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NO. 97-CA-0884-WC

ACCURIDE CORPORATION APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-94-025787

ROGER BRUCE JENKINS; ROBERT E. SPURLIN, Director of SPECIAL FUND; J. LANDON OVERFIELD, Administrative Law Judge; and WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

* * * * * *

BEFORE: COMBS, EMBERTON, and MILLER, Judges.

COMBS, JUDGE: Accuride Corporation petitions and the Special Fund cross-petitions for review of a Workers' Compensation Board (Board) opinion rendered 7 March 1997, that affirmed the Administrative Law Judge's (ALJ) decision on reopening that Roger Bruce Jenkins was totally occupationally disabled. Having considered the arguments presented and reviewed the record, we affirm.

Jenkins began working for Firestone, Accuride's predecessor, in 1977. In 1991, Jenkins sustained a compensable injury for which he filed a claim. On 26 January 1994, ALJ Thomas Dockter rendered an opinion finding him 25% permanently partially disabled. ALJ Dockter carved out 5% disability for a previous claim for injury to Jenkins's right thumb --a claim which had been settled for a lump sum. He also noted a previous award of 10% occupational disability related to a hearing loss but did not make any determination that this was a prior active occupational disability. The award was apportioned equally between the employer and the Special Fund.

Jenkins continued his employment with Accuride. However, he suffered a series of work-related injuries occurring on 15 July 1993; on 14 June 1994; and again, on 8 May 1995. On 17 July 1995, Jenkins filed a new Form 101, Application for Adjustment of Claim. On 2 October 1995, Accuride filed a motion to reopen his 1991 claim and a motion to consolidate the reopening with the three most recent injuries. The claims were ordered consolidated on 19 October 1995.

A hearing was conducted with ALJ Overfield rendering a decision on 9 October 1996, in which he found that Jenkins had met his burden of proving an increase in occupational disability and awarded him benefits reflecting total permanent occupational disability. He confined the pre-existing active disability to the 5% carved out by ALJ Dockter in Jenkins's original claim. The 95% occupational disability award was apportioned equally

between Accuride and the Special Fund, beginning 2 October 1995, the date Jenkins's motion to reopen was filed, and continuing for as long as Jenkins remained disabled. On appeal, the Board affirmed the ALJ's finding of total disability; his determination with respect to the number of weeks that Accuride is responsible for payment of the award; his refusal to award a credit to Accuride in the amount of the past benefits paid pursuant to the initial award; his refusal to grant credit to Accuride for voluntary temporary total disability benefits paid prior to the date of the reopening motion; and finally, his refusal to reduce Jenkins's award based upon benefits payable for his past hearing loss.

The standard to which we must adhere when reviewing a decision of the Workers' Compensation Board is set forth in Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687 (1992):

> The function of further review of the [Workers' Compensation Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

After reviewing the Board's opinion, the ALJ's opinion and award, and the record, we conclude that the Board did not assess the evidence in a manner so flagrant as to result in a gross injustice to Accuride or the Special Fund. Consequently, the decision to reopen and to award total occupational disability benefits must be affirmed.

We also reject a related argument advanced by Accuride (and adopted by the Special Fund) concerning the applicability of amendments to KRS 342.125, the reopening statute, which became effective 4 April 1994 and 12 December 1996. These amendments altered the standard under which a motion to reopen was -- and is -- considered.

KRS 446.080(3) provides that "[n]o statute shall be construed to be retroactive, unless expressly so declared."[1] Generally, then, the law in effect on the date of injury fixes the rights of the injured worker and the obligations of the defendant regarding income benefits for that injury. Maggard v. International Harvester, Inc., Ky., 508 S.W.2d 777 (1974). However, legislation has been applied to causes of action which arose before its effective date in the absence of an express declaration that the provision is to be so applied in those instances where the courts have determined that the provision was remedial or procedural in nature and that retroactive application of the provision was consistent with the legislative intent. Benson's Inc. v. Fields, Ky., 941 S.W.2d 473 (1997).

Accuride and the Special Fund maintain that the 1994 amendment to KRS 342.125 must be viewed in light of the "crisis" in the workers' compensation system. They suggest that the emergency clause contained in the 1994 legislation indicates that the legislature intended the amendments to be "remedial" and to

[1]There is no expression by the legislature that either of the amendments to KRS 342.125 are to be applied retroactively.

apply retroactively. Relying on Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991), they contend that the 1994 amendment to the statute is applicable to Jenkins's reopened claim. We disagree.

We do not find the employer's reliance on Peabody Coal Co. in support of its position to be persuasive. In Peabody Coal Co., the court held that the 1987 amended version of KRS 342.125, permitting reopening upon a showing of change of "occupational disability," was intended and drafted to authorize reopenings despite the fact that there was no change in the workers' functional disability or physical condition.[2] The court recognized that workers' compensation awards were premised upon occupational rather than functional disability and determined that the 1987 amendment to KRS 342.125 was remedial legislation which was consistent with the purpose of the reopening statute. Thus, the amendment was not viewed as a retrospective law and could properly be applied to a claim arising before the amendment's effective date. The rationale for the court's decision was supplied by a commentary found in 73 Am.Jur.2d Statutes § 354 (1974). The Peabody court quoted the following passage with approval:

> A retrospective law . . . is one which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty,

[2]Prior to 1987, the statute permitted reopening upon a showing of change of "condition." In Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), the court interpreted a "change in condition" to mean a change in physical condition as well as a change in occupational disability.

> or attaches a new disability, in respect to transactions or considerations already past. Therefore, despite the existence of some contrary authority, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. [A] remedial statute must be [construed retroactively] as to make it effect the evident purpose for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty. (Footnotes omitted).

Id. at 36.

The 1994 amended version of KRS 342.125, however, announced a standard requiring the claimant to prove a change in his medical condition in order to demonstrate a change in occupational disability sufficient to justify reopening.[3] Unlike the amendment considered in Peabody Coal Co., the 1994 amendment to KRS 342.125, was not remedial or merely procedural legislation. Rather, the amendment served to change substantively the rights and obligations of claimants and defendants. Retroactive application of the 1994 amendment would thus run afoul of KRS 446.080(3), which states unequivocally: "No statute shall be construed to be retroactive, unless expressly so declared." Benson's , Inc. v. Fields, Ky., 941 S.W.2d 473 (1997) and Spurlin v. Adkins, Ky., 940 S.W.2d 900

[3]This standard applies to the reopening of a claim where an award was entered pursuant to KRS 342.730(1) (c) or (d).

(1997).[4]

Separate and apart from this significant issue, however, we still would not reverse the Board's opinion on this point. As the Board noted, Jenkins was originally awarded benefits for his 1991 work-related injury pursuant to KRS 342.730(1)(b). The standard for reopening established in the 1994 amendment to KRS 342.125(1) specifically references the sections of KRS 342.730 to which it pertains and conspicuously omits (1)(b) from the covered portions as follows: "in claims where an award or order is entered pursuant to KRS 342.730(1)(c), or (d), and . . . upon the application of any party and a showing of change of medical condition. . . ." The 1994 amendment to KRS 342.125 applied only to the new additions to §730 and not to the subsection (1)(b), under which Jenkins was originally awarded benefits. Moreover, we note that effective 4 April 1994, KRS 342.125(3) provided as follows:

> In a reopening or review proceeding where there has been additional permanent partial disability awarded, the increase shall not extend the original period, unless the combined prior disability and increased disability exceeds fifty percent (50%), but less than one hundred percent (100%), in which event the awarded period shall not exceed five hundred twenty (520) weeks, from commencement date of the original disability previously awarded. The law in effect on the date of the original injury controls the rights of the parties. (Emphasis added.)

Consequently, the 1994 amendment is inapplicable by its terms.

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[4]We are not persuaded that the emergency clause, of itself, contained in the legislation indicates that the amendment is remedial. See Benson's Inc. v. Fields, Ky., 941 S.W.2d 473 (1997).

The Board did not err in so concluding.

Next, we turn to consider the effect of the 1996 amendment to the statute upon Jenkins's reopening. As a result of that amendment, KRS 342.125 now provides, in relevant part, as follows:

> (1) Upon motion by any party or upon an arbitrator's or administrative law judge's own motion, an arbitrator or administrative law judge may reopen and review any award or order on any of the following grounds:
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> * * * *
>
> (D) Change of disability <u>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</u>.
>
> * * * *
>
> (3) Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, or within two (2) years of such award or order, and no party may file a motion to reopen within two (2) years of any previous motion to reopen by the same party.
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> * * * *
>
> (8) The time limitation prescribed in this section shall apply to all claims irrespective of when they were incurred, or when the award was entered, or the settlement approved. <u>However, claims decided prior to the effective date of this Act may be reopened within four (4) years of the award or order or within four (4) years of the effective date of this Act, whichever is later, provided that the exceptions to reopening established in subsections (1) and</u>

(3) of this section shall apply to these claims as well.

(Emphasis added).

Accuride and the Special Fund insist that the 1996 amendment expressly directs that its provisions are to be applied retroactively. As a result, they maintain, Jenkins's reopening is governed by the more stringent proof requirements of the new statute. Since Jenkins did not introduce "objective medical evidence" of a worsening of his impairment before the ALJ, they contend, the award of increased benefits must be reversed. We do not conclude that the statute, by its terms, is to be applied to Jenkins's reopened claim; nor do we conclude that the 1996 amendment is remedial. Consequently, we conclude that the Board did not err by determining that the 1996 amendment to KRS 342.125 did not apply to this re-opening proceeding.

Accuride and the Special Fund rely upon the second sentence of KRS 342.125(8) to support their assertion that the legislature expressed its intention that the amendment would apply retroactively to pending claims (including those on appeal). Again, this sentence provides as follows: "[h]owever, claims decided prior to December 12, 1996, may be reopened with four (4) years of the award or order or within four (4) years of December 12, 1996, whichever is later, provided that the exceptions to reopening established in subsections (1) and (3) of this section shall apply to these claims as well."

While this provision deals with the treatment of claims decided prior to the effective date of the statute, we do not

construe this language as expressing an intention that the amendment apply to the reopening considered here. Instead, in our view, the language merely provides that as of the effective date of the statute, claims decided prior to the enactment of the statute are subject to being reopened at the latest until 12 December 2000. Those reopened claims are also subject to the limitations set out in subsections (1) (including the requirement that a change in disability be shown by "objective medical evidence" of the worsening of the claimant's impairment) and (3) of the statute. At the time the amended statute took effect, however, Jenkins's reopening claim had already been filed and decided by the ALJ.[5] Despite the employer's arguments to the contrary, the limitations governing reopenings undertaken after the effective date of the amendment simply do not apply to those reopenings filed and decided prior to 12 December 1996, the effective date of the amendment. Additionally, we find the fact that the ALJ's opinion and award were subsequently appealed to the Board and that the claim was arguably still "pending" as of the effective date of the amendment to be of no consequence. The amendment does not contain any language suggesting that reopening claims filed before the effective date of the statute's amendment, yet "pending" on appeal to the Board as of 12 December 1996, are controlled by the statute's new standard for

[5]Jenkins's motion to re-open his 1991 claim was filed on 2 October 1995; the ALJ's opinion and award were entered on 9 October 1996. The statute as amended became effective 12 December 1996.

determining a change of disability.

Finally, we cannot conclude that the amendment to KRS 342.125 is merely procedural in nature or that it operates to effectuate a remedy such that it might be considered "remedial legislation" exempt from the requirements of KRS 446.080(3). To the contrary, we conclude that a retroactive application of the amendment would have the unconstitutional effect of divesting Jenkins of a vested right. Consequently, we have determined that KRS 342.125, as amended effective 12 December 1996, should not be given retrospective effect in this case. While the legislature clearly intended to alter the proof required upon reopenings undertaken after 12 December 1996, we find no indication that it intended to alter awards previously entered.

In its next argument, Accuride contends that the Special Fund should be responsible for all income benefits on reopening beyond the 212.5 weeks of liability for which Accuride was initially responsible pursuant to the original award. This argument was addressed in well-reasoned fashion by the Board. We adopt this portion of the Board's opinion as follows:

> Accuride next argues that . . . the ALJ erred in not reducing the number of weeks the ALJ found that Accuride must pay. The rationale for Accuride's argument here is that in the initial Opinion and Award rendered by ALJ Dockter in 1994, Accuride was found responsible for paying the first 212.5 weeks of Jenkins'[s] disability. Of course, that was because Jenkins was found, at that time, to be only permanently partially disabled and the ALJ applied the appropriate provision for calculation of apportionment between an employer and the Special Fund contained with KRS 342.120. Nevertheless, Accuride argues the fact that Jenkins is now totally disabled, while extending the number of weeks for which benefits are payable, should

not be found to extend the period for which Accuride is responsible for paying benefits.

We believe Accuride's argument in this connection is misplaced. The employer is responsible for paying the first part of the reopened award until it has paid the percentage of full income benefits which is equal to the disability resulting from the injury alone. KRS 342.120(6). In this case, that is 50% of the total award. Since there will be a period of overlap of benefits during the period that permanent partial benefits are paid and the period for commencing lifetime benefits as awarded on reopening, Jenkins may not receive more than 95% of the award to which he is entitled. In effect, the ALJ's award allows Accuride to reduce its initial payments during the overlapping period. Moreover, Accuride's argument that its liability should be extinguished in accordance with the initial 212.5 weeks of disability and that the Special Fund should be responsible for all of the increased benefits on reopening, clearly overlooks the language of KRS 342.120(6) and (7) which mandates that the employer pay its proportionate share of all liability. Sovereign Coal Corporation v. Adkins, Ky. App., 690 S.W.2d 129 (1985).

We further should be mindful, as the Court noted in Pickands Mather & Co. v. Newberg, Ky., 895 S.W.2d 3 (1995), that "although [the payment scheme set out in KRS 342.120(6) and (7)] may result in each defendant actually paying more or less than the assigned percentage of liability on a given award, it does not alter the underlying premise that each defendant is liable for its proportionate share of a lifetime award." The underlying principle is that when an award is increased, such as here on reopening, Accuride, as the employer, is required to pay its proportionate share of any additional liability.

[In the alternative] Accuride argues that the ALJ erred in not providing a credit to Accuride in the amount of its past benefits paid pursuant to the initial award against its increased responsibility pursuant to the reopened award. However, Jenkins was not totally disabled until that judgment was made by the ALJ and became entitled to such benefits for total disability only as of October 2, 1995 when his motion to reopen was filed. Under the original award, Jenkins was entitled to benefits for 425 weeks for the 20% occupational disability awarded. Any benefits paid prior to October 2, 1995 were for the prior disability.

> The only credit therefore which may be granted is during that period when the two awards overlapped. While Accuride argues that there is clearly a lack of equity in the amount it may be required to pay when compared to what the Special Fund may be required to pay, we believe that Accuride has overlooked the fact that the Special Fund will continue to pay its portion of the old award pursuant to ALJ Overfield's determination so that it will have paid the same amount of benefits as Accuride has paid for Jenkins'[s] prior partial disability award.

Next, Accuride argues that it should be given credit for voluntary temporary total disability benefits that it paid for certain periods of disability stemming from Jenkins's three work-related injuries which were determined to be merely exacerbations of his original injury. We agree with the Board that the ALJ did not err by refusing to grant credit on the reopened award for any payments that were made prior to the date the motion to reopen was filed. These benefits were paid prior to the date of the reopening motion and do not overlap the reopened award.[6]

Finally, Accuride argues that the 10% award that Jenkins received for a prior hearing loss claim should be carved out of the current award. Again, we agree with the Board that the ALJ did not err in making his award.

In his Opinion and Award, ALJ Dockter noted that Jenkins had previously received a 10% award for a hearing loss. He made no determination, however, that the hearing loss was an

[6]As the Special Fund notes, Jenkins should not have received more than the statutory maximum and the prior permanent partial disability payments should have been interrupted during the periods of time that the claimant received temporary total disability benefits.

active prior occupational disability to be carved out of the 20% disability award made to Jenkins for his 1991 back injury. Similarly, there was no persuasive evidence presented to ALJ Overfield in the reopening proceeding indicating that the past hearing loss award was an active occupational disability contributing to his overall total disability. Since the ALJ found that the only pre-existing active disability affecting Jenkins was the 5% related to his prior thumb injury, only that percentage can be carved out from the current award.

We decline to consider Accuride's alternative argument that it should be given credit for any benefits that Jenkins is receiving for his hearing loss claim. Accuride did not address this issue to the ALJ in its petition for reconsideration and has not pointed to any evidence indicating that Jenkins receives hearing loss benefits overlapping the total disability award.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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