weekly wage of the state presented an issue South Akers could have appealed to the Board. KRS 342.285(1). Instead, South Akers waited nearly three years to reopen the award on the basis of mistake pursuant to KRS 342.125(1)(c). As such, we are not persuaded by South Akers's argument that the facts presented here constitute a “mistake” for the purposes of reopening the award.

In *Whittaker v. Cecil*, 69 S.W.3d 69 (Ky. 2002), the Court addressed the implications of *res judicata* when an employer sought to reopen on the basis of mistake. The Court ultimately denied relief and advised that the employer's claim of error “involved a question that could have been foreseen when the award was entered, that should have been raised with the exercise of due diligence, and that is properly viewed as coming within the decision on the merits.” *Id.* at 73. We find the same reasoning applicable in the instant case. We acknowledge the availability of KRS 342.125(1)(c) as an error-correcting tool similar to CR 60.02. However, under the circumstances presented here, we find KRS 342.125(1)(c) should not provide South Akers with the opportunity to circumvent the established appellate procedure in a workers' compensation case.

For the reasons stated herein, the decision of the Workers' Compensation Board reversing and remanding the order of the ALJ is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE

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