

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000594-WC

FRUIT OF THE LOOM

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-93-15281

TIM KEETON; HON. DONNA TERRY, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
REVERSING & REMANDING  
\*\* \*\* \* \* \* \* \*

BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

DYCHE, JUDGE. Fruit of the Loom (FOL) petitions this Court to review an opinion of the Workers' Compensation Board (the Board) rendered on February 12, 1999, which affirmed an opinion and order of the Administrative Law Judge (ALJ) that awarded temporary total disability (TTD) benefits to Tim Keeton (Keeton).

On March 24, 1993, Keeton injured his right wrist in the course of his employment with FOL. After enduring two surgical operations, Keeton filed a claim for workers' compensation benefits. Keeton and FOL ultimately settled the claim for a lump sum of \$10,746.71, equaling 15% permanent,

partial occupational disability. In January 1997, Keeton underwent a third wrist operation consisting of an arthrodesis of the right luno-triquetral joint. On January 27, 1997, pursuant to Kentucky Revised Statute (KRS) 342.125, Keeton filed a motion to reopen his previous claim alleging that his condition had worsened since the time of the settlement. On March 24, 1997, an ALJ denied Keeton's motion to reopen on the ground that he failed to support the motion with any medical evidence.

In May 1998, Dr. Thomas Wolff performed a fourth wrist surgery on Keeton characterized as a "redo" of the arthrodesis utilizing a left iliac crest bone graft. As a result of the surgery, Keeton was unable to work from May 14, 1998, until September 2, 1998. While FOL agreed to pay for the cost of the surgical procedure, it refused to pay Keeton TTD benefits during his recuperation. On June 4, 1998, Keeton filed a motion to reopen seeking TTD benefits for the time he was unable to work. In its response to Keeton's motion, FOL argued that Keeton was precluded by KRS 342.125(3) from filing a second motion to reopen within two years. In an order entered on July 24, 1998, an arbitrator found that Keeton's motion should be treated as a motion to reinstate TTD benefits rather than a motion to reopen and ordered FOL to respond to the merits. After FOL's motion for reconsideration was denied, it filed a request for de novo review before an ALJ. 803 KAR 25:010.

On review, the Hon. Donna H. Terry, Chief Administrative Law Judge (CALJ), determined that a motion to reopen was not required to compel payment of TTD benefits "during

a period of unquestioned temporary total disability following an unquestionable work-related surgery" and ordered FOL to pay Keeton TTD benefits at a rate of \$197.11 per week from May 8, 1998, to September 2, 1998. FOL appealed the decision to the Board. The Board, citing its previous decision in General Electric Company v. Higdon, 96-06027, rendered August 7, 1998, affirmed the CALJ's opinion. This petition followed.

The issue presented by the case sub judice is whether a party to a final award must file a motion to reopen in order to receive TTD payments for recuperation following a post-award surgery that is clearly related to the original injury. We must note that the legitimacy of Keeton's request for TTD is not at issue; our primary focus is on the means by which he must pursue such a claim.

An agreement to settle a workers' compensation claim that has been approved of by an arbitrator or ALJ becomes a final award and is enforceable in circuit court pursuant to KRS 342.305. KRS 342.265(1). Once an approved settlement has been filed in circuit court, the court "shall render judgment in accordance therewith and notify the parties." KRS 342.305. As a judgment of the court, the settlement becomes "subject to the principles concerning the finality of judgments." Campbell v. Universal Mines, Ky., 963 S.W.2d 623, 624 (1998). It is well settled that a party to a final award may obtain relief from its terms "only if it is reopened pursuant to the provisions of KRS 342.125." Uninsured Employers' Fund v. Turner, Ky., 981 S.W.2d

544, 545 (1998), citing Beale v. Faultless Hardware, Ky., 837 S.W.2d 893, 896 (1992); KRS 342.265(4).

Because we are concerned with the procedures applicable to benefits provided in the Workers' Compensation Act, our query begins with the statutory scheme itself, KRS Chapter 342. TTD is defined as a condition in which an employee "has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" KRS 342.0011(11)(a). TTD benefits serve the particular purpose of assisting an injured worker through the recovery process, W.L. Harper Construction Co. v. Baker, Ky. App., 858 S.W.2d 202 (1993), and are a form of income benefit, KRS 342.0011(12). The General Assembly elected to delegate to the Commission of the Department of Workers' Claims the authority to promulgate regulations relating to the expeditious payment of TTD. KRS 342.735(1). While administrative regulations have been promulgated to deal with the payment of TTD at any time during a claim, 803 KAR 25:010, Section 11, the Commissioner has failed to promulgate any regulations relating to the post-award payment of TTD. As a result, we are now forced to determine what procedures should be followed when an injured worker seeks the post-award payment of TTD.

The Board's answer to the pressing issue came in the case of General Electric Company v. Higdon, 96-06027, rendered August 7, 1998. In the Higdon case, the Board held that in a post-award situation, an individual is not required to file a motion to reopen or any other pleading in order to receive TTD

after undergoing a reasonable and necessary surgery that is clearly related to the original injury. The Board's conclusion was based on the premise that TTD benefits are more like medical expenses than permanent income benefits; therefore, we should expect employers to pay TTD in a similar fashion as reasonable and necessary medical expenses. For the payment of post-award medical expenses, a motion to reopen is only required when there is a dispute concerning the reasonableness, necessity, or work-relatedness of the expense. 803 KAR 25:012, Section 1(6). Otherwise, the worker merely submits the bill to the employer, or employer's insurer, and the bill is paid without any pleadings being filed.

Initially, we are inclined to agree with the Board's premise. TTD is by definition self-limiting, and even though it is classified as an income benefit we have traditionally recognized the difference between TTD and permanent disability benefits. Robinson v. Newberg, Ky., 849 S.W.2d 532, 534 (1993), citing Island Creek Coal Company v. DeMoss, Ky. App., 621 S.W.2d 509 (1981). To a worker who was forced to undergo a surgical procedure due to a prior work-related injury, there is no economic difference between the cost of the procedure itself and the subsequent loss of income incurred because he/she was required to be off work for a specified period of time after the procedure. It seems illogical to differentiate between the expenses solely on the basis of their designations. Thus, a motion to reopen is not required to be filed in order for an individual to request the post-award payment of TTD benefits

after a reasonable and necessary surgery. However, where there is a subsequent dispute relating to the payment, nonpayment, reasonableness, necessity, or work-relatedness of TTD, we believe that a motion to reopen is required to be filed.

According to the administrative regulations that govern a post-award dispute regarding the payment, nonpayment, reasonableness, necessity, or work-relatedness of a medical expense, a motion to reopen pursuant to 803 KAR 25:010, Section 4(6) is required to be filed. 803 KAR 25:012, Section 1(6). In order to remain consistent with the original premise of similar treatment for TTD and medical expenses, the same procedures must be utilized to resolve disputes involving the post-award payment of TTD benefits. Keeton's motion in the case sub judice was properly filed as a motion to reopen to resolve a dispute regarding the nonpayment of TTD benefits by FOL. The CALJ and Board erred in construing the motion as a motion to reinstate TTD benefits.

Because we concluded that Keeton was required to file a motion to reopen to resolve the dispute regarding the nonpayment of TTD benefits, we must determine what version of KRS 342.125 applies to his claim. As indicated earlier, Keeton was originally injured in 1993, when there were no limits contained in KRS 342.125 on the time within which or number of motions an injured worker could file. In 1996, however, the General Assembly adopted a time line for filing motions to reopen in KRS 342.125. KRS 342.125 now provides, in pertinent part:

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

FOL argues that under this version of KRS 342.125(3), Keeton's June 1998 motion to reopen should be dismissed because it was filed within two years of his previous motion to reopen, which was filed in January 1997. Resolution of this issue requires us to determine whether the time limitations set forth in KRS 342.125(3) are applicable to a claim in which the award was entered into prior to the effective date of the amendment, December 12, 1996.

This issue has been recently addressed and decided by our Supreme Court in Meade v. Reedy Coal Co., No. 1999-SC-0552-WC, 2000 WL 309942 (Ky., Mar. 23, 2000). In Meade, the Court determined whether the December 12, 1996, amendments to KRS 342.125 applied to a claim in which the award was entered into

prior to the effective date of the amendments. In that case, the claimant had received an award of 50% permanent, partial occupational disability on December 21, 1995, and subsequently filed a motion to reopen his claim on January 30, 1997. The employer argued that the claimant was prohibited from reopening his claim by the two-year time limitation adopted in KRS 342.125(3). In construing KRS 342.125(8), the Court noted that the legislature expressly declared in KRS 342.0015, effective December 12, 1996, that KRS 342.125(8) was remedial in nature and that the language contained in KRS 342.125(8) clearly indicated the legislature's intent to apply the four-year time limitation retroactively to claims decided prior to December 12, 1996. As for the two-year waiting periods in KRS 342.125(3), the Court stated:

In view of the fact that KRS 342.125(8) contains a time limitation which applies specifically to claims decided prior to December 12, 1996, and the fact that KRS 342.125(8) refers only to the "exceptions" contained in KRS 342.125(3), we find no clear indication that the legislature intended for the two-year waiting periods which are contained in KRS 342.125(3) to apply retroactively to claims which arose and were decided before December 12, 1996.

Meade, 2000 WL 309942, at \*3. Therefore, the Court concluded that the two-year waiting periods, referring to both the prohibition against filing a motion to reopen within two years of the award or order and the prohibition against filing a motion within two years of any other motion, and the four-year limitation set forth in KRS 342.125(3) apply only to claims in which the award is entered on or after December 12, 1996. Id.



In the case sub judice, Keeton was originally injured in 1993, and his claim was settled pursuant to an agreement on March 15, 1996. Based on the Supreme Court's interpretation of the 1996 amendments to KRS 342.125, we find that Keeton's claim is governed by the law in effect prior to December 12, 1996. Meade v. Reedy Coal Co., No. 1999-SC-0552-WC, 2000 WL 309942 (Ky., Mar. 23, 2000). Therefore, the two-year waiting period prohibiting the filing of successive motions within two years is not applicable. At the time of Keeton's injury and at the time of his award, KRS 342.125(1) provided that an award could be reopened "at any time" upon the requisite showing.

The opinion of the Board is reversed and remanded for proceedings consistent with this opinion.

BUCKINGHAM, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I would affirm the well-reasoned opinions of the CALJ and the Board, which accurately summarize the propriety for payment of TTD under the circumstances of this case - without the expense and delay occasioned by the procedural meanderings proposed by the appellant.

BRIEF FOR APPELLANT:

Norman E. Harned  
Jeff V. Layson III  
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Mark D. Knight  
Somerset, Kentucky

