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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2000-CA-002271-WC

FRITO-LAY, INC. — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-97-79722

MARTHA LOVELESS;
SPECIAL FUND;
THOMAS A. NANNEY,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

AND
NO. 2000-CA-002280-WC

ROBERT L. WHITTAKER,
Director of SPECIAL FUND — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-97-79722

MARTHA LOVELESS;
FRITO-LAY, INC.;
HON. THOMAS A. NANNEY
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING IN PART AND

REVERSING IN PART

** ** ** ** **

BEFORE: HUDDLESTON, KNOPF and TACKETT, Judges.

HUDDLESTON, Judge: Frito-Lay, Inc. and Robert L. Whittaker, Director of Special Fund, appeal from an opinion of the Workers' Compensation Board that affirmed in part and reversed in part an Administrative Law Judge's award and remanded the claim to the ALJ for further proceedings. The ALJ's opinion and order had dismissed Martha Loveless's claim for failure to file her application of resolution of injury within the applicable statute of limitations period.

Loveless filed a claim for an injury that occurred on March 29, 1996, for which Frito-Lay paid temporary total disability benefits from May 6, 1996, through August 23, 1996. On August 26, 1997, Frito-Lay filed a handwritten Employee's Disability Status Report, SF3A, form with the Department of Workers' Claims. It is uncontroverted that all the statistical information on the form was correct, including Loveless's mailing address. On August 29, 1997, the Department of Workers' Claims sent a WC-3 letter to Loveless advising that she had two years from August 23, 1996, in which to file a claim.

No evidence was introduced by any party that the WC-3 letter mailed to Loveless was returned to the Department of Workers' Claims as undelivered, but Loveless testified at the hearing before the ALJ that she never received the WC-3 letter.

Loveless also testified that Frito-Lay's insurance carrier contacted her several times in 1997 with offers of settlement, but she did not respond, nor did she seek the advice of an attorney, until well after her medical benefits were terminated.

The upshot was that Loveless filed her application for resolution of injury claim on July 13, 1999, more than two years after the last TTD benefits had been paid. Therefore, by an opinion and order rendered May 11, 2000, the ALJ dismissed Loveless's claim as barred by the statute of limitations.

The single issue raised by Loveless before the ALJ was whether the statute of limitations is to be tolled based solely on the claimant's testimony that the letter from the Department of Workers' Claims advising her of her rights was not received. The ALJ found that the claimant's testimony alone on this fact could never be sufficient to toll the running of the statute of limitations.

In Loveless's brief to the Board, the only issue identified as raised before the ALJ was that the statute of limitations should be tolled based on her testimony that she never received the letter. Loveless contended that this was merely an issue of credibility. The Board addressed this question and affirmed the decision of the ALJ, stating that the testimony of a claimant alone can never be sufficient to toll the running of the statute of limitations where hard documentary evidence supports a finding of compliance with Kentucky Revised Statute (KRS) 342.020 by the employer and the commissioner.

However, the Board went further in its opinion and stated an alternative issue that served as the basis for reversing the ALJ's decision. Specifically, the Board said, "[a]lternatively, Loveless contends that the statute of limitations should be tolled based on prejudice to her caused by Frito-Lay's failure to file an SF3A with the commissioner for approximately one year following termination of her temporary total disability ("TTD") benefits." Based upon this alternative argument, the Board reversed the ALJ's decision and allowed Loveless to proceed with her claim.

We have reviewed the record and do not find that this alternative argument was raised by Loveless before the ALJ, nor is this alternative argument raised in Loveless's brief to the Board. Although couched in language that suggests that the argument was raised by Loveless, the Board raised this argument without it having been first presented to the ALJ.

Under the old workers' compensation system, four tiers of consideration existed: the referee, the (old) Board, the circuit court and the Court of Appeals (then the Court of last resort).[1] In Harvey Coal Corp. v. Morris,[2] Kentucky's highest court held that "[i]t is unconscionable for the parties to practice their case before the referee and then before the full Board without raising the issue as to whether the parties were under the Act . . . and

[1] See Harvey Coal Corp. v. Morris, Ky., 237 S.W.2d 70 (1951)(decided based upon the scheme then in existence under Ky. Rev. Stat. (KRS) 342.285).

[2] Id.

then on review before the circuit court raise the question for the first time."[3]

Under the present system, the ALJ serves as the fact-finder, a function performed by the Board under the old system.[4] The Board now serves "the same functions as an intermediate [appellate] court reviewing the decisions of a court of original jurisdiction . . . lacking only the power of constitutional review."[5] When we review opinions of the Board, the Board is entitled to the same deference extended to this Court by the Supreme Court when it exercises discretionary review.[6] Our function in reviewing the Board "is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[7]

A party to a workers' compensation action cannot raise a question for the first time before the appellate court without having first raised the question before the ALJ.[8] Loveless was required to file a petition for reconsideration with the ALJ if she believed that an error patently appeared on the face of the ALJ's

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[3] Id. at 71.

[4] See Western Baptist Hospital v. Kelly, Ky. 827 S.W.2d 685 (1992).

[5] Id. at 687.

[6] Id.

[7] Id.

[8] See Harvey Coal Corp., supra, n. 1.

order.[9] "[A] petition for reconsideration [must] be filed in order to preserve an issue for appellate review."[10] The Board, functioning as an intermediate appellate court, is not empowered to reverse an opinion of the ALJ based on a question that was not presented to the ALJ.[11]

We affirm that portion of the Board's opinion that affirms the conclusion reached by the ALJ that Loveless is barred in pursuit of her claim due to the running of the statute of limitations but reverse that portion of the opinion of the Board reversing Loveless's claim based on the alternative question raised by the Board.

In light of this decision, the appeal of the Special Fund is moot.

ALL CONCUR.

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[9] See Wells v. Beth-Elkhorn Coal Corp., Ky. App., 708 S.W.2d 104 (1986); KRS 342.281.

[10] Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.2d 327, 330 (2000).

[11] Compare Ky. R. Civ. P. (CR) 59.01; see also Caslin v. General Electric Co., Ky. App., 608 S.W.2d 69, 70 (1980)("It is elementary that a reviewing court will not consider for the first time an issue not raised in the trial court").

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