

RENDERED: July 2, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-2934-WC

WAL-MART STORES, INC.

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-94-045960

LENA MCKINNEY;
MAHLIAN GRINSTEAD;
HON. DONNA TERRY,
CHIEF ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

* * *

BEFORE: GARDNER, HUDDLESTON, AND KNOX, JUDGES.

KNOX, JUDGE: Wal-Mart Stores, Inc. (Wal-Mart), appeals from the ruling of the Workers' Compensation Board (Board) that claimant Lena McKinney (McKinney) timely filed her motion to reopen her claim, and was not precluded from doing so by operation of KRS 342.125(1)(d) and (3), as amended December 12, 1996.

In February 1994, while employed by Wal-Mart, McKinney sustained bilateral carpal tunnel syndrome. She and Wal-Mart

settled that claim based upon a 40% occupational disability which was approved by Hon. Donna H. Terry, Chief Administrative Law Judge (CALJ), by ordered entered May 21, 1996.

On October 14, 1996, McKinney filed a motion to reopen pursuant to KRS 342.125. On December 5, 1996, Administrative Law Judge Roger D. Riggs (ALJ) entered an order directing McKinney to submit a physician's affidavit relating to the worsening of her medical condition and a current medical release. The ALJ's order further provided that, in the event those materials were not submitted within twenty (20) days from the date of the order, McKinney's motion to reopen would be overruled. On December 26, 1996, McKinney filed a second motion to reopen, attaching the affidavit of Andrew Moore, M.D., "in compliance with the Administrative Law Judge's Order of December 5, 1996" On February 18, 1997, Administrative Law Judge James L. Kerr issued an order directing McKinney to submit an affidavit from a physician "relating to a worsening in medical condition" and a current medical release before the motion to reopen could be ruled upon. That order directed McKinney to furnish those materials within twenty days, or otherwise her motion to reopen would be overruled. On February 26, 1997, McKinney filed a third motion to reopen, attaching to that motion another affidavit from Dr. Moore and a current medical release.

On April 24, 1997, Chief Arbitrator E. Mahlian Grinstead issued an order overruling McKinney's motion to reopen. That order states, in part:

[T]he brief affidavit filed by Dr. Andrew Moore, II simply is not sufficient to establish a prima facie case for reopening in that it establishes no causation for plaintiff's current condition and does not state any degree of specificity in what respect her condition has worsened nor did it address any of the prior current physical requirements of that job.

The arbitrator's order was appealed to the CALJ. In her order affirming the arbitrator's decision overruling McKinney's motion to reopen, the CALJ stated her belief "that McKinney has established at least a minimal prima facie showing of change of condition and change in occupational disability" However, the CALJ ruled that KRS 342.125, as amended December 12, 1996, prohibited McKinney from reopening her claim until two years following May 21, 1996, the date the settlement agreement entered into by Wal-Mart and McKinney was approved by the ALJ. In her order, the CALJ noted: "In October, 1996 McKinney attempted to reopen the claim, alleging a worsening of condition. Subsequent motions were filed after Administrative Law Judges ruled on procedural deficiencies, and the instant motion was filed with the Department of Workers' Claims on February 26, 1997."

McKinney appealed the CALJ's decision to the Board. The Board, in reversing the CALJ's decision, ruled that, on October 14, 1996, the date McKinney first filed her motion to reopen, McKinney had a vested right "based upon a potential increase in occupational disability resulting from a change in occupational disability as provided in KRS 342.125(1)." The

Board held that the CALJ erroneously applied the December 1996 amendment of KRS 342.125, rather than the pre-amended version in effect on October 14, 1996¹.

Appellant raises two arguments: (1) the Board erred in failing to recognize the CALJ's determination that McKinney's motion to reopen was filed on February 26, 1997; and, (2) the Board erred in failing to apply KRS 342.125, as amended in December 1996, to McKinney's motion to reopen.

KRS 342.125(3) and (8), as amended effective December 12, 1996, state:

- (3) Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, or within two (2) years of such award or order, and no party may file a motion to reopen within two (2) years of any previous motion to reopen by the same party.
- (8) The time limitation prescribed in this section shall apply to all claims irrespective of when they were incurred, or when the award was entered, or the settlement approved. However, claims decided prior to December 12, 1996, may be reopened within four (4) years of the award or order or within four (4) years of December 12, 1996, whichever is later, provided that the exceptions to reopening established in subsections (1) and (3) of this section shall apply to these claims as well.

¹The pre-amendment version provided that a motion to reopen may be made at anytime, with no time limitation.

Wal-Mart argues that the Board erroneously found, contrary to the CALJ's finding that McKinney's motion to reopen was filed on February 26, 1997, that McKinney's motion to reopen was filed on October 14, 1996. McKinney, on the other hand, argues that the Board's finding is supported by the evidence.

In reading the opinion affirming the arbitrator, it appears the CALJ concluded, without articulating reasons, that McKinney's motion to reopen was filed with the Department of Workers Claims on February 26, 1997. Ultimately, the CALJ ruled that the December 1996 amendment to KRS 342.125(3) applies to McKinney's motion, and does not permit reopening less than two years following the approval of the settlement agreement entered into by McKinney and Wal-Mart on May 21, 1996.

On the other hand, the Board appears to have clearly determined that McKinney's motion to reopen was filed, not in February 1997, but in October 1996. From that, the Board concluded McKinney had acquired a vested right or status on that date, and "the standard required to be utilized by both the Chief Arbitrator and the CALJ was whether McKinney's motion and affidavits constituted a prima facie showing of change in occupational disability for reopening." Board's opinion of October 1997. The Board ruled that KRS 342.125, prior to the December amendment, applied, and thus permitted McKinney's motion to reopen.

The decisions of both the CALJ and the Board appear to be premised upon their perceptions as to the date upon which

McKinney filed her motion to reopen. The CALJ has taken the position that McKinney filed her motion after the effective date of the amendment to KRS 342.125, and therefore that statute applies to prohibit her claim since it was filed within two (2) years from the date of her settlement with Wal-Mart. On the other hand, the Board's position is that McKinney filed her motion to reopen in October 1996, prior to the effective date of the December amendments, and therefore the pre-amendment version of KRS 342.125 applies to permit McKinney's claim.

Even though the CALJ and the Board appear to disagree about the date upon which McKinney filed her motion to reopen, in view of McKinney's argument that she acquired a vested status under the pre-December 1996 amendment to KRS 342.125 based upon the date of her settlement agreement with Wal-Mart, we believe the pivotal issue in this case is whether the 1996 amendment of KRS 342.125 is remedial and whether it has retroactive application.

KRS 342.0015, effective December 12, 1996, reads:

The substantive provisions of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall apply to any claim arising from an injury or last exposure to the hazards of an occupational disease occurring on or after December 12, 1996. Procedural provisions of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall apply to all claims irrespective of the date of injury or last exposure, including, but not exclusively, the mechanisms by which claims are decided and workers are referred for medical evaluations. The provisions of KRS 342.120(3), 342.125(8), 342.213(2)(e), 342.265, 342.270(7), 342.320, 342.610(3), 342.760(4), and 342.990(11) are remedial.

According to the express language of KRS 342.0015, KRS 342.125(8) is remedial in nature. However, McKinney argues that KRS 342.125(3) cannot be applied to prevent her from reopening her claim within two (2) years from the date of her injury, because to do so would take away her vested right to reopen her claim at anytime, a right she acquired on the date of her injury or when she filed her October 1996 motion to reopen. Further, McKinney argues that, to the extent her motion to reopen may be considered to have been filed in October 1996, KRS 342.125 as amended was not intended by the legislature to apply to claims in which motions to reopen were filed prior to the amendment's effective date.

In Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991), our highest Court addressed whether a 1987 amendment to KRS 342.125, which altered the standard for reopening from a change of "condition" to a change of "occupational disability," had retroactive application. The Court ruled that the statute, as amended, was remedial in nature. Addressing the argument that the amended statute could not be retroactively applied, a position with which it ultimately disagreed, the Court cited with approval this language from 73 Am Jur 2d Statutes § 354 (1974):

A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. Therefore, despite the existence of some contrary authority, remedial statutes, or statutes relating to remedies or modes of procedure, which do not

create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. In this connection it has been said that a remedial statute must be so construed as to make it effect the evident purpose for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty.

Peabody Coal Co., 819 S.W.2d at 36. See also Miracle v. Riggs, Ky. App., 918 S.W.2d 745 (1996).

In this case, the effect of the amendment is to define the time period within which motions to reopen may be brought. While McKinney argues that she acquired vested rights to additional benefits on the date of her injury, or at the latest, when she filed her October 1996 motion to reopen, both events being prior to the effective date of the December amendments to KRS 342.125, we do not agree.

First, the express language of KRS 342.125(8) applies KRS 342.125(3) to all pending claims, clearly evincing the legislature's intent to do so. Further, KRS 342.0015 specifically manifests the legislature's intent that KRS 342.125(8) is remedial in nature. Although we cannot find any Kentucky authority directly on point, other courts have held that the imposition of limitation periods for the reopening of workers' claims do not affect any vested rights of a worker. In

Oestreich v. Department of Labor And Indus., 64 Wash. App. 165, 168, 822 P.2d 1264, 1266 (1992), the court said:

However, the imposition of a limitation period for making claims for adjustment of workers' compensation benefits is remedial and does not affect any vested rights of an injured worker (citations omitted). A claimant has no vested right to make future applications for adjustment based on aggravation of his condition (citations omitted).

In a similar vein, a Pennsylvania court said:

No one has a vested right in a statute of limitations or other procedural matters. So long as there is no omission of a remedy for the enforcement of a right for which a remedy existed when the right accrued, a want of due process is in no way involved.

Primoli v. Philadelphia Bronze & Brass Corp., 211 Pa. Super. 224, 229, 238 A.2d 29, 32 (1967), (quoting Vetrulli v. Wallin Concrete Corp., 144 Pa. Super. 73, 18 A.2d 535 (1941)).

Considering those authorities, we conclude that the 1996 amendments of KRS 342.125, by establishing a limitations period for reopening claims, is remedial or procedural in nature, and does not deprive McKinney of a vested right or status, regardless whether her claim was filed in October 1996 or February 1997.

Since neither the Board nor the CALJ articulated findings with respect to the dates each perceived McKinney's motion to reopen to have been filed, we do not address that question. Rather, we leave that issue to be determined specifically upon any refiling by McKinney to reopen her claim.

For the foregoing reasons, we reverse the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR LENA MCKINNEY:

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