RENDERED: June 9, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002697-WC

BETTY MONTGOMERY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-90-15903

KOCH FILTER COMPANY;
HON. SHELIA LOWTHER,
ADMINISTRATIVE LAW JUDGE;
SPECIAL FUND; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND MCANULTY, JUDGES.

GUIDUGLI, JUDGE. Betty J. Montgomery (Montgomery) appeals from an opinion of the Worker's Compensation Board (the Board) entered October 8, 1999, affirming an opinion and order entered by the Administrative Law Judge on June 22, 1990, which dismissed her motion to reopen pursuant to KRS 342.125. We reverse and remand.

On March 26, 1990, Montgomery sustained a back injury in the course of her employment with Koch Filter Company (Koch). In an opinion and award entered October 7, 1991, Montgomery was awarded benefits based on a 25% occupational disability rating.

Liability for benefits was apportioned equally between Koch and the Special Fund.

On February 18, 1998, Montgomery filed a motion to reopen the 1990 claim (the first motion) pursuant to KRS 342.125. Attached to the motion was an affidavit from Montgomery alleging that her condition had worsened and that she was unable to do any work, thus warranting reopening under KRS 342.125. Also attached to the motion was a letter from Dr. Tinsley Stewart (Dr. Stewart) to Montgomery's attorney dated March 25, 1997. In the letter, Dr. Stewart indicated that Montgomery's injuries were permanent and that she "would have a 10% disability based on Table 72 plus another 10% based upon the principals outline in Chapter 15 regarding her chronic pain syndrome." Although Dr. Stewart listed restrictions on Montgomery's activities, he also stated that "she should be able to perform some type of gainful employment if it were not physical, such as lifting, carrying, pushing, or pulling." In a second letter dated December 2, 1997, Dr. Stewart stated that Montgomery was disabled and "physically and mentally incapable of doing any type of gainful employment. . . . Betty is undergoing severe trauma in her life with the neurologic deterioration of her companion and her physical disability." Koch contested Montgomery's first motion, arguing that she failed to establish a prima facie case as to her entitlement to reopening.

On April 13, 1998, the arbitrator assigned to hear Montgomery's claim entered an order denying her first motion. In so ordering, the arbitrator found that Montgomery's motion "fails

to establish a prima facie case for worsening of condition [or] increase in occupational disability[.]"

On July 15, 1998, Montgomery filed her second motion to reopen (the second motion). Montgomery's motion to reopen and affidavit in support thereof were identical to the first motion and affidavit, with the exception that no medical proof was attached.[1] Koch once again contested the motion to reopen, this time arguing that pursuant to KRS 342.125(3), as amended effective December 12, 1996, she was "precluded from filing a Motion to Re-Open within two years of February, 1998." Koch further contended that although Montgomery's injury occurred in 1991, the 1996 amendments to the statute applied retroactively. On August 25, 1998, the arbitrator entered an order denying Montgomery's second motion pursuant to KRS 342.125(3).

Undaunted, Montgomery filed a third motion to reopen on January 19, 1999 (the third motion). Montgomery's motion and affidavit were identical to the second motion, with the exception that this motion was directed to the Chief ALJ (the CALJ). Koch once again contested Montgomery's motion, this time on grounds of KRS 342.125(3) and that "the claimant may not succeed in subsequent motions to reopen based on the same facts alleged in a former motion to reopen." Koch also alleged that Montgomery's motion was barred by the doctrine of res judicata. On March 4, 1999, the arbitrator granted Montgomery's motion to reopen,

[1]Although Montgomery's attorney stated in his affidavit attached to the second motion that he was attaching medical records "setting out the medical condition of the Plaintiff," no medical records appear in the record on appeal in regard to the second motion.

finding that she had set forth evidence of a prima facie case for reopening pursuant to KRS 342.125.[2] Montgomery's motion to reopen was transferred directly to an ALJ by order entered April 1, 1999.

On April 5, 1999, Koch filed a request for de novo review of the arbitrator's March 1999 order by an ALJ. The parties briefed the issue, and on June 22, 1999, the CALJ entered an order overruling the arbitrator's March 1999 order and dismissing Montgomery's motion to reopen. Although the CALJ found that Montgomery succeeded in establishing a prima facie case for reopening pursuant to KRS 342.125, she went on to state:

> However, [Koch] argues that regardless of the merits of the motion for reopening, it is time barred. KRS 342.125, as amended effective December 12, 1996, states at subsection 3 that except for reopening solely for the determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c), or for reducing a permanent total disability award when an employee returns to work, no claim may be reopened more than four years following the date of the original award or within two years of such award. Furthermore, no party may file a motion to reopen within two years of any pervious motion to reopen by the same party. Ms. Montgomery has moved to reopen her claim on three occasions between February 17, 1998 and January 14, 1999. While she was unsuccessful on the two earlier attempts, the statute does not indicate that the motion must have been sustained, in order to prohibit a similar pleading during the next two years. Rather, it merely states that "no party may file a motion to reopen

[2]The arbitrator's notation that Dr. Stewart's records were attached to Montgomery's third motion is not supported by the record on appeal. Likewise, the CALJ's later statement that Dr. Stewart's records were attached to Montgomery's second motion is also not supported by the record on appeal.

> within two years of any previous motion to reopen by the same party."
>
> Subsection 8 of KRS 342.125 indicates that the time limitations in that section shall apply to all claims irrespective of when they occurred. However, claims which were decided prior to December 12, 1996 may be reopened within four years of the award or order, or within four years after December 12, 1996, whichever is later. Furthermore, KRS 342.0015 declares this provision to be remedial. Remedial statutes are to be applied retroactively. Peabody Coal Company v. Gossett, 819 SW2d 33 (1991). [emphasis in original]

Montgomery appealed to the Board, which affirmed the CALJ's opinion and order. In addressing Montgomery's claim that KRS 342.125(3) is substantive in that it deprives her of a vested right and thus is not subject to retroactive application, the Board held:

> In her brief before this Board, Montgomery recognizes the recent unpublished Court of Appeals [decision] of . . . Reedy Coal Co. v. Dannie Meade, (98-CA-000888-WC). The Court held . . . that merely establishing a limitation period for reopening a claim does not deprive an employee of a vested right or status even when the previous award was rendered prior to December 12, 1996. Montgomery urges that the rationale [in Reedy] is incorrect. She claims, in fact, the claimant does have a vested right.
>
> The Board, in its decision in . . . [Reedy] . . . essentially agreed with the position of Montgomery. However, we were reversed by the Court of Appeals in [that] decision. While we recognize that the Court of Appeals chose not to publish their [sic] decision, we further note that the [Reedy] case now has been appealed to the Kentucky Supreme Court and we believe that until there is a published case on a new issue, it is the obligation of this Board to follow the decision and rationale of the Courts as shown in their unpublished opinions. Therefore, we agree with the CALJ that KRS 342.125(3) bars

> consecutive reopenings within two years of each other.

This appeal followed.

Montgomery contends on appeal that "KRS 342.125(3) is substantive as opposed to procedural in that is potentially deprives the appellant of a vested right." Fortunately for Montgomery, after her appeal was perfected and briefed before this Court, the Kentucky Supreme Court entered its decision in Meade v. Reedy Coal Company, Ky., ____ S.W.3d ____ (2000), in which it held that the two year provisions of KRS 342.125(3) are not to be applied retroactively. In so ruling, the Court stated:

> Under the law in effect on the date of injury and on the date of claimant's award, a reopening was permitted "at any time" upon proof of one of the permissible grounds. As noted by the Board, parties who settled claims prior to December 12, 1996, and ALJs who decided claims before that date, had no opportunity to anticipate that a two-year waiting period might be imposed on the ability to reopen the resulting award and to provide accordingly. Keeping in mind that even remedial statutes should be given retroactive effect only to the extent that the intent of the legislature in that regard is clear, we are convinced that only the four-year limitation which is explicitly stated in KRS 342.125(8) should be applied retroactively to claims which arose and were decided prior to December 12, 1996.
>
> We conclude, therefore, that the exception to reopening established in KRS 342.125(1) and (3) permit the reopening of any claim, at any time upon proof of the requisite facts. The two-year waiting periods and the four-year limitation contained in KRS 342.125(3) govern the reopening of claims in which an award is entered on or after December 12, 1996. The four year limitation contained in KRS 342.125(8) governs the reopening of claims decided prior to December 12, 1996.

Meade, ____ S.W.3d at ____. Thus, based on Meade, the Board and the CALJ erred in deciding that Montgomery's motion to reopen is precluded by KRS 342.125(3).

Koch argues that even if Montgomery's motion to reopen is not precluded by KRS 342.125, it was error for the arbitrator to grant her third motion because the grounds contained therein were identical to the second motion. We agree with Koch that "a claimant may not succeed in a second motion to reopen based on the same facts alleged in support of a former motion to reopen." Ratliff v. Harris Bros. Const. Co., Ky., 441 S.W.2d 127, 128 (1969). However, we find that Ratliff does not apply here because Montgomery's second motion was erroneously dismissed under KRS 342.125(3) as opposed to being decided on the merits. Had Montgomery's second motion been decided on the merits, or had her third motion been identical to the first, Koch's argument may have had merit, but neither situation fits the case at hand.

As we have decided that Montgomery is entitled to have her motion to reopen decided on the merits, we need not address the other issues raised in her brief on appeal.

Having considered the parties' arguments on appeal, the opinion of the Board is reversed and this matter is remanded to the ALJ with instructions to reinstate Montgomery's third motion and allow it to proceed on the merits.

ALL CONCUR.

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