

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002334-WC

VALLEY DEVELOPMENT MINING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-88-036775

JAMES ENDICOTT; SPECIAL FUND;
HON. RONALD W. MAY, Administrative Law
Judge; and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, COMBS, and McANULTY, Judges.

COMBS, JUDGE: The appellant, Valley Development Mining (Valley), appeals from the judgment of the Workers' Compensation Board affirming the order of the Administrative Law Judge which found James Endicott totally, occupationally disabled upon reopening. Valley contends on appeal that Endicott did show by objective medical evidence a change in his occupational disability. We disagree and affirm the decision of the Board.

In September of 1988, Endicott sustained a work-related injury to his back while in the employment of Valley. He subsequently filed a claim for workers' compensation benefits,

and in April 1992, he was found 70% disabled and was awarded benefits accordingly. On March 18, 1997, Endicott filed a motion to reopen his claim, alleging that his condition had worsened. The ALJ entered his opinion and order on April 8, 1998, finding that Endicott's disability had increased to the extent that he was now totally, occupationally disabled. Valley appealed the ALJ's decision to the Board. On August 17, 1998, the Board affirmed the ALJ's decision. This appeal followed.

Valley argues on appeal that the ALJ applied the incorrect standard on the reopening of Endicott's claim. It asserts that the amendments to KRS 342.125 (the reopening statute), effective December 12, 1996, govern the standard under which Endicott's motion to reopen should have been considered. The 1996 amendments to KRS 342.125 altered the standard under which motions to reopen are considered, requiring the claimant to show a change in disability by objective medical evidence. KRS 342.125(1)(d). Valley contends that Endicott failed to establish through objective medical evidence that his condition had worsened.

"[N]o statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). The law in effect on the date of injury generally determines 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 arising before its effective date in certain 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). The Kentucky Supreme Court explained this distinction in Peabody Coal Co. v Gossett, Ky., 819 S.W.2d 33, 36 (1991), quoting 73 AmJur 2d Statutes § 354 (1974)

(footnotes omitted):

A retrospective [sic] 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, 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 retrospective operation of statutes. In this connection it has been said that a remedial statute must be so construed 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 rights or violate some constitutional guaranty.

KRS 342.0015, effective December 12, 1996, specifically provides that KRS 342.125(8) is remedial and, therefore, retroactive. However, KRS Chapter 342 in general contains no express declaration as to whether the other 1996 amendments to KRS 342.125 are remedial as well. Pertinent to this appeal, KRS 342.125(1), as amended in December 1996, provides:

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:

- (a) Fraud;
- (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;
- (c) Mistake; and
- (d) Change of disability 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.

The 1996 amendments did not change three of the grounds for reopening a claim, but they did alter the standard for evaluating motions based upon a change in disability. The claimant must now prove a change in disability based upon the heightened standard of objective medical evidence – clearly an additional duty or obligation imposed upon him rendering more cumbersome his right to reopen the claim as it existed at the time of his original injury. We agree that the provisions contained at KRS 342.125(1)(a), (b), and (c) are wholly procedural. But KRS 342.125(1)(d) cannot be deemed to be solely procedural under the circumstances of this case since it does adversely encumber a right that existed at the time of the injury. Thus, while it is argued that it is wholly procedural and therefore susceptible of retroactive application, we hold to the contrary: that its substantive import in this case is not remedial in nature nor is it consistent with the beneficent purpose underlying the Workers' Compensation legislation in effect at the time of the injury. Therefore, pursuant to Peabody, this portion of the statute is

not the kind of retrospective law that can be accorded retroactive application.

The standard for appellate review of decisions by the Workers' Compensation Board is set forth in Western Baptist Hospital 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.

Even if the Board and the ALJ had applied the incorrect standard (which we have just held that they did not), we find that they did not assess the evidence in a manner so flagrant as to result in gross injustice. The record shows that Endicott did indeed show by objective medical evidence that his condition had worsened and that the ALJ based his findings upon this evidence.

Objective medical evidence is defined in KRS 342.0011(33) as "information gained through direct observation and testing of the patient applying objective or standardized methods." In concluding that Endicott was now totally occupationally disabled, the ALJ relied heavily upon the examination reports of Dr. Kenneth Graulich and Dr. Joseph Rapier. The two doctors examined Endicott initially in 1991 and again in 1997. Both doctors reported significant decreases in Endicott's range of motion in the lumbosacral spine – as well as decreases in flexion and in full, right-and-left side bending. Additionally, Dr. Graulich and Dr. Rapier imposed severe restrictions based upon their respective examinations of Endicott

in 1997. Significantly, Dr. Graulich had restricted Endicott to lifting weight of no more than 75 pounds in 1991. However, more recently, he has restricted Endicott to lifting weight no greater than 25 pounds. Thus, the record contains "objective medical evidence" that Endicott's disability has changed. We find no error on appeal.

Valley also raises the issue of whether upon remand the ALJ could find that Endicott is entitled to an additional award based upon mistake. In his opinion, the ALJ noted that Endicott "might prevail on reopening on the basis of mistake." However, this point is moot in light of the fact that Endicott established a change in his condition by objective medical evidence – the retroactive issue notwithstanding.

For the foregoing reasons, we affirm the judgment of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roberta K. Kiser
Lexington, KY

BRIEF FOR APPELLEE JAMES
ENDICOTT:

Jeffery Hinkle
Inez, KY

BRIEF FOR APPELLEE SPECIAL
FUND:

David W. Barr
Louisville, KY