

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000252-WC

JAMES L. WILLIAMS

APPELLANT

PETITION FOR REVIEW OF A DECISION OF
V. THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-26721

BOULWARE CENTER, INC.; SPECIAL
FUND; J. KEVIN KING, Arbitrator;
DONNA H. TERRY, Chief
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and DYCHE,¹ Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (board), which determined that James L. Williams was precluded from filing a motion to reopen his claim by operation of KRS 342.125(3) and (8), as amended December 12, 1996. We affirm.

Williams previously filed a workers' compensation claim for a low back injury which he sustained on October 21, 1993, in

¹Judge Abramson was present at the oral argument herein but a majority decision was not reached prior to her departure from the court. Judge Dyche was assigned as the third member of the panel after her departure.

the course of his employment with Boulware Center, Inc. In an opinion and award rendered May 8, 1996, J. Landon Overfield, Administrative Law Judge, found that Williams's low back injury was in the nature of a sprain or strain. Williams was awarded benefits based upon a 5% permanent occupational disability.

On April 20, 1997, Williams filed a motion to reopen based upon a change of condition pursuant to KRS 342.125. On July 21, 1997, Kevin King, Arbitrator, denied the motion to reopen on the basis that KRS 342.125(3) and (8) prevented a claim from being reopened, except to contest medical expenses, within two years of the date of the previous opinion or award. The arbitrator's order was appealed to Donna H. Terry, Chief Administrative Law Judge (CALJ). In her order affirming the arbitrator's decision to deny Williams's motion to reopen, the CALJ agreed that KRS 342.125, as amended December 12, 1996, prohibited Williams from reopening his claim until two years following May 8, 1996, the date the previous award was made. In her order, the CALJ noted as follows:

[I]t must be concluded that under the plain language of the statute, as amended, Williams' motion to reopen cannot be maintained. The Kentucky General Assembly clearly stated its intent to proscribe all reopenings for a potential increase in income benefits for two years after an award or order, and applied this prohibition to all awards, even those entered prior to December 12, 1996, the effective date of the amendment. Thus, upon de novo review pursuant to 803 KAR 25:010, the Arbitrator's order must be AFFIRMED and Williams' motion to reopen must be overruled. (Emphasis added).

Williams appealed the CALJ's decision to the board. He argued that KRS 342.125(3) and (8) cannot be applied to prevent him from reopening his claim within two years from the date of his original award of benefits, because to do so would deprive him of several federal and state constitutional protections. Citing Blue Diamond Coal Co. v. Cornett, Ky., 189 S.W.2d 963 (1945), the board declined to render a decision with respect to the constitutionality of the amended statute.

In his appeal to this court, Williams reiterates his argument that the statute, as amended, is unconstitutional as it deprives him of substantive and procedural due process, equal protection of the law, and reasonable access to the courts. We disagree.

KRS 342.125, as amended effective December 12, 1996, provides in pertinent part as follows:

- (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.

. . . .

- (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. However, claims decided prior to December 12, 1996, may be reopened within 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.

Williams contends that the language of the statute, as amended, serves to deprive him of the right to a remedy and to compensation for his injury, as guaranteed through various provisions of the Kentucky Constitution. We disagree.

The right to receive workers' compensation benefits is a creature of statute. KRS 342.690.² The entirety of the basic underlying statutory framework of Kentucky's workers' compensation system was declared constitutional in Greene v. Caldwell, 170 Ky. 571, 580-81, 186 S.W. 648, 652 (1916), wherein the court explained as follows:

It is quite correct to say that [section 54 of the Kentucky Constitution] operates as a restraint on the General Assembly and prohibits it from attempting to limit the amount of recovery in the cases described in the section. But in this legislation the General Assembly did not arbitrarily or at all undertake to limit the amount of recovery. It merely proposed a statute to a certain class of people for their individual acceptance or rejection. It did not assume to deprive these classes or individuals without their consent of any constitutional rights to which they were entitled. The General Assembly merely afforded by this legislation a means by and through which

²There is no common law right to be compensated for an injury in the absence of negligence.

individuals composing classes might legally consent to limit the amount to which the individual would be entitled if injured or killed in the course of his employment.

More recently, it was held that

[o]ur Kentucky Constitution, §§14, 54, and 241, preserve to all persons, including the employee, the common law remedy in tort against a party at fault, except where the employee has made a voluntary election to waive such constitutional rights, express or implied. The foundation for declaring workers' compensation constitutional in Kentucky is built on recognition of this principle. Wells v. Jefferson Co., Ky., 255 S.W.2d 462 (1953). In Wells, we recognized a "presumed acceptance" as a waiver of the worker's constitutional rights, but we did not abolish the acceptance and waiver requirements.

M.J. Daly Co. v. Varney, Ky., 695 S.W.2d 400, 403 (1985),
overruled on other grounds U.S. Fidelity & Guaranty Co. v.
Technical Minerals, Inc., Ky., 934 S.W.2d 266 (1996).

Williams has made no argument that he opted out of the coverage provided by the Workers' Compensation Act. Instead, he elected to proceed under our workers' compensation system. As a result, we must conclude that Williams has waived any rights that he could have asserted under §§14 and 54 of the Kentucky Constitution. Edwards v. Louisville Ladder, Ky. App., 957 S.W.2d 290 (1997). Under the same analysis, we must also conclude that Williams has waived any rights that he might have asserted under §§2 and 59 of Kentucky's constitution.

Williams also argues that the statute, as amended in 1996, is unconstitutional as it deprives him of federal and state due process and equal protection guarantees. Again, we disagree.

As we noted in Edwards, supra at 295, "[a] court dealing with a challenge to the constitutionality of an act of the General Assembly must 'necessarily begin with the strong presumption in favor of constitutionality and should so hold if possible.'" (Citation omitted). In addition, "[a] statutory classification in the area of social welfare is not unconstitutionally arbitrary if it has a legitimate objective and it is rationally related to that objective." Estridge v. Stovall, Ky. App., 704 S.W.2d 653, 655 (1985). Moreover, due process or equal protection is violated "'only if the resultant classifications or deprivations of liberty rest on grounds wholly irrelevant to a reasonable state objective.'" Id. (citing Kentucky Association of Chiropractors, Inc. v. Jefferson County Medical Society, Ky., 549 S.W.2d 817 (1977)). See also Wynn v. Ibold, Inc., Ky., 969 S.W.2d 695 (1998).

In this case, the effect of the challenged amendment is to define the time period within which motions to reopen may be brought. The designation of such a time period constitutes an attempt by the General Assembly to ease the administrative and practical difficulties associated with reopening and altering workers' compensation awards. With this amendment, Kentucky joins the majority of jurisdictions having enacted time limits for reopening proceedings based upon a change of condition. 3

Arthur Larson, Workers' Compensation Desk Book §81.20 (1998).

Even those states in the minority which still permit a reopening of the proceedings on the basis of a changed condition at any time make such proceedings subject to various qualifications and restrictions. Delaware, for example, provides that modifications to an award cannot be made more often than once every six months. Id.

Through the enactment of the subject time limitations, the Commonwealth's legislators sought to answer obvious administrative concerns related to reopening proceedings. As a result, we cannot say that the restrictions imposed by the statute's amendment are "wholly irrelevant to a reasonable state objective." Estridge, supra at 655. Thus, we conclude that the 1996 amendment to KRS 342.125, as applied to Williams's claim, does not deprive him of any enumerated vested or constitutional rights.

The board's opinion is affirmed.

DYCHE, J., CONCURS.

COMBS, J., DISSENTS AND FILES A SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I respectfully but strenuously dissent from the reasoning and the result reached by the majority opinion. A very narrow issue is before us, an issue that does not require this court to address or analyze the propriety of the 1996 legislative re-vamping of workers' compensation statutory scheme as a whole. Rather, this appeal

focuses upon one minute portion of the new legislation, which is, in my opinion, unconstitutional as applied to the appellant in this case and which will have an enormously crushing impact on his life.

The constitutionality of the time limitation as applied prospectively is not before us -- although its potentially punitive impact on litigants is apparent and is alluded to in appellant's brief. The precise and narrow issue presented in this appeal is whether the application of the time limitation on reopenings, applied retroactively to injuries occurring before the 1996 amendments, amounts to an unconstitutional deprivation of due process. I believe that it does.

Williams argues correctly that he cannot hope to obtain adequate compensation benefits for the two-year period of his injury during which he is precluded from seeking a reopening. Even if he were to prevail upon reopening, an award flowing from that new hearing would relate back only to the actual date of the reopening. No matter how egregious the error resulting from the failure of an adjudicator to hear critical, newly discovered evidence (which is highly compelling in this case -- so compelling that it appears to have the capacity to negate the original opinion and order in this case as a matter of law), the injury could not be compensated with respect to the two-year "waiting period." This two-year hiatus virtually leaves an injured worker without any remedy at all -- at least for that two-year period.

Such a result does not comport with or promote the rule of statutory construction that the statute "be liberally construed in favor of the employee to effectuate the beneficent purposes of the Compensation Act." Marc Blackburn Birch Company v. Yates, Ky., 424 S.W.2d 814, 816 (1968). That old rule was reiterated more recently in Wilson v. SKW Alloys, Inc., Ky. App., 893 S.W.2d 800, 802 (1995): "... we must adhere to the general rule that the workers' compensation statutes will be liberally construed to effect their humane and beneficent purposes." Prolific case law is replete and consistent with that rule of liberal construction, going so far as to hold that where there is any doubt as to an employee's entitlement to receive benefits, the doubt is to be resolved in favor of the employee. Hinkle v. Allen-Codell Co., 298 Ky. 102, 182 S.W.2d 20 (1944).

This case spotlights and places in bold relief the inequity flowing from an absolute ban on reopenings for two years with regard to a claimant. The compelling evidence of the fact of a surgery to correct two herniated discs on January 8, 1997, squarely refuted the specific finding of the ALJ only months earlier in his decision of May 8, 1996, that claimant did not have herniated discs and that his pain was attributable to a low back strain. And yet under the 1996 statute, the claimant has no recourse, no remedy for his injury, for at least two years -- despite the obvious and significant error at the heart of the ALJ's decision. This is precisely the kind of error ("an error in assessing the evidence so flagrant as to cause gross

injustice") recited as grounds for appellate intervention by our Supreme Court in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992).

Our courts have consistently held that a reopening is justified under such circumstances. In Messer v. Drees, Ky., 382 S.W.2d 209, 213, the court stated:

When subsequent events indicate that an award was substantially induced by a misconception as to the cause, nature or extent of disability at the time of the hearing, justice requires further inquiry. Whether it be called a 'mistake' or a 'change in conditions' is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it.

The court cited that holding again in Reynolds v. Justice Coal Company, Ky., 425 S.W.2d 750 (1968). More recently, the Supreme Court addressed a case of a clear misdiagnosis of hypothyroidism as the underlying cause of the overall medical problem where, after entry of the opinion and order, medical tests revealed a torn rotator cuff at the right shoulder to have been the correct cause of the injury. In ordering a reopening of this claim, the Supreme Court stated: "This is egregious error and constitutes a manifest injustice." Durham v. Copley, Ky., 818 S.W.2d 610, 612 (1991).

The error in this case is no less egregious, and the manifest injustice cannot be corrected under the present statute. I would, therefore, hold KRS 342.125(3)(8) to be unconstitutional as applied.

On its face, the statute appears to serve a legitimate state interest of imposing a new order of predictability and efficiency in reopenings. As applied, however, it results in allowing a wrong to go remediless in violation of the legitimate expectations and constitutional rights of the claimant. It has been black-letter law since the inception of workers' compensation legislation that the substantive rights of an employee/claimant are fixed and defined by all statutory provisions in effect at the time of an injury and that, as such, his legitimate expectations upon that status of the law as of date of injury are an integral part of his employment contract:

The substantive rights of a claimant under the workers' compensation statute are fixed by the statutory provisions in effect on the date of his injury. See McGregor v. Pip Johnson, Ky., 721 S.W.2d 708, 710 (1986). This is so because the provisions of the statute in effect at the time of injury are considered to be a part of the contract of employment between the claimant and his employer. (Emphasis added.)

Collins v. Cumberland Gap Provision Co., Inc., Ky. App., 754 S.W.2d 864, 866 (1988).³ The change as to reopening, while facially neutral, has had the practical impact on Williams of

³This case was superseded by Kentucky Insurance Guaranty Association v. Conco, Inc., Ky. App., 882 S.W.2d 129 (1994), explaining Collins, supra, and holding that remedial workers' compensation legislation that reversed a cap on liability could be applied retroactively since it was remedial in nature and did not operate to take away vested rights in derogation of the remedial purpose of the workers' compensation. Pursuant to this reasoning, there can be no retroactive application of the statute at issue here as it is far from remedial in impact.

severely altering the terms of his employment contract and thus arbitrarily denying him his right to substantive due process.

It cannot be argued that Williams has acquiesced to and elected this substantive change in his employment remedies merely by continuing to participate in workers' compensation or by failing to waive specifically workers' compensation coverage in lieu of his right to pursue his common law tort remedy, most clearly set forth at §54 of the Kentucky Constitution: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." It is wholly illogical and inconsistent to construe a waiver on Williams's part of his right to seek recovery for an injury by arguing that a new statute, having significant and controlling impact on his right to recover for an injury, a statute not in effect either at the time of his employment or at the time of his injury, should be permitted to supersede and to emasculate by implication those substantive rights which he believed to constitute his contract of employment at the time of his employment.

I concur with appellant's argument that KRS 342.125(3)(8) results in a denial of equal protection of the laws in violation of Amendment 14 of the United States Constitution and of §§2, 3, and 59 of the Constitution of Kentucky. Under the 1996 amendments, an employer is at liberty to reopen: (1) to contest medical expenses, (2) to determine fraud, or (3) to reduce an award of permanent total disability upon an employee's

return to work. An employee, on the other hand, has absolutely no ability to reopen for two years from the date of the decision. Additionally, injury endured during the two-year interim will assuredly go uncompensated since any award upon reopening must run from the date of reopening. Such disparity in treatment of employers and employees is both untenable and unconstitutional as a violation of the right of equal protection of the laws.

In summary, I would hold that KRS 342.125(3)(8) is unconstitutional as applied. I would urge a remand of this case to the ALJ for him to consider the newly discovered medical evidence according to the analysis set forth in this dissent.

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