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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003109-WC

ROBERT L. WHITTAKER, Director of
SPECIAL FUND — APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC96-92580

TOMMIE LEE TERRY; ABM COAL COMPANY (insured by Wausau); ABM COAL COMPANY (insured by Orion); IRENE STEEN, Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

AND

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Insurance of Wausau) — APPELLANT

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ACTION NO. WC96-92580

TOMMIE LEE TERRY; HON. IRENE STEEN, Administrative Law Judge; ABM COAL COMPANY; ABM COAL COMPANY (insured by Orion of Hartford); ROBERT WHITTAKER, Director of SPECIAL FUND; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: COMBS, EMBERTON, and McANULTY, Judges.

COMBS, JUDGE: This matter is before us on a petition for review of an order entered by the Workers' Compensation Board (Board) which affirmed in part and vacated and remanded in part an administrative law judge's (ALJ's) opinion and award. For the reasons stated hereafter, we affirm in part, reverse in part, and remand.

Tommie Lee Terry, the appellee, was employed by ABM Coal Company (ABM) for many years. While lifting some equipment in August 1989, Terry suffered the onset of low back pain. Terry was not hospitalized, but he missed work for a time and received medical treatment from Dr. James R. Bean. A herniated disc was diagnosed at the L4-5 level. Terry did not receive income benefits as a result of this incident.

Eventually, Terry was released to work on light duty. When he reported back to work, however, he performed the same duties as he had before. He experienced intermittent episodes of back pain; he missed work periodically and took vacation time to rest his back. He was also prescribed a variety of pain medication.

Terry continued to work at his regular job until May 11, 1994, when he again felt the onset of severe pain while pulling on miner cable. Terry was hospitalized following this incident. He was again treated by Dr. Bean, who diagnosed a newly herniated disc at the L3-4 level. Dr. Bean noted that Terry was experiencing low back pain with increased frequency because of the degenerative disc condition. Terry was paid temporary total disability benefits from May 12, 1994, until June

6, 1994. Eventually, he was released back to work. Although he returned to work performing the same tasks as before, he became weaker and suffered more back pain. He was paid temporary total disability benefits again from November 1, 1994, until November 6, 1994.

On April 1, 1996, Terry felt the onset of severe low back pain again while pulling on miner cable. He testified that following this onset of pain, he could barely stand. Terry did not return to work following this incident. He underwent back surgery in May 1997, and he now takes prescribed pain medication daily. Terry says that the surgery did not relieve his pain and that additional surgery has been recommended.

On November 1, 1996, Terry filed his claim for workers' compensation benefits. Terry's claim listed the injury of April 1996 — as well as the earlier injuries of August 1989 and May 1994. On February 4, 1997, ABM filed a special answer, asserting that Terry's claim was barred by the two-year period of limitations set forth at KRS 342.185. As discussed at a prehearing conference, one of the issues to be decided by the ALJ was whether the incidents of 1989, 1994, and 1996 were separate and distinct injuries; if so, the critical issue was whether a claim for benefits stemming from the 1989 incident was time-barred.

After giving extensive summaries of the lay and medical evidence submitted by the parties in this claim, the ALJ made the following relevant findings:

> Based upon the record herein, it is the finding of this ALJ that Plaintiff is 100% occupationally disabled

under the guidelines of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968) which is still the case law prevailing for the injuries herein. The big question is who is to pay for Plaintiff's award, and is the 1989 injury indeed barred by the statute of limitations. Based upon the entirety of the record and in going through the medical testimony carefully, I do find that, although plaintiff did return to work subsequent to both the 1989 and 1994 injuries, Plaintiff's back never returned to the pre-1989 condition and that, in fact, he pretty well worked in pain ever since that time. It is clear that he was diagnosed with a herniated disc by Dr. Bean already at the time of the 1989 incident, but that apparently Dr. Bean felt he was too young at that time to have surgery and, thus, treatment only consisted of conservative modalities and pain medication. The record is clear, and Plaintiff's testimony indicates, that he continued to work in pain and was on and off work periodically, some of which was paid using his own vacation time. This scenario continued until the 1994 injury, when Plaintiff had an exacerbation of this previous condition, and he was again paid TTD benefits on and off during 1994, the last apparently having been paid on November 6, 1994. The record reflects that Plaintiff's claim was filed on November 1, 1996 and, therefore certainly the 1989 and 1994 claims would be within the statute of limitations. The record is further clear that Plaintiff's back continued to become progressively worse subsequent to this return to work following the 1994 episode, and he finally got [to] the point where he was no longer even able to drive to work some 7 to 8 months prior to the 1996 incident, having to rely upon a co-worker for transportation. It does, in fact, appear from the record that subsequent to the 1994 injury, Dr. Bean had actually recommended surgery, knowing Plaintiff's back condition from previous times, but then changed his mind apparently after he saw the MRI, now telling Plaintiff that he had actually waited too long to have the surgery. It appears from Plaintiff's testimony that he was rather confused about Dr. Bean's attitude regarding the surgical intervention. The record has reflected that Plaintiff, subsequent to the 1994 injury, had now developed a herniated disc at the L3-4 level on top of the herniated L4-5 disc which had occurred in 1989. In further looking at the medical records from Plaintiff's treating physician, Dr. Stoltzfus, it appears that it certainly was his opinion that Plaintiff's back had continued to deteriorate and the 1996 incident was a mere exacerbation of the earlier problems. . . . All other physicians, except Dr. Muffly, seem to basically agree with that assessment. In fact, Dr. Brassfield, who was the treating neurosurgeon, felt that Plaintiff's diagnostic

> testing, in fact, did not show any appreciable changes between the 1994 and the 1996 situations. I find that the 1996 incident was not an injury of appreciable proportions but a mere continuation of Plaintiff's earlier problems. I find that Plaintiff shall be entitled to total disability benefits based upon his 1996 average weekly wage.

ABM, insured by Employers Insurance of Wausau, appealed, asserting that the ALJ erred by failing to find: (1) that Terry's claim for benefits was barred by the period of limitations; and (2) that the April 1, 1996, injury was a separate and distinct injury sustained while Orion Insurance of Hartford was covering the risk. Additionally, ABM argues that the ALJ erred by finding that Terry was totally disabled.

The Special Fund also appealed. It agreed with ABM that some — if not all — of Terry's claim for benefits was barred by the period of limitations; that the ALJ erred by treating this claim as one involving a wear-and-tear injury process rather than three separate and distinct injuries; that the ALJ erred by awarding benefits at the maximum rate for a 1996 injury; and finally, that the ALJ erred by failing to provide for a tier-down of benefits in accord with KRS 342.730(4). The Board rejected all but the last of these arguments, affirming the decision of the ALJ but remanding the matter for a tier-down of benefits. This appeal followed.

ABM and the Special Fund advance the same arguments here as were presented to the Board. We shall first consider whether the ALJ erred by concluding that Terry's claim had been timely filed.

The Prehearing Order and Memorandum entered in this case specifically provided that the parties would contest whether the incidents of 1989, 1994, and 1996 constituted separate and discrete injuries. Thus, we cannot agree with the appellants' argument that the parties had stipulated that the injuries were separate and distinct. Moreover, the medical evidence supports the ALJ's specific finding that the 1996 injury was an exacerbation of Terry's earlier condition. We conclude that the ALJ did not err in treating this claim as one for gradual injury.

However, we are compelled to address this case in light of the Kentucky Supreme Court's recent pronouncements in Alcan Foil Products v. Huff, No. 98-SC-678-WC, 1999 WL 401886 (Ky., Jun. 17, 1999), with respect to whether the period of limitations set forth in KRS 342.185 began to run on Terry's claim in August 1989.

In Alcan, the Supreme Court considered whether an ALJ properly determined that each of three workers' claims arose when each worker became aware that he had sustained a significant hearing loss caused by work and consequently that each claim was barred by the two-year period of limitations. In reaching its decision to affirm the ALJ, the court re-visited the reasoning of Randall Co. v. Pendland, Ky. App., 770 S.W.2d 687 (1989).

The Pendland Court recognized that an injury resulting from the cumulative effect of minitrauma develops gradually and that a worker does not become aware that a work-related injury has been sustained until the injury manifests itself in the form of physically and/or occupationally disabling symptoms. Thus,

the Pendland court defined a rule of discovery for purposes of notice and the statute of limitations.

In Alcan, the Kentucky Supreme Court noted that the worker in Pendland "discovered" her injury when she experienced disabling symptoms of pain. The worker's manifestation of physical and occupational disability (and the activation of the running of the period of limitations) coincided temporally. However, because the facts surrounding the Alcan workers' claims indicated that the workers "discovered" their physical disabilities more than two years before their claims were filed, the Supreme Court re-focused on the phrase "manifestation of disability" as used in Pendland. In construing anew the definition of "manifestation of disability," the Supreme Court scrutinized whether it refers "to the physical disability or symptoms which cause a worker to discover that an injury has been sustained or whether it refers to the occupational disability due to the injury." Alcan at 11. The court concluded that the phrase should pertain to the worker's initial awareness or discovery that an injury had been sustained, expressly stating:

> Nothing in Pendland indicates that the period of limitations should be tolled in instances where a worker discovers that a physically disabling injury has been sustained, knows it is caused by work, and fails to file a claim until more than two years thereafter simply because he is able to continue performing the same work. We also note that a worker's ability to perform his usual occupation is not dispositive of whether he has sustained an occupational disability. Contrary to the view expressed by the Board and the Court of Appeals, a worker is not required to undertake less demanding work responsibilities or to quit work entirely in order to establish an occupational disability.

Alcan at 12. (Footnote and citations omitted).

In evaluating the ALJ's determination that the workers' claims were barred by the period of limitations, the Supreme Court noted that the workers had been aware of their work-related disability for many years before their claims were filed. It noted that the medical evidence established that the level of impairment had been in existence for more than two years before the claims were filed and had not changed since that time. Finally, the court noted that the work restrictions which had been imposed at the time of litigation would have been imposed more than two years before the claims were filed if the workers had sought medical advice at that time. As a result, the ALJ's dismissal of the workers' claims was affirmed.

Applying the reasoning of Alcan to the facts of this case, it would appear — as the appellants maintain — that Terry's disabling, work-related back condition first manifested itself more than two years before the claim was filed. Importantly, however, the ALJ also determined that Terry's receipt of TTD benefits following the incident in 1994 served to toll the period of limitations.

In her opinion and award, the ALJ specifically determined that the TTD benefits paid to Terry in 1994 were made by Wausau in connection with Terry's back problems stemming from both the 1989 and 1994 incidents. Provisions of KRS 342.185 extend the period of limitations, requiring that an application for adjustment of claim be filed within two years following the suspension of voluntary payment of income benefits to the claimant. The last payment of TTD was made on November 6, 1994.

Terry's claim was filed on November 1, 1996 — falling within two years of the last voluntary payment of income benefits. Consequently, we affirm the Board's conclusion that the claim was not barred by the period of limitations.

Additionally, neither of the appellants has challenged the Board's conclusion that ABM failed to file a Form SF-1, First Report of Injury, as required by KRS 342.038, following the 1989 and 1994 incidents. The failure of ABM to comply with the notification requirements of the statute meant that the Board did not notify Terry of his right to prosecute a claim and the time frame in which he had to file a claim under the Workers' Compensation Act. The burden of loss in such a case is properly placed on the employer. KRS 342.040. See Colt Management Co. v. Carter, Ky. App., 907 S.W.2d 169 (1995); Ingersoll-Rand Co. v. Whittaker, Ky. App., 883 S.W.2d 514 (1994). The employee is not responsible for such an error and is entitled to have the period of limitations tolled. Id.

Next, we address ABM's contention that the evidence does not support the ALJ's finding of total occupational disability. Because Terry prevailed on the claim before the ALJ, the determinative issue is whether there was substantial evidence to support the award. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). After thoroughly reviewing the evidence and applying the applicable law, the Board affirmed the ALJ on this issue. Our function in workers' compensation cases is to intervene only if there has been a flagrant misconception of the evidence resulting in gross injustice. Western Baptist Hosp. v. Kelly,

Ky., 827 S.W.2d 685 (1992). Our review of the evidence does not indicate that the Board committed reversible error when it concluded that the ALJ had relied on evidence of substance in making her determination.

Next, we consider the Special Fund's contention that the ALJ erroneously awarded benefits in using the maximum rate for a 1994 and 1996 injury rather than the maximum rate for a 1989 injury. As distinct from the point at which the period of limitations begins to run, the entitlement to workers' compensation benefits begins at such time as an occupational injury has been sustained. In this case, the ALJ determined that the onset of occupational disability occurred following Terry's 1996 injury and his inability to return to work. The Special Fund has not convinced us that this determination was in error.

Finally, we address the Special Fund's contention that Terry's benefits should be subject to a reduction of ten percent each year from the original amount of the award between ages sixty-five and seventy in accordance with the "tier-down" provisions found at KRS 342.730(4). We agree with the Board's determination that the ALJ erred by failing to provide for such a "tier-down" of benefits. However, we disagree that the reduction in benefits applies only to portions of the award. Instead, given the onset of occupational disability, we are persuaded that the entire award is subject to the provisions of KRS 342.730(4).

Based upon the foregoing, the opinion of the Workers' Compensation Board is affirmed in part, reversed in part, and the

case is remanded to the ALJ for action consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT SPECIAL FUND:

Joel D. Zakem
Louisville, KY

BRIEF FOR APPELLANT ABM COAL COMPANY (as insured by Employer's Insurance of Wausau):

J. Logan Griffith
Paintsville, KY

BRIEF FOR APPELLEE ABM COAL COMPANY (as insured by Employer's Insurance of Wausau):

J. Logan Griffith
Paintsville, KY

BRIEF FOR APPELLEE ABM COAL COMPANY (as insured by Orion Insurance of Hartford):

Denise M. Davidson
Hazard, KY

BRIEF FOR APPELLEE TOMMY LEE TERRY:

Otis Doan, Jr.
Harlan, KY

BRIEF FOR APPELLEE SPECIAL FUND:

Joel D. Zakem
Louisville, KY