RENDERED: AUGUST 18, 2000; 10:00 a.m
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002070-WC

ZIELINSKI CONSTRUCTION COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-01277

STEPHEN BURDEN; HON. THOMAS A. NANNEY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Zielinski Construction Company brings this petition for review from an opinion and order rendered by the Workers' Compensation Board on August 6, 1999, which affirmed an award of retraining incentive benefits (RIB) by the administrative law judge to Stephen Burden. Having concluded that the Board has not misconstrued controlling statutes or precedent in refusing to apply KRS 342.732(1)(a), as amended in 1996, to Burden's claim, we affirm.[1]

[1]See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, (continued...)

Burden was employed by Zielinski Construction Company in various capacities from July 1993 until July 5, 1996. After his employment with Zielinski ended, Burden worked for various construction companies as a heavy equipment operator. However, his last exposure to coal dust occurred during his employment with Zielinski. On July 30, 1998, Burden filed an Application for Resolution of Occupational Disease claim.[2]

In support of his claim, Burden filed medical reports from Dr. Judah L. Skolnick and Dr. Ballard D. Wright. Dr. Skolnick interpreted Burden's chest x-ray as category 1/1 pneumoconiosis, while Dr. Wright's interpretation was category 1/0 pneumoconiosis. Dr. Wright also had Burden undergo pulmonary function testing, resulting in an FVC of 88% of predicted value and an FEV1 of 91% of predicted value. In addition, Burden was referred to Dr. Arthur Lieber at the University of Kentucky for a KRS 342.315 evaluation. Dr. Lieber interpreted the x-rays as negative for pneumoconiosis.

Based upon the reports of Dr. Skolnick and Dr. Wright, the arbitrator and subsequently the ALJ found that Burden suffered from category 1/1 pneumoconiosis and he received a RIB award. The ALJ's determination was based upon the version of KRS 342.732(1)(a) which became effective on April 4, 1994. The ALJ also concluded that since Burden's last exposure occurred prior to December 12, 1996, the effective date of the 1996 amendments

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[1](...continued)
687 (1992).

[2]Form 102.

to KRS 342.315(2), he was not required to afford presumptive weight to Dr. Lieber's report.

In affirming this award, the Board stated that the 1996 amendments to KRS 342.732 were not remedial and could not be applied retroactively to a claim with a last exposure date prior to the effective date of the statute. The Board further noted that Zielinski did not raise for its review the issue concerning the presumptive weight to be afforded to university evaluators pursuant to the 1996 amendments to KRS 342.315(2). Zielinski's petition for review followed.

Zielinski first argues that Burden's RIB claim is controlled by the version of KRS 342.732(1)(a) that was in effect on the date his claim was filed rather than the version in effect on the date of his last exposure. Zielinski claims that "[t]he prevailing law in Kentucky mandates that a claim for retraining incentive benefits be evaluated based upon the law in effect on the date the claim for benefits is filed." We disagree. Instead, we believe the Board was correct that in order to determine which version of KRS 342.732 is applicable, we must first decide whether the 1996 amendments to KRS 342.732(1)(a) are remedial. Since we conclude the amendments are not remedial, we hold that the 1996 amendments to KRS 342.732(1)(a) do not apply to Burden's claim.[3]

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[3]The Board noted the significance of whether the 1996 amendments to KRS 342.732 were applicable to this claim as follows:

> At the time the benefit review determination ("BRD") was issued by the ALJ/Arbitrator, Burden was not employed in a

(continued...)

We accept Zielinski's statement that "occupational disease claims are generally governed by the proposition that the law in effect on the date of the injury or the date of last exposure establishes the rights of the claimant."[4] However, we disagree with its contention that the Supreme Court has recognized that RIB claims "are distinguishable from awards for occupational disability," and that "the Court specifically declined to adopt this traditional rule of law with regard to RIB

[3](...continued)
job involved in the severance or processing of coal. This factual determination is significant if the 1994 amendment to KRS 342.732(1)(a) applies to Burden's RIB award. Under that circumstance, benefits may be paid directly to the employee. However, if the 1996 amendment to KRS 342.732(1)(a) is applied, the standard and benefit to the employee is substantially different. To qualify for a RIB under the 1996 statute, Burden's medical evidence must show a Category 1/1 or ½ on chest x-ray, and spirometric test values of 55% or more but less than 80% of the predicted normal values under the AMA Guides to the Evaluation of Permanent Impairment. Burden had met the 1994 standard by showing a Category of 1/0, 1/1, or 1/2. The 1994 standard did not require pulmonary functions test results. On the other hand, even if Burden could have qualified under the 1996 standard (which he could not), any benefits payable would not be paid directly to Burden unless he was enrolled and actively and successfully participating as a full-time student taking 24 or more hours of instruction per week in a bona fide training or education program approved under regulations promulgated by the Commissioner.

[4]See Maggard v. International Harvester Co., Ky., 508 S.W.2d 777, 783 (1974).

claims."[5] Instead, we believe Burden is correct that the cases relied upon by Zielinski, where the Supreme Court used the date the claim was filed as the operative date, were RIB cases that involved the setting of the benefit rate for a "working miner."

In Thomas, supra, the Supreme Court noted that the case before it was not "a disability case where the employee has quit his job so as to mark a time when he was 'last exposed.'" Rather, "RIB claims involve workers who do not cease working during the time they are drawing these benefits." Accordingly, the Supreme Court held "that the compensation rate for a RIB award should be that rate payable on the date the claim is filed." However, unlike Thomas, the case sub judice does not involve a "working miner." Thus, we do not believe that the exception from Thomas that uses the date the claim was filed applies to the case sub judice. Instead, we must follow the general rule that uses the date of last exposure as the operative date.

In addition, we believe the 1996 amendments themselves clearly provide that the changes in KRS 342.732(1)(a) were not to be applied retroactively. KRS 342.0015 provides as follows:

> The substantive provisions of 1996 (1st Extra Sess.) Ky. Acts ch. 1 shall apply to any claim arising from an injury or last exposure to the hazards of an occupational disease occurring on or after December 12, 1996. Procedural provisions of 1996 (1st Extra Sess.) Ky. Acts ch. 1 shall apply to all claims irrespective of the date of injury of last exposure, including, but not exclusively, the mechanisms by which claims are decided and workers are referred for

[5]See Breeding v. Colonial Coal Co., Ky., 875 S.W.2d 914 (1998); Arch of Kentucky, Inc. v. Thomas, Ky., 895 S.W.2d 578 (1995).

> medical evaluations. The provisions of KRS 342.120(3), 342.125(8), 342.213(2)(e), 342.265, 342.270(7), 342.320, 342.610(3), 342.760(4), and 342.990(11) are remedial.

The amendments to KRS 342.732(1)(a) at issue herein were clearly substantive and not procedural. Thus, to be retroactive, they would have to be remedial; and they were not designated by KRS 342.0015 as remedial. KRS 342.0015 limited the designation of substantive provisions that were remedial to only nine statutory provisions: KRS 342.120(3); KRS 342.125(8); KRS 342.213(2)(e); KRS 342.265; KRS 342.270(7); KRS 342.320; KRS 342.610(3); KRS 342.760(4); and KRS 342.990(11).

KRS 446.080(3) provides that "[n]o statute shall be construed to be retroactive, unless expressly so declared." Here, the Legislature expressly declared specific sections of the 1996 amendments to be remedial, and thus, retroactive. When the Legislature specifies certain items in a statute but omits certain items, it must be presumed that it did so with a specific purpose in mind.[6] Since the Legislature did not identify the changes to KRS 342.732(1)(a) as remedial, it would be an abuse of this Court's authority to hold them to be so.

We are well aware that the Supreme Court in Thornsbury v. Aero Energy,[7] in addressing the 1994 amendments to KRS 342.732(1)(a), held the amendments to be remedial and thus retroactive. However, unlike the 1994 amendments, the

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[6]Bailey v. Reeves, Ky., 662 S.W.2d 832, 834 (1984); Inland Steel Co. v. Hall, Ky., 245 S.W.2d 437, 438 (1952); Rhodes v. Rhodes, Ky.App., 764 S.W.2d 641, 643 (1988).

[7]Ky., 909 S.W.2d 109 (1995).

Legislature in the 1996 amendments specifically set forth which sections of the amendments were remedial. When the Legislature enacted the 1996 amendments, it was certainly aware of the Supreme Court's holding in Thornsbury. We do not believe the Legislature could have made its position any more clear than it did when it took the affirmative step of specifying which amendments were remedial.

As to the second issue, the Board noted that Zielinski failed to appeal the ALJ's finding that KRS 342.315(2) was not applicable to Burden's claim.[8] Any party who seeks to have a

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[8]The Supreme Court recently issued an opinion in Magic Coal Co. v. Fox, Ky., _____ S.W.3d _____ (2000), holding:

> It is apparent that KRS 342.316(3)(b)4.b. relates to the mechanism by which workers are referred for medical evaluations in occupational disease claims. It also is apparent that KRS 342.315(2) relates to the mechanisms by which claims are decided. We, therefore, view KRS 342.0015 as expressing a clear legislative intent for KRS 342.315 and KRS 342.316(3)(b)4.b., to apply to all claims pending before an arbitrator or ALJ on or after December 12, 1996. This appeal turns upon what we discern the meaning and intent of KRS 342.315(2) to be. The role of the Court in construing a legislative act is to effectuate the intent of the legislature. Where that intent is not clear, we remain mindful of the principle embodied in KRS 446.080(3) that, unless the legislature clearly indicates otherwise, legislation is not intended to affect the legal consequences of events which occurred before its enactment.
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> . . .
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> [T]he amendments to KRS 342.315 which became effective on December 12, 1996, apply to all claims pending before the fact-finder on or after that date. KRS 342.315(2) creates a

(continued...)

decision of the Board reviewed by this Court must have preserved an assertion of error by having raised it first to the Board.[9] Consequently, Zielinski's argument that the ALJ erred in failing to accord presumptive weight to the university medical school's evaluator's report is not properly before this Court.

Accordingly, the opinion and order of the Workers' Compensation Board is affirmed.

HUDDLESTON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

John C. Morton
Henderson, KY

BRIEF FOR APPELLEE, STEPHEN BURDEN:

Ronald K. Bruce
Greenville, KY

[8](...continued)
rebuttable presumption which is governed by [Kentucky Rules of Evidence] 301 and, therefore, does not shift the burden of persuasion. Pursuant to KRS 342.315(2), the clinical findings and opinions of the university evaluator constitute substantial evidence of the worker's medical condition which may not be disregarded by the fact-finder unless it is rebutted. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence. In instances where a fact-finder chooses to disregard the testimony of the university evaluator, a reasonable basis for doing so must be specifically stated.

[9]Smith v. Dixie Fuel Co., Ky., 900 S.W.2d 609, 612 (1995); Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985).