RENDERED: November 6, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1998-CA-000789-WC

RICHARD HAWKINS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-023994

BILLY RAY CARROLL CONSTRUCTION;
HON. ROBERT L. WHITTAKER,
Director of SPECIAL FUND;
HON. IRENE STEEN,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GARDNER and MILLER, Judges.

MILLER, JUDGE. Richard Hawkins (Hawkins) asks us to review an opinion of the Workers' Compensation Board (Board) rendered October 27, 1997. Ky. Rev. Stat. (KRS) 342.290. We affirm.

On May 23, 1994, Hawkins was injured in a work-related accident while in the employ of Billy Ray Carroll Construction Company (Carroll). Hawkins was forced to jump from a Carroll truck after it stalled and began to roll over the side of a mountain. He sustained numerous injuries as a result of the fall. Hawkins filed for benefits under the Workers' Compensation

Act (KRS 342.000 et seq.) based upon those injuries as well as coal workers' pneumoconiosis. The administrative law judge (ALJ) found him to be 40% occupationally disabled as a result of a shoulder injury sustained in the accident. Hawkins appealed to the Board, which, in turn, affirmed the ALJ's decision. This appeal followed.

Hawkins first complains that the ALJ erred when he dismissed his coal workers' pneumoconiosis claim. The ALJ's opinion dismissed the claim based on Hawkins's failure to prove injurious exposure while in the employ of Carroll. To the contrary, Hawkins maintains that his testimony *was* sufficient to prove injurious exposure. He testified that he was exposed to a significant amount of coal dust throughout his employment. Additional evidence, however, reflects that all of Hawkins's coal mining experience with Carroll was above-ground. Further, no medical evidence was presented to address the issue of injurious exposure. As such, we do not believe the evidence compelled a different result. See Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (1984).

Hawkins's next complaint concerns the ALJ's failure to make findings of fact regarding his alleged stomach problems. The Board held that because Hawkins failed to file a petition for reconsideration under KRS 342.281 requesting such findings, the error is not preserved. Hawkins maintains that a petition for reconsideration in such circumstances is not necessary and the error of which he complains is still preserved.

We agree with the Board's disposition of this issue and

adopt such herewith:

> KRS 342.281 provides that a party may file a petition for reconsideration within 14 days of the date of an award in order to request correction of errors patently appearing upon the face of the opinion. Prior to December 12, 1996, KRS 342.281 provided, "The failure to file a petition for reconsideration shall not preclude an appeal on any issue." That sentence was removed from the statute in the 1996 amendments to KRS Chapter 342. In Smith v. Dixie Fuel Co., Ky., 900 S.W.2d 609 (1995), it was held that the 1994 amendment to KRS 342.281 inserting this language was a procedural change. It therefore follows that the 1996 amendment deleting this language is also procedural. KRS 342.0015 provides that the procedural provisions of the 1996 Act "shall apply to all claims irrespective of the date of injury or last exposure." We believe that the effect of the amendment deleting the above-mentioned sentence from KRS 342.281 is to reinstate the Supreme Court's holding in Eaton Axle Corp. V. Nally, Ky., 688 S.W.2d 334 (1985), which provides that errors appearing patently on the face of the award must be brought to the ALJ's attention in a petition for reconsideration and that failure to do so precludes that issue from being raised on appeal to this Board. Failure to make a required finding of fact is an error patently appearing upon the face of the opinion. Wells v. Ford, Ky., 714 S.W.2d 481 (1986). Hawkins failed to properly preserve this issue; . . .

Hawkins next contends that the ALJ erred by finding that the neck, back, and testicular injuries he suffered in the accident did not result in occupational disability. Having reviewed the record, we perceive no error by the ALJ on this issue. Dr. Andrew Morfesis, Hawkins's treating physician, did not diagnose Hawkins with back pain syndrome until two years after the work-related injury. An EMG and an MRI of the cervical spine were found to be normal. Drs. Ben Kibler and David Muffly testified that Hawkins's neck pain could merely be referred pain

from his shoulder. Further, Dr. Muffly testified that Hawkins could return to his previous employment as an equipment operator or coal truck driver. Regarding Hawkins's injured testicle, Dr. Richard Lotenfoe testified that although it had atrophied and was somewhat tender, Hawkins's pain was not severe. Dr. Charles Ray believed it highly unlikely that Hawkins could not carry out routine work activities as a result of this malady. Upon the whole, we do not believe the evidence compelled a different finding. See Wolf Creek Collieries, 673 S.W.2d 735.

Last, Hawkins maintains that the ALJ erred by finding that Carroll was not in violation of safety regulations.[1] Hawkins advances the theory that the truck's auxiliary steering pump was missing at the time of the accident. In support thereof, he testified that he examined the truck's wreckage approximately three weeks after the incident and discovered that the auxiliary steering pump was missing. Hawkins, however, testified that he was not a mechanic but was trained only to check the tires and fluid levels in the truck. Moreover, Carl Dale Johnson, another Carroll employee, testified that the truck in question could not have been driven without the auxiliary pump.

In further support of his allegation of safety violations, Hawkins avers that Carroll failed to maintain adequate berms on the road where the accident occurred. Carroll's owner, however, testified that on the day of the

[1]Such a finding would have entitled Hawkins to a 15% increase in benefits. Kentucky Revised Statute 342.165.

accident, berms were present on the road in question. He stated that the berms were created when dirt was dumped on the road and leveled by a bulldozer. The only regulation that Hawkins proffers pertaining to berms is 30 Code of Federal Regulations § 77.1605(k), which states that "[b]erms or guards shall be provided on the outer bank of elevated roadways." He refers us to no law mandating that the berms be of a particular size. As such, we do not believe Hawkins presented sufficient evidence to compel a finding that Carroll committed safety violations. See Id.

Under the precepts of Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), we perceive no error in the Board's construction of the law or its assessment of the evidence.

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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