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(2003-SC-0046-WC)

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001311-WC

AUTOZONE, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-77846

THOMAS R. BREWER; LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: This is a petition for review from a decision of the Workers' Compensation Board ("Board") reversing a ruling of the Administrative Law Judge ("ALJ") limiting the duration of claimant's benefits pursuant to KRS 342.730(4) and affirming the ALJ's finding that the employer was given timely notice of the claimant's injuries. The employer argues that the claimant did not give timely notice of certain of his injuries, and that although the claimant was a retired federal employee and would

thus not qualify for social security benefits, the ALJ was nevertheless correct in limiting the duration of claimant's benefits pursuant to KRS 342.730(4) as a matter of policy. We agree with the Board that under the clear unambiguous language of KRS 342.730(4), said statute could not limit claimant's benefits since the claimant was not eligible for old-age social security benefits, and that the ALJ's finding regarding notice was not in error. Hence, we affirm.

Claimant Thomas Brewer was born on February 20, 1937, and was employed by the federal government for 32 years at the Naval Ordinance. In 1994, he retired from his federal employment and began working part-time for Autozone, a company which sells auto parts. At Autozone, Brewer worked in stocking, as a sales representative, and on the night crew unloading stock. In 1998, Brewer became a full-time employee of Autozone. On June 24, 1999, Brewer was pushing a pallet of parts onto a truck and felt a sudden pain in his feet. He reported the injury to his shift supervisor and filled out an accident report on June 24, 1999, and thereafter sought treatment from Caritas Medical Center. On June 4, 2000, Brewer was lifting a trash can into a dumpster when he felt the onset of pain in his arms. Brewer stated that he did not immediately report this injury to his supervisor because he thought the injury was minor. He thereafter sought treatment on July 11, 2000, when the muscles

in both arms began knotting up. During his examination, Brewer's physician told him his injuries were work-related. ON that same date, Brewer reported the injury to his left bicep/shoulder to the store manager, Eddie Stillwell. Brewer testified that he did not report an injury to his right shoulder at the time because the pain in his left arm was far worse and he thought the injury to this right arm would resolve on its own. When Brewer subsequently went to see his doctor about his right shoulder pain, his doctor told him it was also work-related. Brewer claims that he told his supervisor about he right shoulder injury on September 21, 2000, although Stillwell maintains that Brewer never reported any injury to his right shoulder. Brewer also developed numbness and tingling in his hands that was ultimately diagnosed as carpal tunnel syndrome. Brewer testified that he told Stillwell about this condition in December of 2000, when he was diagnosed with the condition. Stillwell testified that Brewer never advised him of this condition.

Brewer filed for workers' compensation benefits for the disability resulting from the injuries to his feet, left bicep/shoulder, right shoulder, and hands. On December 20, 2001, the ALJ issued an opinion in Brewer's favor, determining that: 1) all of his claimed injuries were work-related; 2) Brewer had provided due and timely notice of his injuries and

conditions to Autozone; and 3) Brewer was suffering from a total functional impairment of 18%. The ALJ then awarded benefits based upon an 18% permanent partial disability. However, in light of Brewer's age, the ALJ limited payment of periodic benefits to age 65 or not longer than two years after the June 4, 2000, injury pursuant to KRS 342.730(4). Brewer thereafter appealed the ALJ's interpretation of KRS 342.730(4), and Autozone appealed the issues of percentage of disability and notice. The Board affirmed on the issues of percentage of disability and notice, and reversed the ALJ's determination that Brewer's periodic benefits were limited by KRS 342.730(4). This petition for review by Autozone followed.

Autozone first argues that the Board erred in reversing the ALJ's determination that KRS 342.730(4) would apply in this case to limit the duration of Brewer's benefits. KRS 342.730(4) provides in pertinent part:

> All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs.

It is undisputed that as a retired federal employee, Brewer does not qualify for old-age retirement Social Security benefits. Nevertheless, the ALJ applied KRS 342.730(4) for

policy reasons, citing language in Wynn v. Ibold, Inc., Ky., 969 S.W.2d 695 (1998), which addressed the constitutionality of the prior KRS 342.730(4) which provided for the reduction in benefits for claimants between the ages of 65 and 70. In upholding the former KRS 342.730(4), the Wynn Court stated:

> Keeping in mind that the purpose of workers' compensation legislation is to maintain a stream of income to disabled workers and their dependents, we are persuaded that avoiding a duplication of income benefits is a legitimate state objective and sound public policy. At a time when workers become eligible for other forms of income replacement, not only does KRS 342.730(4) help avoid making it more profitable to be disabled than not, it also serves to reduce the overall cost of maintaining the workers' compensation system, thereby improving the economic climate for all the citizens of the state.

Id. at 697 (citation omitted).

Unlike the Court in Wynn, we are not faced with the constitutionality of KRS 342.730(4); rather, we are simply interpreting whether the current version of KRS 342.730(4) applies to a certain claimant. When statutory language is clear and unambiguous, it will be construed to mean what it plainly expresses. Commonwealth ex rel. Chandler v. Kentucky Title Loan, Inc., Ky. App,. 16 S.W.2d 312 (1999). "[I]t is not our function to 'add words and meaning to a statute that is clear on its face.'" Posey v. Powell, Ky. App., 965 S.W.2d 836, 838 (1998), quoting Cole v. Thomas, Ky. App., 735 S.W.2d 333, 335

(1987). The language of the current version of KRS 342.730(4) is clear that it applies to those who qualify for normal old-age Social Security retirement benefits. We must presume that when the legislature enacted this statute, it was aware of the fact that federal employees were ineligible for Social Security retirement benefits from their years of federal employment. See Reynolds Metal Co. v. Glass, 302 Ky. 622, 195 S.W.2d 280 (1946), (the legislature is presumed to be aware of existing laws pertaining to statutes it was enacting). Yet there is no provision for those who do not qualify for Social Security retirement benefits but receive retirement income from other sources, and we decline to read any such language into the statute. As to Autozone's and the ALJ's policy argument, it has been held that "[t]he plain meaning of a law cannot be ignored by the courts simply because another meaning might be considered to state a better policy." Board of Education of Nelson County v. Lawrence, Ky., 375 S.W.2d 830, 831 (1963). Accordingly, we affirm the Board's reversal on this issue.

Autozone next argues that it was error for the ALJ to find (and the Board to affirm) that Brewer gave timely notice of his right shoulder and carpal tunnel injuries. Autozone erroneously maintains that it is undisputed that Brewer never gave them notice of the right shoulder and carpal tunnel injuries. While Eddie Stillwell testified that Brewer never

gave him notice of those injuries, Brewer testified at the hearing that he gave definitive notice of his right shoulder injury stemming from the June 4, 2000, incident on September 21, 2000, and that he remembered the date he gave notice because he made a note thereof. Brewer also testified in his deposition that he thought he told his superior, Ronnie Spencer, and Stillwell about the pain in both arms, his shoulders, and wrists a couple of weeks after seeing Dr. Hockenbury on July 11. He stated that he told them that the right arm was now in the same condition as the left, with a little difference, and that work was making the condition worse. He explained that he did not give notice when he gave notice of the left bicep/shoulder injury because he did not believe the injury to this right should was as serious as the injury to his left bicep/shoulder. As to the carpal tunnel injury, Brewer testified at the hearing that he was "fairly certain" he told Stillwell about that injury in December 2000, when his carpal tunnel syndrome was diagnosed. Brewer further testified that he told Spencer he was having problems with his fingers getting numb and that he had to wear a wrist splint at night.

KRS 342.185 provides that in order to maintain a claim for workers' compensation benefits, notice of the accident must be given to the employer "as soon as practicable after the happening thereof." A reviewing court will overturn the

decision of the Board only if the Board misconstrued the law or erroneously assessed the evidence so flagrantly as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). A determination of whether notice is due and timely is a mixed question of law and fact. See Harry M. Stevens Co. v. Workmen's' Compensation Board, Ky. App., 553 S.W.2d 852 (1977). As to the factual portion of the determination, we cannot say that the ALJ erred in believing Brewer over Stillwell that he gave notice of the right shoulder and carpal tunnel injuries. See Brockway v. Rockwell International, Ky. App., 907 S.W.2d 166 (1995). As to whether that notice was timely, even if we accept that notice was not given until September 21, 2000, we believe the three and a half-month delay in giving notice of the right shoulder injury was excusable given Brewer's explanation that he did not believe the injury was serious at first and thought that it would resolve on its own. See Marc Blackburn Brick Co. v. Yates, Ky., 424 S.W.2d 814 (1968) (sixty-six-day delay in giving notice was excusable where employee did not know the extent of the injury or that the injury would be disabling). As for the carpal tunnel injury, which is more of a gradual injury, there was evidence that Brewer gave notice to Autozone in December of 2000, when the injury was first diagnosed. See Randall Co./Randall Div. of Textron, Inc. v. Pendland, Ky. App., 770 S.W.2d 687 (1988).

Hence, we agree with the ALJ and the Board that that notice was timely as well.

For the reasons stated above, we affirm the opinion of the Board reversing in part and affirming in part the ALJ's decision.

ALL CONCUR.

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