

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-003026-WC

JAMES CRESSWELL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-93-47304

SANDVIK SEAMCO COMPANY; SPECIAL FUND;  
HON. VONNELL C. TINGLE, ARBITRATOR;  
HON. THOMAS NANNEY, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

MILLER, JUDGE: James Cresswell appeals from an Opinion of the Workers' Compensation Board rendered November 12, 1999. Kentucky Revised Statutes (KRS) 342.290. We affirm.

In June, 1993, Cresswell suffered a work-related injury to his lower back. In October, 1993, he suffered another work-related injury to his neck. On both occasions he was employed by Sandvik Seamco Company. In February 1994, Cresswell filed a Form 101 to initiate a claim seeking income benefits under the Kentucky Workers' Compensation Act. KRS Chapter 342. Said claim

was based upon the aforementioned injuries. On November 3, 1995, the administrative law judge (ALJ) rendered an Opinion and Award holding Cresswell failed to give due and timely notice of the June injury. KRS 342.185(1). As to the October injury, however, the ALJ awarded Cresswell benefits based upon a 40% occupational disability.

In June 1996, Sandvik filed a motion to reopen in order to challenge certain medical bills submitted by Cresswell. On July 19, 1996, Cresswell, in turn, filed a motion to reopen based upon a worsening of his condition -- namely, the onset of a psychiatric problem. On September 6, 1996, the Chief ALJ granted Sandvik's motion to reopen and denied Cresswell's motion to reopen stating he failed to present a prima facie case of a change in occupational disability. Cresswell appealed the order.<sup>1</sup> On November 6, 1996, Cresswell filed a second Form 101 asserting a claim for psychiatric problems arising from the October 1993 injury. On January 17, 1997, Cresswell filed another motion to reopen claiming a worsening of his condition based upon psychiatric problems. On September 24, 1998, the ALJ rendered an opinion in which he stated, in relevant part, as follows:

After careful review, I find that there is no legal basis for preventing the plaintiff from filing a new Form 101 from a procedural standpoint. The new Form 101 could not be acted upon during the pendency of the appeal but essentially was held in abeyance until the appeal was final. Nevertheless, having found that the plaintiff was entitled to file

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<sup>1</sup>The Court of Appeals ultimately affirmed the circuit court's order.

the second Form 101, it is not necessary to address the propriety of the January 1997 Motion to Reopen. . . .

. . . It is my finding that the plaintiff had sufficient knowledge of the existence of the psychiatric condition at the time of the original Hearing, and that the psychiatric claim should have been litigated with plaintiff's neck injury. In reaching this conclusion, I rely upon the case of Slone v. Jason Coal Company, Ky., 902 S.W.2d 820 (1995).

. . . .

. . . It is further ORDERED that plaintiff's claim for impairment due to a psychiatric condition is OVERRULED. . . . (Emphases added.)

No appeal was taken from the September 24, 1998, Opinion. On November 30, 1998, Cresswell filed a motion to set a proofing schedule for his psychiatric claim or to remand the claim to the commissioner for reassignment to a different ALJ. The motion, heard by an arbitrator in Frankfort, was overruled on the basis that the psychiatric claim had been fully and completely litigated as all issues were disposed of in the September 24, 1998, Opinion. Cresswell then filed a request for a *de novo* review by an ALJ of the order overruling his request to set a proofing schedule. Same was denied. Cresswell appealed that decision to the board, which, in turn, affirmed. This appeal followed.

Generally, Cresswell argues that it was error to deny his motion for a proofing schedule on his psychiatric claim. Specifically, he alleges that the September 24, 1998, order only disposed of the January 1997 motion to reopen but did not dispose

of his psychiatric claim. Hence, he asserts, the psychiatric claim should proceed. We disagree.

The language of the September 24, 1998, order is clear and unambiguous. Therein, the ALJ specifically concluded that Cresswell's psychiatric claim was properly filed and, therefore, the "propriety" of the January, 1997, motion to reopen was moot. The ALJ thereupon proceeded to overrule Cresswell's psychiatric "claim" on the merits. As no appeal was taken from this order,

we deem it final. We agree with the arbitrator who held, in part, the following:

[Cresswell's psychiatric] claim under the second Form 101 has been fully and completely litigated; and all parties were afforded the opportunity to present evidence in support of their respective positions; [and,] that all issues were addressed in the Opinion dated September 24, 1998.

We note the board affirmed the ALJ because it believed Cresswell did not timely file the second Form 101 wherein he asserted the psychiatric claim. We shall not address that issue as we affirm for the reasons stated herein. See Daily v. Kelly, 304 Ky. 229, 200 S.W.2d 114 (1947).

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

ALL CONCUR.

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