

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001137-WC

BOBBY BISHOP

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-97272

TECO COAL CORPORATION,
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE,
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

CLAYTON, JUDGE: Bobby Bishop petitions for review of the opinion of the

Workers' Compensation Board affirming the Administrative Law Judge's ("ALJ")

January 21, 2014 Order and the February 21, 2014 Order on Reconsideration.

After careful consideration, we affirm the Board.

Bishop worked in the coal mining industry, primarily as a heavy equipment operator, for over twenty-six years. He began working for Teco Coal Corporation (“Teco Coal”) in 2000. His job as a heavy equipment operator was strenuous and involved heavy lifting, frequent climbing, and continuous vibration. On April 15, 2013, Bishop filed an application for workers’ compensation benefits alleging a left knee injury that occurred on May 3, 2011, while he was employed by Teco Coal.

During the pendency of this claim, he was examined by Dr. David Muffly on May 13, 2013, who diagnosed a cumulative trauma cervical spine injury. He could not recall exactly when he began to experience neck pain, but testified he sought treatment with Dr. Thad Manning in October 2009. Thereafter, he underwent fusion surgery in December 2009. Bishop was off work until February 18, 2010. Though he continued to have pain and stiffness in his neck after surgery, he returned to work. Bishop continued to work until June 20, 2013, when he was laid off. Despite being laid off, he believed he would have been physically unable to continue working much longer. After Dr. Muffly’s diagnosis, Bishop filed a separate workers’ compensation claim for cumulative trauma neck injury specifying the date of manifestation of the injury as May 15, 2013. The claims were consolidated.

In the Opinion, Award and Order, the ALJ awarded permanent partial disability benefits and medical benefits for Bishop's left knee injury but dismissed the cumulative trauma injury claim because the ALJ determined that the claim was barred by the statute of repose. Bishop then filed a petition for reconsideration that the ALJ denied. Next, Bishop appealed to the Board arguing the ALJ erred in dismissing his cumulative trauma claim as barred by the statute of repose because Teco Coal had not preserved the issue for consideration. Neither party appealed the ALJ's award with respect to the knee injury.

Bishop maintained in his appeal to the Board that the issue of the statute of repose was not preserved by the employer, and thus, should not have been addressed by the ALJ. Furthermore, he contended that Teco Coal also should not be permitted to argue the statute of repose because of the doctrine of equitable estoppel. In sum, Bishop, in his appeal to the Board, did not directly contest the reasoning underlying the ALJ's application of the statute of repose but rather argued that the statute of repose defense had not been preserved, and therefore, was waived by Teco Coal.

On June 27, 2014, the Board entered its opinion affirming the ALJ's decision. In its opinion, the Board initially determined that the statute of repose was preserved as an issue since the Benefit Review Conference ("BRC") Order lists "statute of limitations" with respect to the cervical injury as a contested issue. The Board explained that the applicable provision, KRS 342.185, has been interpreted as both a statute of limitations and a statute of repose. *Manalapan*

Mining Company, Inc. v. Lunsford, 204 S.W.3d 601, 605 (Ky. 2006). Bolstering its analysis, the Board observed that Bishop discussed the issue in his brief before the ALJ. Finally, the Board noted that even if not considered preserved by the BRC Order, the issue was tried by consent of both parties, and therefore, the issue was properly before the ALJ.

However, regarding the issue of equitable estoppel, the Board did not believe that this issue had been properly preserved by Bishop for appellate review. The Board explained that Bishop did not identify equitable estoppel as a contested issue at the BRC, raise it in his brief to the ALJ, or request further findings of fact concerning equitable estoppel in his petition for reconsideration. As such, the Board reasoned that Bishop may not raise the issue of equitable estoppel for the first time in his appeal to the Board.

Bishop now appeals the Board's decision. On appeal, he argues that the ALJ erred by applying the statute of repose to Bishop's cumulative trauma injury claim.¹ In reply, Teco Coal maintains that because Bishop did not argue that the ALJ erred in the interpretation of the statute of repose to the Board, his claim was not preserved for review by the Court of Appeals or, even if it was, the claim was not viable.

The review of workers' compensation cases is governed by statute. To begin, Kentucky Revised Statutes (KRS) 342.285 gives the ALJ the sole

¹ Bishop relies heavily on *Consol of Kentucky, Inc. v. Goodgame*, 2014WL2154091 (Ky. App. 2014). However, this case is not final and is on appeal to the Kentucky Supreme Court. Therefore, this case is not binding and is also distinguishable from the case at bar.

discretion to determine the quality, character, and substance of evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). Further administrative and judicial review is governed by KRS 342.285(2) and KRS 342.290. These statutes limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;" whether the decision "was procured by fraud;" or whether the decision was erroneous as a matter of law. *Greg's Const. v. Keeton*, 385 S.W.3d 420, 424 (Ky. 2012)(citations omitted). Review of legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion. *Id.*

Regarding our review of the Board decision, the Court of Appeals only reviews a Board decision to ascertain whether the Board overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687–88 (Ky. 1992). Thus, the "standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law." *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 860 (Ky. 2001)(citation omitted). With these standards in mind, we address the case before us.

Bishop did not directly contest the reasoning underlying the ALJ's application of the statute of repose but contended that the statute of repose was not preserved as an issue for the ALJ's determination, and hence, waived by Teco Coal. Alternatively, he suggested that Teco Coal was barred by the doctrine of equitable estoppel from asserting a statute of repose argument. The Board determined that the issue of the statute of repose was preserved for the ALJ's consideration, and we agree. The Board also decided that the issue of equitable estoppel had not been adequately preserved by Bishop for the Board's consideration. Again, we agree with the Board's reasoning.

Here, however, Bishop has abandoned these arguments and returned to his claim that the ALJ erred by applying the statute of repose to the cumulative trauma injury in this case. In response, Teco Coal highlights that in Bishop's appeal to the Board, he only contested Teco Coal's actions in the case and did not dispute the ALJ's decision. Consequently, Teco Coal points out that the Board never addressed this particular issue because Bishop did not argue that issue to the Board. Accordingly, because we review the Board's decision, the ALJ's findings and legal conclusions are not preserved for our review.

Preservation of issues in workers' compensation cases are governed by Kentucky Administrative Regulations 803 KAR 25:010 § 13. Therein it is noted that after the ALJ conducts a Benefits Review Conference, if there are unsettled claims after the conference, a summary stipulation of all contested and uncontested issues must be prepared and signed by the parties. The regulation

further provides that only contested issues shall be the subject of further proceedings. In the case at bar, Bishop only appealed to the Board the issue of whether Teco Coal had preserved the issue involving the statute of repose for consideration by the ALJ. The Board held that it had been, and we agree.

The procedures for an appeal of a Board decision is found in Kentucky Rules of Civil Procedure (CR) 76.25 and KRS 342.290. The rule articulates that “[p]ursuant to Section 111(2) of the Kentucky Constitution and SCR 1.030(3), decisions of the Workers' Compensation Board shall be subject to direct review by the Court of Appeals in accordance with the procedures set out in this Rule.” CR 76.25(1). The scope of review by this Court is contained in KRS 342.290:

The decision of the board shall be subject to review by the Court of Appeals pursuant to Section 111 of the Kentucky Constitution and rules adopted by the Supreme Court. The scope of review by the Court of Appeals shall include all matters subject to review by the board and also errors of law arising before the board and made reviewable by the rules of the Supreme Court for review of decisions of an administrative agency.

Based on this statutory guidance, only issues before the Board are reviewable by us. Bishop did not argue to the Board that the ALJ erred in its interpretation of the statute of repose, and therefore, this issue is not preserved for our review.

Evansville Printing Corp. v. Sugg, 817 S.W.2d 455, 458 (Ky. App. 1991).

Our jurisprudence posits that a theory of error cannot be raised for the first time on appeal. *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011). As the

oft-quoted statement goes, an appellant “will not be permitted to feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). This analysis applies to appellate review of workers’ compensation cases, too.

Finally, we are compelled to comment that even if the issue of the statute of repose had been preserved, the applicable provision, KRS 342.185, has been interpreted as both a statute of limitations and a statute of repose. *Manalapan* 204 S.W.3d at 605. In his opinion, the ALJ astutely explained the implications of the statute of repose:

The evidence clearly shows [Bishop] experienced temporary total and permanent partial disability with his fusion surgery in December 2009. The entirety of the 25% impairment which he continues to have, came into existence at that time. He believed the condition to be related to his work, but did not pursue a medical opinion at that time. Since the work activities which produced the impairment and disability occurred prior to December 2009 and the work activities following that time failed to lead to additional impairment or disability, [Bishop’s] claim expired by virtue of the statute of repose before his period of limitations began to run pursuant to *Manalapan Mining Co., Inc. v. Lunsford*, 204 S.W.3d 601 (Ky. 2006). Additionally, since [Bishop] did not incur any additional impairment for the condition during the two years prior to the filing of his claim he simply does not have a cervical impairment on which an award of benefits can be based pursuant to *Kentucky Family Prac. v. Leach*, 237 S.W.3d 530 (Ky. 2007).

Although Bishop maintained that the ALJ improperly interpreted the statute of repose, he only proffered a statute of limitations argument and never directly argues or provides evidence that the statute of repose was not applicable. We

believe otherwise, and while not germane to the reason for our decision, conclude that the reasoning of the ALJ was not in error.

The decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Fleet Johnson
Randy G. Clark
Pikeville, Kentucky

BRIEF FOR APPELLEE:

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