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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001863-WC

MARTIN COUNTY FISCAL COURT — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-71250

JOHN SIMPKINS;
HON. OTTO DANIEL WOLFF,
ADMINSTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND MAZE, JUDGES.

MAZE, JUDGE: The Martin County Fiscal Court (hereinafter "Martin County") seeks our review of a decision of the Workers' Compensation Board (hereinafter "the Board") affirming in part and vacating in part the decision of the

Administrative Law Judge (ALJ). The present appeal stems from the 2010 and 2011 injuries to John Simpkins, an employee of Martin County. On appeal, Martin County's sole allegation of error concerns whether KRS[1] 342.270(1) required Simpkins to join his claims, therefore barring his recovery on the 2013 claim. Observing no error in the Board's application of KRS 342.270(1), we affirm.

Background

On July 12, 2010, Simpkins suffered skin damage caused by his exposure to chemicals at work. Simpkins sought medical treatment and filed a claim against Martin County's workers' compensation policy. On October 10, 2011, the Administrative Law Judge (ALJ) in Simpkins's 2010 claim entered a hearing order noting that the parties had settled for a "lump sum of $3,000.00 for complete buy-out and dismissal." The ALJ formally approved the settlement on October 27, 2011.

In January 2013, Simpkins filed a second workers' compensation claim (hereinafter "2013 claim") for a back injury which occurred on October 4, 2011 – six days before entry of the hearing order denoting settlement of his 2010 claim. Martin County filed a motion to dismiss the 2013 claim on the grounds that KRS 342.270(1) required joinder of the claims. Without ruling on this motion, the ALJ scheduled a benefit review conference.

Prior to the benefit review conference, the parties submitted the reports of several medical professionals including Dr. Lafferty whose records

[1] Kentucky Revised Statutes.

noted treatment of Simpkins from October 5, 2011, until June 4, 2013. During this time, Simpkins suffered lower back pain and muscle spasms. Dr. Lafferty first diagnosed Simpkins with a lumbosacral strain on October 5, 2011. He later added a diagnosis of a chronic lumbar strain; and after a February 9, 2012 examination, Dr. Lafferty stated that Simpkins had reached maximum medical improvement. In a record which coincided with a January 3, 2013 examination, Dr. Lafferty referred to Simpkins's October 2011 back injury for the first time as a "job injury resulting in a low back injury[.]" The ALJ later concluded that Simpkins sustained a 3% lumbar impairment and awarded benefits. The Board vacated and remanded this portion of the ALJ's opinion, and neither party petitions us to review it.

More important to our purposes on appeal, the ALJ concluded that the joinder requirement of KRS 342.270(1) did not bar Simpkins's 2013 claim. The ALJ reasoned that Simpkins's injury did not accrue until after settlement of the 2010 claim; and therefore, the statute did not require joinder. The Board affirmed, and Martin County now appeals on the sole basis of the joinder issue.

Standard of Review

To properly review the Board's decision, we are ultimately required to review the ALJ's underlying opinion. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). We will affirm the Board absent a finding that the Board has misconstrued or overlooked controlling law or has so flagrantly erred in evaluating the evidence that gross injustice has occurred. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687–88 (Ky. 1992). However, to the extent the matter before us

involves statutory interpretation, as a matter of law, we review it *de novo*. *Saint Joseph Hosp. v. Frye*, 415 S.W.3d 631, 632 (Ky. 2013)(citation omitted).

Analysis

KRS 342.270(1) states, in pertinent part,

> When the application is filed by the employee or during the pendency of that claim, he or she shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him or her. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

Since its enactment in 1996, our Supreme Court has made it clear that this language is "clear, unequivocal, and mandatory[.]" *Ridge v. VMV Enterprises, Inc.*, 114 S.W.3d 845, 847 (Ky. 2003). However, as Martin County points out in its brief, law regarding when a claimant's cause of action has "accrued" is scarce. Nevertheless, to determine whether KRS 342.270(1) required joinder of Simpkins's claims, we must determine on what date his 2013 claim accrued.

For clarification of this question, both the ALJ in his opinion and Simpkins in his brief relied upon an unpublished case from this Court, *Pepsi Cola General Bottlers, Inc. v. Butler*, 2007 WL 1964526, No. 2006-CA-002401-WC (Ky. App. 2007). In that case, a separate panel of our Court employed KRS 342.270(1) and the same Chapter's definition of "injury" in holding that the claimant's cause of action for psychological injury did not accrue until the "claimant has suffered a 'harmful change in [his] human organism evidenced by

objective medical findings' and he knows or should know that such harmful change is a 'direct result of a physical injury.'" *Id*. at *7, citing KRS 342.0011(1).[2]

The undisputed objective of KRS 342.270(1) is "to address the problems created by the piecemeal litigation of workers' compensation claims. *Ridge*, 114 S.W.3d at 847, citing *Jeep Trucking, Inc. v. Howard*, 891 S.W.2d 78 (Ky. 1995). This objective is achieved through faithful application of the statute's mandatory language in conjunction with other statutes, including KRS 342.0011 and its definition of an "injury." Therefore, we reaffirm our holding in the *Pepsi Cola* case, and we see no reason the same rule should not apply in Simpkins's case.

Whether it concerns joinder or the statute of limitations, the existence of an injury is but one criterion for determining when a workers' compensation claim "accrues." Of additional import is the question of when the claimant became aware that the injury was work-related. *Compare Pepsi Cola* at *7, *with Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky. 1999) (holding that workers' awareness of their work-related hearing loss and when that loss had ceased to worsen were key to a decision regarding the statute of limitations.); *see also* KRS 342.0011.

Looking to the facts in the present case, and applying the above criteria to the chronology of Simpkins's respective claims, we agree with the ALJ and the Board that KRS 342.270(1) did not compel joinder. Martin County argues that as of October 5, 2011, Simpkins had or should have had sufficient information

[2] KRS 342.0011(1) defines the term "injury," in part, as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings."

to require joinder of his claims. It bases this assertion on Simpkins's testimony that he reported his October 4 injury to his employer; that he told his doctor on October 5 that he had "done a lot of lifting[;]" and that Dr. Lafferty diagnosed an injury on that day. While these facts show the existence of an injury, they do not definitively demonstrate that Simpkins also knew or should have known that the injury was work-related. Rather, the record demonstrates that it was unclear on October 5, 2011, whether Simpkins's complaints stemmed from a new work-related injury or from aggravation of preexisting and possibly non-work-related back pain. This issue was not resolved until Dr. Lafferty concluded on January 3, 2013, that Simpkins's was a "job injury resulting in a low back injury[.]"

As the Board stated, in the five days between the injury and settlement of the 2010 claim, "[i]t was extremely difficult to determine whether Simpkins had a meritorious claim for a work-related injury[.]" Indeed, on October 10, 2011, when the 2010 claim was settled, the appropriate process for making such a determination had only just begun. To read KRS 342.207(1) as requiring Simpkins to immediately continue the settlement of the 2010 claim and seek joinder of an unconfirmed work-related claim is unreasonable, unduly burdensome, and beyond the intended function of KRS 342.270(1).

Conclusion

We conclude that the Board did not misconstrue the law or otherwise err in deciding the question of joinder, and we affirm that portion of the Board's

October 17, 2014 order. Pursuant to that order, Simpkins's case will be remanded to the ALJ for further proceedings on other matters not before this Court.

ALL CONCUR.

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