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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002775-WC

SOUTHERN GAS/ENERGY MANAGEMENT CORPORATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-90-47122

MAC ARTHUR BEGLEY; SPECIAL FUND;
HON. ROGER D. RIGGS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, COMBS, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant, Southern Gas/Energy Management Corporation ("the employer"), asks us to review an opinion of the Workers' Compensation Board, affirming the ALJ's award of increased benefits upon reopening. Finding no error, we affirm.

On November 8, 1990, the Appellee, Mac Arthur Begley ("Begley"), sustained a work-related injury. In the original proceeding, the evidence was in conflict. The employer's proof included the medical report of Dr. William Brooks, a neurologist, who assigned 0% impairment based upon the AMA Guidelines and the medical report of Dr. Jeffrey W. Parr who recommended that Begley

return to work. On April 14, 1993, the ALJ awarded Begley benefits for a 50% permanent partial disability. The award was apportioned 50-50 between the employer and the Appellee, Special Fund. That decision was not appealed.

On April 26, 2000, Begley filed a motion to reopen alleging that his condition had worsened and that he was "now totally occupationally disabled based upon the change of condition since April 14, 1993."

On May 21, 2001, the ALJ rendered an opinion and award upon reopening. The ALJ found that Begley had been "judicially determined" to be 50% occupationally disabled in 1993. The ALJ concluded that Begley was now 100% occupationally disabled, based upon Begley's own testimony as well as the "credible testimony" of Dr. Muffley and Dr. Sweazy, under the guidelines of Osborne v. Johnson, Ky. App., 432 S.W.2d 800 (1968).

The employer appealed to the Board and argued that (1) the ALJ's finding of total occupational disability was not supported by substantial evidence; and (2) that the December 12, 1996 amendments to KRS 342.125 — specifically subsection (1)(d) which changed the criteria for reopening — applied to this claim, requiring Begley to demonstrate a "[c]hange of disability as shown by objective medical evidence of a worsening . . . of impairment due to a condition caused by the injury since the date of the award or order." In an opinion rendered November 28, 2001, the Board unanimously affirmed the ALJ, stating that:

> Dr. Scariano placed restrictions on Begley in 1991 of lifting no more than fifty pounds maximum or twenty-five pounds frequently. Dr. Muffly stated that the appropriate

restrictions in 2001 would be lifting no more than twenty pounds maximum. We believe this alone would be sufficient to support a finding of an increase in occupational disability. . . . . Given Begley's education, work experience and the physical restrictions placed on him by Dr. Muffly, we believe there is substantial evidence supporting a finding of total occupational disability under the criteria of Osborne v. Johnson, Ky. App., 432 S.W.2d 800 (1968), and the definition of "disability" that applied at the time of Begley's injury.

We are . . . not persuaded by Southern's argument that Dr. Muffly's testimony regarding a change in functional impairment must be disregarded because he relied upon the Fourth Edition of the AMA Guides rather than the edition in effect on the date of Begley's injury. . . . . The testimony from Dr. Muffly regarding Begley's impairment under the Fourth Edition of the AMA Guides in 1992 and 2001 is relevant and probative regarding whether there has been a change in Begley's physical condition. . . . .

. . . . Southern contends that under the holding in Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991), the amendments to KRS 342.125(1) should be held to be retroactive. . . . .

We do not believe the reasoning set forth in Peabody Coal Company v. Gossett, supra, is applicable in this case. It is generally the rule that the law in effect on the date of the claimant's injury is the law to be applied to the claim. Maggard v. International Harvester, Inc., Ky. App., 508 S.W.2d 777 (1974). Furthermore, a legislative enactment generally may not be given retroactive effect unless the legislature specifically so declared. KRS 446.080. The legislature has not specifically declared the grounds for reopening under KRS 342.125(1) to be retroactive. Where the modification of a statute is found to be "remedial," however, it may be given retroactive effect. See Peabody Coal Co. v. Gossett, supra; Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109 (1995).

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. . . . In Peabody, the Supreme Court stated that the purpose behind the 1987 amendment to KRS 342.125 was merely to bring the standards for reopening in line with the standards for an original award. In this sense, the 1987 amendments were clearly remedial in that they were designed to correct imperfections in the prior law.

The 1996 amendments to KRS 342.125 did not attempt to cure any imperfections that existed in the law. Prior to 1996, workers' compensation benefits were awarded based upon occupational disability. Likewise, reopening could be had upon a mere showing of a change in occupational disability. The 1996 amendments to KRS Chapter 342.730 provided for PPD benefits to be based upon a percentage of functional impairment as determined under the AMA Guides and likewise provided for reopening only upon demonstration by objective medical evidence of a change in impairment. Thus, the modifications of KRS 342.123 were not designed to bring the standards for reopening in line with other sections as they existed prior to December 12, 1996, but were part of the general overhaul of the benefits system made in the 1996 legislation. In that sense, therefore, the amendments to KRS 342.125 cannot be considered remedial.

Furthermore, as pointed out in Peabody, even a remedial statute may not be applied retroactively if to do so would impair some vested right. Since Begley's injury occurred prior to the date of the 1996 amendments, the parties to this claim had a vested right to reopen the award upon a simple showing of a change in occupational disability without regard to a change in impairment. Since the 1996 amendments to KRS 342.125 made the grounds for reopening more stringent, it is clear that the parties' reopening rights would be impaired if the amendments were applied retroactively. Thus, even if the 1996 amendments could be considered remedial, they may not be applied retroactively. We therefore find no error with the ALJ's failure to apply the 1996 version of KRS 342.125(1) to this claim.

On December 27, 2001, the employer filed a petition for review on appeal to this Court. On appeal, the employer raises the same issues as it raised before the Board.

> The WCB is entitled to the same deference for its appellate decisions as [the Supreme Court intends when it exercises] . . . discretionary review of Kentucky Court of Appeals decisions . . . . The function of further review . . . in the Court of Appeals 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.

Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992). We perceive no such error. The ALJ's finding of increased occupational disability has a substantial evidentiary basis and will not be disturbed on appeal. Moreover, we concur with the Board's conclusion that the December 12, 1996 amendment to KRS 342.125(1)(d) is not remedial and does not apply retroactively. KRS 342.0015, entitled Application of 1996 (1st Extra. Sess.) Ky. Acts ch.1, effective December 12, 1996, provides:

> 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)[1]; 342.213(2)(e), 342.265, 342.270(3), 342.320, 342.610(3), 342.760(3) are remedial.

"It is a primary rule of statutory construction that the enumeration of particular things excludes the idea of something else not mentioned." Smith v. Wedding, Ky. App., 303 S.W.2d 322,323 (1957). Clearly, KRS 342.125(1)(d), as amended December 12, 1996, is not remedial and does not have retroactive application to Begley's claim. We affirm the Board's November 28, 2001 opinion affirming.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, WORKERS' COMPENSATION FUNDS:

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[1] The 12-12-96 version of KRS 342.125(8) deals with time limitations for reopening.