RENDERED: DECEMBER 9, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001452-WC

DRESSER INSTRUMENT DIVISION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-72338

SUE E. COLWELL; HON. MARCEL SMITH, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: GUIDUGLI, KNOPF AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: Dresser Instrument Division petitions this Court for review of an opinion of the Workers' Compensation Board vacating and remanding a decision of the Administrative Law Judge which dismissed the claim of Sue W. Colwell for increased benefits on reopening. The Board held in relevant part that the ALJ erred in requiring proof of an increase in Colwell's disability from the date of settlement as a condition

precedent to an award of additional income benefits on reopening. For the reasons stated below, we reverse the Board's opinion.

On July 6, 1999, Colwell injured her back while lifting boxes during the course of her employment with Dresser. She experienced symptoms including low back pain and radiating leg pain. Timely notice was given to Dresser, after which Colwell was examined by Dr. Phillip Tibbs, a neurosurgeon. An MRI indicted the presence of a herniated disc and nerve root impingement. On August 30, 1999, Colwell underwent surgery, and later was allowed to return to light duty work with restrictions. Dr. Tibbs assessed a 12% functional impairment rating.[1]

Colwell returned to work on July 29, 2001. On December 29, 2001, the parties reached a settlement on the workers' compensation claim in the amount of $28,000.

On February 26, 2004, Colwell filed a motion to reopen the workers' compensation claim. As a basis for the motion, Colwell maintained that she suffered from a worsening of her condition subsequent to the settlement.

The claim was reopened for the purpose of assigning it to the ALJ. Upon taking proof, the ALJ rendered an order

[1] It is not clear from the record whether this impairment rating arises from the back injury, or bilateral carpal tunnel syndrome manifesting in 1997, or both.

dismissing the claim upon finding that Colwell had not presented proof on an increase in AMA impairment above the original 12% assessed by Dr. Tibbs. The ALJ found that proof was tendered showing that Colwell had suffered increased pain, but that she had not met her burden under KRS 342.125(1)(d) requiring proof of an increased functional impairment.

Colwell appealed to the Board, which rendered an opinion vacating and remanding the ALJ's order dismissing Colwell's claim for increased benefits on reopening. The Board concluded that the ALJ erred in basing her decision on the presence or absence of increased functional impairment. Rather, the Board determined that the statutory law required a determination of whether Colwell's disability had increased, and it remanded the matter to the ALJ for reconsideration under this standard. This appeal followed.

Dresser now argues that the Board erred in ruling that the ALJ must rely on evidence of a change in disability rather than a change in impairment as a basis for granting a motion to reopen. It maintains that the Board incorrectly interpreted KRS 342.125(1)(d) as requiring reliance solely on a change in disability, and contends that the Board improperly relied on an unpublished opinion in reaching this conclusion. It argues that the statute requires reliance on a change in impairment, if any, and that the ALJ properly so found. It seeks an order reversing

the Board's opinion and reinstating the ALJ's opinion on its merits.

We must first note that unpublished opinions shall "not be cited or used as authority in any other case in any court of this state."[2] Citing an unpublished opinion in a written argument, for example, can subject the party to dismissal of the argument without leave to refile.[3] In the matter at bar, the Board noted the impropriety of relying on the unpublished opinion, but nevertheless did so with the goal of achieving consistency in its decisions. While this is a laudable objective, the Board incorrectly concluded that its analysis was constrained by that represented in the unpublished opinion.[4]

KRS 342.125(1) states that:

> Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds: . . .
>
> (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

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[2] CR 76.28(4)(c). See also, Courier-Journal v. Jones, 895 S.W.2d 6 (Ky.App. 1995).

[3] Jones v. Commonwealth, 593 S.W.2d 869 (Ky.App. 1979).

[4] Board's opinion at page 13.

The sole issue for our consideration is whether the Board properly construed KRS 342.125(1)(d) and the *published* case law as either permitting or requiring reopening under circumstances where the ALJ found no proof in the record that the movant's impairment worsened since the date of the award. This question must be answered in the negative. The requirements of KRS 342.125(1)(d) are not ambiguous. Reopening may occur where objective medical evidence shows a worsening or improvement of impairment causing a change in disability. It naturally follows that if no such evidence is found in the record, a reopening is not warranted.

This conclusion is supported by Dingo Coal Co. v. Tolliver.[5] It stated,

> Reopening is the remedy for addressing certain changes that occur or situations that come to light after benefits are awarded. Under KRS 342.125, a motion to reopen is the procedural device for invoking the jurisdiction of the Department of Workers' Claims to reopen a final award. In order to prevail, the movant must offer prima facie evidence of one of the grounds for reopening that are listed in KRS 342.125(1). (Citation omitted). Only after the motion has been granted will the opponent be put to the expense of litigating the merits of an assertion that the claimant is entitled to additional income benefits . . . . In other words, KRS 342.125(1)(d) addresses the necessary prima facie showing in order to prevail on a motion to reopen

[5] 129 S.W.3d 367 (Ky. 2004).

. . . .[6]

In the matter at bar, the ALJ concluded that Colwell did not prove that her functional impairment rating increased subsequent to the award. This finding falls within the broad discretion of the fact-finder and shall not be disturbed absent an abuse of that discretion.[7] While the ALJ did not expressly state that Colwell did not experience a change in disability, the ALJ's finding on the issue of impairment was sufficient to satisfy KRS 342.125(1)(d) because a change in impairment is the only statutory basis for finding a change in disability. The Board's conclusion to the contrary is not correct.

For the foregoing reasons, we reverse the June 17, 2005, opinion of the Workers' Compensation Board.

McANULTY, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING IN RESULT: While I agree with the result reached by the majority opinion, I do so on somewhat different grounds. First, I disagree with the majority's assertion that it was improper for the Board to cite or rely upon an unpublished opinion. The civil rules "govern the procedure and practice in all actions of a civil nature *in the Court of Justice . . .*". CR 1. However, the Board is not a

[6] Id. at 369.

[7] Transportation Cabinet, Department of Highways v. Poe, 69 S.W.3d (Ky. 2001).

court – it is an administrative review panel created by statute. Vessels by Vessels v. Brown Foreman Distillers Corp., 793 S.W.2d 795, 797-98 (Ky. 1990). Consequently, CR 76.28(4)(c)'s prohibition against citation to unpublished opinions does not apply to the Board. While the Board's citation to unpublished opinions creates some difficulties during our review of the Board's decisions, I disagree with the majority that it is an improper practice for the Board.

Furthermore, the Board did not "recognize the impropriety" of relying on an unpublished opinion. Rather, the Board recognized that the unpublished Supreme Court opinion was not binding precedent, but concluded that the Supreme Court's interpretation of the statutory authority was indicative of the appellate courts' position on the issue. But since the reasoning adopted by the Board is not binding precedent, the Board's interpretation of the statute is a legal issue to which we owe no deference. Bob Hook Chevrolet Isuzu v. Commonwealth, Transportation Cabinet, 983 S.W.2d 488, 490-91 (Ky. 1998).

The central question in this case, as the majority correctly notes, concerns the proof necessary for reopening as set out in KRS 342.125(1). In Dingo Coal Co. v. Tolliver, 129 S.W.3d 367 (Ky. 2004), the Kentucky Supreme Court held that a claimant on reopening must show a change in disability as shown by objective medical evidence of worsening or improvement of

impairment due to a condition caused by the injury since the date of the award or order. KRS 342.125(1)(d). However, the Court went on to add that this is a procedural and not a substantive requirement. In order to invoke the jurisdiction of the Department of Workers Claims to reopen a final award, a claimant must present such proof to establish a prima facie case for reopening. But the statute does not affect the substantive proof required to establish a worker's right to receive additional income benefits under KRS 342.70. Tolliver, *supra* at 370.

In the unpublished opinion cited by the Board majority, the claimant was seeking to reopen based on his claim that he had become totally disabled. Because the motion to reopen was never contested, the appeal was taken from the merits of the claimant's right to additional benefits. Thus, the procedural issue of whether claimant had met his *prima facie* case was not before the Court. The Supreme Court, citing Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), noted that an award for partial disability must be based on an AMA functional impairment rating, but a finding of total disability may be based on other factors. Thus, the Court concluded that the claimant was not required to show a change in his impairment rating, but was only required to prove that he was now totally disabled.

Because the facts of the current case are so similar, I cannot fault the Board majority for adopting the reasoning from this unpublished case. However, dissenting Board Member Young makes a compelling argument that this reasoning is inconsistent with the plain language of KRS 342.125(1)(d):

> Sue E. Colwell ("Colwell") failed to demonstrate that she had a change of disability as shown by objective medical evidence of a worsening of impairment due to a condition caused by her injury or injuries since the date of her settlement. The Kentucky General Assembly, as is its legislative and constitutional prerogative, requires such evidence before a claim may be reopened under KRS 342.125(1)(d). The requirement is a procedural restriction on the availability of reopening relief. In other words, a claimant who fails to comply with the procedural requirement has a statutory right to neither a consideration of the merits of her reopening claim nor additional benefits.
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> In Johnson v. Gans Furniture Industries, Inc., 114 S.W.3d 850 (Ky. 2003), the Court noted that "the very right to reopen what amounts to a final judgment by virtue of a post-judgment change of condition is a peculiarity of Chapter 342." Id. at 854. The legislature has the right to place procedural limitations on the availability of such relief. The fatal flaw in the Parris case, *supra*, in my view, is that by ignoring the procedural limitation embodied in KRS 342.125(1)(d) which the Kentucky General Assembly placed on the availability of reopening relief, the Court has effectively rewritten the statute to extend additional benefits to a claimant on reopening under circumstances where reopening and resultant benefits are not statutorily authorized. Although it may true that the law in effect at the time of

injury governs the substantive rights of the parties, one cannot statutorily reach the merits on reopening unless a statutory basis for reopening has first been established.

In Johnson, *supra*, the Court explained: "[I]t has long been established that **a worker's right to benefits for a post-award increase in disability vests when a motion to reopen is filed, without regard to when the increased disability began.**" Id. at 855, *citing* Rex Coal Co. v. Campbell, 213 Ky. 636, 281 S.W. 1039 (1926) (Emphasis added). Consistent with this principle, KRS 342.0015 provides in pertinent part that the "[p]rocedural provisions of 1996 (1st Extra. Sess.) Ky. Acts ch. 1 shall apply to all claims irrespective of the date of injury." In Johnson, *supra*, the Court recognized that **"[u]nder the 1996 Act, neither a worker nor an employer may re-open a pre-December 12, 1996, award after December 12, 2000, solely upon an allegation of a change of disability.**" Id. at 856 (**Emphasis added**). The ALJ's decision in the claim presently on appeal is consistent with this observation. The reasoning in the unpublished Parris case, *supra*, is inconsistent with this observation in the published Johnson case.

> Further, the Johnson Court noted:
>
> > As we pointed out in [Brooks v. University of Louisville Hospital, Ky., 33 S.W.3d 526 (2000)] and [McCool v. Martin Nursery & Landscaping, Ky., 43 S.W.3d 256 (2001)], **limitations** on the time for taking action **relate to the remedy and may be enlarged or restricted without impairing vested rights**. *See* Stone v. Thompson, Ky., 460 S.W.2d 809, 810 (1970).
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> Id. at 854 (**emphasis added**).

In Dingo Coal Company, Inc. v. Tolliver, 129 S.W.3d 367 (Ky. 2004), the Court agreed that KRS 342.125(1)(d) "is remedial." Id., at 368. The Tolliver Court explained that KRS 342.125(1)(d) establishes

> the showing which must be made in order to secure a reopening at which the merits of the claim may then be considered pursuant to the law in effect at the time of the injury.
>
> I recognize that the holding in the Johnson case, *supra*, dealt with time limitations imposed by provisions of KRS 342.125 other than KRS 342.125(1)(d). I also recognize that in Woodland Hills Mining, Inc. v. McCoy, 129 S.W.3d 367 (Ky. 2004), the Court said that the analysis the Court applied to the time limitations imposed by other provisions of KRS 342.125 does not apply to KRS 342.125(1)(d) because KRS 342.125(1)(d) is not remedial. The Court having subsequently determined in Dingo Coal Company, Inc. v. Tolliver, *supra*, however, that KRS 342.125(1)(d) is a remedial provision, I am at a loss to understand why KRS 342.125(1)(d) is not now being applied as it was written by the Kentucky General Assembly.
>
> As the Court explained in the Johnson case, a remedial provision may be enlarged or restricted without impairing even vested rights. Id. at 854. Regardless, the Johnson Court also explained that "[i]t has long been established that a worker's right to benefits for a post-award increase in disability vests when a motion to reopen is filed, without regard to when the increased disability began." Id. at 855. A claimant who fails to establish a statutorily authorized basis for reopening pursuant to KRS 342.125 is not entitled to reopen, let alone obtain additional benefits. The Court got it right, in my opinion, when the Court observed in the Johnson case that "[u]nder the 1996 Act, neither a worker nor an employer may re-open a pre-December 12, 1996, award after December 12, 2000, solely upon an allegation of a change of disability." Id. at 856.

Until the Supreme Court clarifies this issue in a published opinion, I find the reasoning by the dissenting Board Member to

be more persuasive than the reasoning adopted by the Board majority. Hence, I agree with the majority that the Board erred by reversing the ALJ's dismissal of Colwell's claim.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, KY

BRIEF FOR APPELLEE, SUE E. COLWELL:

Susan Dabney Luxon
Richmond, KY