

RENDERED: April 18, 1997; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 95-CA-3115-WC (DIRECT)

SEWELL ROOFING, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
WC-94-17545

ALVIS COLLINS; A-B ROOFING; WILLIAM O.  
WINDCHY, Acting Director of the  
Special Fund; UNINSURED EMPLOYERS' FUND;  
and WORKERS' COMPENSATION BOARD

APPELLEES

AND NO. 95-CA-3343-WC (CROSS-APPEAL)

WILLIAM O. WINDCHY, Acting Director  
of the Special Fund; and ALVIS COLLINS

CROSS-APPELLANTS

v. CROSS-PETITION FOR REVIEW OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
WC-94-17545

SEWELL ROOFING, INC.; A-B ROOFING;  
UNINSURED EMPLOYERS' FUND; ROGER D.  
RIGGS, Administrative Law Judge;  
and WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION and  
ORDER DISMISSING

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BEFORE: WILHOIT, Chief Judge; ABRAMSON and EMBERTON, Judges.  
EMBERTON, JUDGE. This case arises from a workers' compensation  
claim filed by the appellee, Alvis Collins.

Collins, while employed by a Florida roofing company, sustained a back injury. In 1993, he returned to Kentucky and began work for the appellee, A-B Roofing, and in May 1993, injured his right arm. In July 1993, Collins was employed by the appellant, Sewell Roofing. While in Sewell's employ, Collins fell from a roof and injured his right shoulder.

The ALJ found that Collins suffered an 80% occupational disability, 40% of which was attributed to the injury suffered while employed by A-B. The remaining 40% was found to be noncompensable as pre-existing and active prior to Collins' employment with A-B. No liability for permanent disability was attributed to the injury sustained while in the employ of Sewell and the Special Fund was dismissed as a party.

A-B appealed contending that the ALJ's finding that Collins sustained a 40% occupational disability as a result of the May 1993, injury and no disability as a result of the August 1993, injury was not supported by substantial evidence. Collins did not appeal the ALJ's decision.

The Board reviewed the record and found that the ALJ's assessment of liability for Collins' injury was based on an erroneous understanding of the evidence. Specifically, the Board stated:

The medical evidence in Collins' case does not compel a finding that the second injury was merely an aggravation of the first injury as in Calloway County Fiscal Court v. Winchester, Ky. App., 577 S.W.2d 216 (1977). We conclude that this claim is governed by

the holding in Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., Ky. App., 618 S.W.2d 184 (1981), and, to the degree that the ALJ had an erroneous understanding of the evidence, requires that this claim be remanded for further consideration and apportionment of liability between A-B, Sewell and the Special Fund. Whitaker v. Peabody Coal Co., Ky., 788 S.W.2d 269 (1990); Cook v. Paducah Recapping Service, supra.

Accordingly, the Opinion and Award rendered by Hon. Roger D. Riggs, Administrative Law Judge, is hereby **REVERSED** and this claim is **REMANDED** to the ALJ for further consideration consistent with this Opinion.

The Board's order is not a final judgment or order within the meaning of Ky. R. Civ. P. (CR) 54.01. It did not "adjudicate the rights of any of the parties, requires no additional evidence to be taken, does not terminate the action or operate to divest any party of some right." Wagoner v. Mills, Ky. App., 566 S.W.2d 159 (1977).

The appeal and cross-appeal are therefore ordered dismissed.

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ENTERED: April 18, 1997

/s/ Thomas D. Emberton  
JUDGE, COURT OF APPEALS

BRIEF FOR SEWELL ROOFING:

Bennett Clark  
Lexington, Kentucky

BRIEF FOR A-B ROOFING:

James B. Cooper  
Steven G. Kinkel  
Lexington, Kentucky

BRIEF FOR ALVIS COLLINS:

L. Davis Bussey  
Lexington, Kentucky

BRIEF FOR SPECIAL FUND:

Joel D. Zakem  
Labor Cabinet  
Louisville, Kentucky