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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001552-WC

JAMES RISTER — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-00805

SCRUBET, INC.; HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: James Rister appeals from a decision of the Workers' Compensation Board, which affirmed the dismissal of his claim for

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

occupational disease benefits from his employer, Scrubet, Inc., because he failed to join his claim with other known claims as required by KRS 342.270(1). Rister argues that: (1) he satisfied the requirements of KRS 342.270(1); (2) Scrubet is estopped from raising KRS 342.270(1) as a defense to his claim; and (3) KRS 342.270(1) is unconstitutional. We affirm.

Rister was exposed to respirable coal dust over a period of 35 years while working for multiple employers. The last date of exposure occurred on December 27, 2006, while he was working for Scrubet. Rister was first informed that he was afflicted with coal workers' pneumoconiosis in March 2007 by his family physician. In a letter dated October 8, 2007, he provided notice to Scrubet of his intention to pursue a workers' compensation claim based on his condition.

On January 24, 2008, Rister filed a claim for workers' compensation benefits against Scrubet alleging work-related hearing loss, which manifested on December 27, 2006. Following the submission of evidence, Administrative Law Judge (ALJ) Overfield held a final hearing on June 26, 2008. Subsequently, the hearing-loss claim was under submission for a determination on the merits.

Meanwhile, on June 25, 2008, Rister filed a claim against Scrubet seeking benefits for pneumoconiosis, which is the subject of the present appeal. The case was temporarily assigned to Chief ALJ Terry. On July 14, 2008, Scrubet filed a special answer to the claim listing notice and statute of limitations as special defenses.

On August 13, 2008, ALJ Overfield issued a decision dismissing Rister's claim for hearing loss. Rister did not file a petition for reconsideration or a notice of appeal, and the decision became final.

On September 3, 2008, the pneumoconiosis claim was reassigned to ALJ Kerr. On October 1, 2008, Scrubet filed an amended special answer and claim denial asserting that Rister's claim was barred pursuant to KRS 342.270(1). Following a hearing, the ALJ dismissed the claim as barred pursuant to that statute. The ALJ then denied a motion for reconsideration. Rister appealed to the Board, which affirmed the decision of the ALJ. This appeal followed.

Rister argues that he complied with the requirements of KRS 342.270(1) because he filed his pneumoconiosis claim during the pendency of his hearing-loss claim.

KRS 342.270(1) states as follows:

> If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

The Supreme Court of Kentucky has stated that "[t]he language of KRS 342.270(1) is clear, unequivocal, and mandatory, both with respect to a worker's obligation to join 'all causes of action' against the employer during the pendency of a claim and with respect to the penalty for failing to do so." *Ridge v. VMV Enterprises, Inc*., 114 S.W.3d 845, 847 (Ky. 2003). Without defining the term "join," the Court indicated that merely filing all accrued claims is not sufficient under KRS 342.270(1), but stated that once appellant filed his initial claim, KRS 342.270(1) required him to "file and join" his additional claims. *Id.* In *Kroger Co. v. Jones*, 125 S.W.3d 241, 245, (Ky. 2004), the Court stated that KRS 342.270 "requires the joinder of all known causes of action[.]" BLACK'S LAW DICTIONARY, Seventh Edition (1999), defines joinder as "[t]he uniting of parties or claims in a single lawsuit."

Based on the foregoing authority, we cannot conclude that the mere filing of a known claim, without more, during the pendency of the initial claim for benefits is sufficient to satisfy the requirements of KRS 342.270(1). The Board did not err when it determined that Rister failed to comply with KRS 342.270(1).[2]

[2] In his brief, Rister cites language from an opinion of the Workers' Compensation Board in *Callahan v. Hubb Coal Corp*., WCB No. 02-02250 (2004). In that case, the worker was unsuccessful in his attempt to bring an occupational disease claim after he had received an award for an injury claim. Rister argues that his case is distinguishable from *Callahan* because he (Rister) filed his occupational disease claim prior to the disposition of his injury claim. On appeal from the Board, this court in *Callahan* stated, "we conclude that the words 'all causes of action' found in KRS 342.270(1) mean **all**, including both injury claims and occupational disease claims. Thus, when Callahan filed his injury claim, he was required to join his occupational disease claim of which he was then aware." *Callahan v. Hubb Coal Corp*., 2005 WL 626583 *2 (Ky. App. 2005) (2004-CA-001527-WC). We conclude that the facts herein do not compel a result different from that reached in *Callahan*.

Next, Rister argues that Scrubet was estopped from asserting KRS 342.270(1) as a defense to his claim. We are cited to no authority in support of this argument. Further, our review of the record indicates that Scrubet raised the KRS 342.270(1) issue in its special answer filed on October 1, 2008. The KRS 342.270(1) issue was listed as a contested issue in an order and memorandum issued by the ALJ on January 14, 2009, following a benefit review conference. The order and memorandum was signed and agreed to by Rister's counsel. As such, the issue is preserved for further determination. *See* 803 Kentucky Administrative Regulations (KAR) 25:010 §13 (13)(a) and (14). Additionally, there is no indication whatsoever that Scrubet misled or persuaded Rister that the joinder requirement of KRS 342.270(1) was inapplicable. Scrubet was not estopped from raising KRS 342.270(1) as a defense.

Finally, Rister argues that KRS 342.270(1) is unconstitutional because the joinder requirement impermissibly shortens the statute of limitations for the class of workers who have both occupational disease and injury claims. In *Stein v. Kentucky State Tax Commission*, 266 Ky. 469, 99 S.W.2d 443, 445 (1936), the former Court of Appeals stated:

> Constitutional questions are not to be dealt with abstractedly. It is well-settled law that the courts will not give their consideration to questions as to constitutionality of a statute unless such consideration is necessary to the determination of a real and vital controversy between the litigants in the particular case before the court. It is incumbent upon a party who assails a law invoked in the course thereof to show that

> the provisions of the statute thus assailed are applicable to him and that he is injuriously affected thereby.

(Citations omitted).

Rister argues that KRS 342.270(1) shortens the three-year statute of limitation for occupational disease set forth in KRS 342.316. He asserts that persons who have an occupational disease claim subject to the three-year limitation period of KRS 342.316 and who also have an injury or hearing loss claim subject to the two-year limitation period of KRS 342.270(1) are required to file their occupational disease claim within two years, despite the three-year limitation period of KRS 342.316, and join it with the other claim under the ALJ's and the Board's interpretation. He argues that this application of KRS 342.270(1) violates constitutional principles.

However, Rister does not demonstrate how he himself was injured by the application of the statute. Rister's pneumoconiosis claim was filed within the two-year period and thus was not barred on the ground of statute of limitation. Rather, Rister's claim was barred on the ground that the failure to join the pneumoconiosis claim to the hearing-loss claim constituted a waiver. We decline to declare KRS 342.270(1) unconstitutional in its application to Rister.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

DIXON, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I respectfully dissent from the majority opinion. While undoubtedly the filing of his second claim barely came within the pendency of the hearing-loss claim, nonetheless it **was** timely filed within that critical period. The employer received fair notice of a claim that was simple and straightforward. There was no unfair surprise to Scrubet nor was this a matter of complex litigation. Fair notice is at the heart of filing requirements – indeed the chief motivating factor. In this case, there was no prejudice to the employer, who was fully aware of the two diagnoses at issue.

Hypertechnicality as to the exact meaning of "file and join" is inconsistent with the beneficent construction of laws pertaining to injured workers. That spirit is expressly recited in the preamble to the Workers' Compensation Chapter and is intended to provide guidance in our interpretation of the statutes as a whole. Indeed, that liberal construction of the statutes was an essential element of the *quid pro quo* whereby injured employees relinquished the constitutional right to sue in tort in exchange for workers' compensation insurance coverage, a blanket of protection from lawsuit for employers.

James Rister was exposed to respirable coal dust for 35 years. In March 2007, Rister's family physician diagnosed him with coal workers' pneumoconiosis. In October 2007, Rister provided proper notice to Scrubet that he intended to pursue a workers' compensation claim.

In January 2008, Rister filed a claim for workers' compensation benefits against Scrubet alleging a work-related hearing loss. A final hearing was conducted in June 26, 2008, and the hearing-loss claim was taken under submission for a determination on the merits.

Rister filed his pneumoconiosis claim against Scrubet on June 25, 2008. In mid-July, Scrubet responded but did not mention the requirements of KRS 342.270(1) requiring "all causes of action against the named employer" to be "joined" or else deemed waived by the employee.

On August 13, 2008, the Administrative Law Judge issued a decision dismissing Rister's claim for hearing loss. Rister did not petition the ALJ for reconsideration nor did he appeal to the Workers' Compensation Board. The decision became final thirty days later.

Two weeks later, when the hearing-loss was no longer pending, Scrubet filed an amended special answer to Rister's pneumoconiosis claim. The employer now belatedly asserted that Rister's claim was barred since he had failed to "join" the pneumoconiosis claim to the hearing loss-claim during the pendency of that claim pursuant to the provisions of KRS 342.270(1). Again, I would note the omission of any reference to this statute in Scrubet's mid-July response. Nevertheless, the ALJ dismissed Rister's claim on that basis, and the Board affirmed.

In *Kroger Co. v. Jones*, 125 S.W.3d 241 (Ky. 2004), an employee filed a single application for adjustment of claim but ultimately sought recovery

based on two injuries. The employer objected, arguing that the employee had failed to amend her initial claim to include the second injury. The employer contended that "joinder" under the provisions of KRS 342.270(1) was not available since the claim was no longer pending. The Supreme Court of Kentucky **rejected** the employer's contention and concluded that the second injury claim remained viable even where no subsequent application or motion for joinder had been filed by the employee.

Our Supreme Court concluded that an ALJ was authorized to amend, *sua sponte*, an employee's application for adjustment of claim to "join" an allegation of another injury that occurred in the course of the same employment. Where the employer was aware of the additional injury and suffered no prejudice, the court held that the informal amendment of the "pleading" was sufficient to comply with the joinder requirements of KRS 342.270(1).

Perhaps with this holding in mind, the majority concedes in its opinion that the term "joinder" as used in KRS 342.270(1) is not clearly defined by the statute or by caselaw – although *Kroger* clearly is precedent for a more liberal construction. Nevertheless, it concludes that Rister's attempts to preserve and to pursue his pneumoconiosis claim were insufficient.

KRS 342.270(1) was presumably enacted in order to streamline the filing process for workers having claims for both occupational disease and injury. The objective of facilitating judicial economy by the mandatory joinder of claims – while laudable – should not be permitted to effectively pre-empt the right of access

to a tribunal to adjudicate a substantive claim. This ruling of the majority illustrates yet another lamentable example of a gradual but insistent erosion of the constitutional right of access to the courts in the name of an overarching convenience and economy for those whose very duty and purpose are to serve the needs of litigants. Convenience should not come at so great a price.

Additionally, I agree with Rister's argument that KRS 342.270(1) is unconstitutional **as applied** in this case. As distinguished from the academic analysis cited by the majority in *Stein*, this constitutional issue is anything but abstract with respect to Rister's claim. His case is a textbook question illustrating a conundrum created by KRS 342.270(1) as it seeks to streamline the filing process for workers having claims for both occupational disease and injury.

To reiterate, fair notice is at the heart of filing requirements – indeed the chief motivating factor. Scrubet had due and timely notice of the pneumoconiosis claim. Rister filed the second application for adjustment of claim both **within** the statutory period and **during** the pendency of the hearing-loss claim. Scrubet **was fully aware** of the diagnoses at issue and was never under the misimpression that Rister intended to waive the pneumoconiosis claim. There was no prejudice – except to the employee.

Under the interpretation of the majority, Rister has effectively been cheated of the three-year statute of limitations granted by KRS 342.316 – a result that is untenable under the traditional rules of statutory construction and in particular in construing workers' compensation statutes. Statutes must be read and

construed **together**; further, they are to be construed in context with the **entire Act**. "The intention of the Legislature is to be collected from the words employed, but, in construing a statute, as in the case of other instruments, the court will look to the whole act." *Commonwealth v. Trent*, 117 Ky. 34, 77 S.W. 390, 393 (1903).

For decades, Kentucky courts have acknowledged that:

> It is a well-settled rule of construction that the letter of a statute will not be followed when it leads to an absurd conclusion. The reason for the enactment must enter into its interpretation, so as to determine what was intended to be accomplished by it. The purpose is to give effect to the **legislative intent**. The will of the Legislature, not its words, is the law.

Smith v. Vest, 265 S.W.3d 246, 253 (Ky. 2007) (quoting *Golightly v. Bailey,* 218 Ky. 794, 292 SW 320, 321 (1927). (Emphasis added.)

Accordingly, under the particular circumstances of this case and in harmony with the beneficent purpose underlying workers' compensation legislation, I would reverse the decision of the Workers' Compensation Board and reinstate Rister's claim for pneumoconiosis.

BRIEF FOR APPELLANT:

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