RENDERED: February 23, 2001; 2:00 p.m.
NOT TO BE PUBLISHED
(OPINION RENDERED NOVEMBER 3, 2000 WITHDRAWN)

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000146-WC

ROBERT L. WHITTAKER,
Director of Special Fund — APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-92-50798

SALLIE JOHNSON;
PHOENIX MANUFACTURING CO., as insured by
AIK SELECTIVE SELF-INSURANCE FUND;
PHOENIX MANUFACTURING CO., as insured by
LIBERTY MUTUAL INSURANCE GROUP;
J. LANDON OVERFIELD,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

** ** ** ** **

NO. 2000-CA-000271-WC

PHOENIX MANUFACTURING COMPANY,
as insured by LIBERTY MUTUAL
INSURANCE GROUP — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS'COMPENSATION BOARD
CLAIM NO. WC-92-50798

SALLIE JOHNSON;
PHOENIX MANUFACTURING COMPANY,
as insured by AIK SELECTIVE SELF-INSURANCE FUND;
ROBERT L. WHITTAKER, Director of Special Fund;
J. LANDON OVERFIELD, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

** ** ** ** **

NO. 2000-CA-000285-WC

PHOENIX MANUFACTURING COMPANY,
as insured by AIK SELECTIVE
SELF-INSURANCE FUND — CROSS-APPELLANT

v. — CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-92-50798

SALLIE JOHNSON;
PHOENIX MANUFACTURING COMPANY, as insured
by LIBERTY MUTUAL INSURANCE GROUP;
ROBERT L. WHITTAKER, Director of Special Fund;
J. LANDON OVERFIELD, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION

AFFIRMING IN PART, REVERSING IN PART

AND REMANDING

** ** ** ** **

BEFORE: HUDDLESTON, MILLER and TACKETT, Judges.

HUDDLESTON, Judge: Robert L. Whittaker, director of the Special Fund, appeals, and Phoenix Manufacturing Company, as insured by Liberty Mutual Insurance Group, and Phoenix Manufacturing Company, as insured by AIK Selective Self Insurance Fund, cross-appeal from a decision of the Workers' Compensation Board affirming in part, reversing in part and remanding an Administrative Law Judge's ruling regarding the reopening of Sallie Johnson's workers' compensation claim.

Johnson was injured on two separate occasions while employed by Phoenix Manufacturing Company. The first injury occurred in 1989 while Phoenix was insured by Liberty Mutual. The

second injury occurred in 1992 while Phoenix was insured by AIK. Following the second injury, Johnson filed a workers' compensation claim against Phoenix. Johnson, who testified at two depositions and at two hearings, described various incidents of pain and discomfort in her back. Her 1989 work-related injury came as a result of picking up rolls of cloth to put them on a pallet. Johnson was treated by Dr. William Brooks, who prescribed physical therapy and ultimately released Johnson to return to work without restriction. Johnson did return to work following this injury. In 1990, Johnson had a flare-up of her 1989 injury, which caused her to miss work for seven months. Then, in 1992, Johnson sustained another work-related injury caused by picking up a heavy item. This injury caused Johnson pain in her low back, burning leg pain and numbness in her left leg. Subsequent to the 1992 injury, Johnson testified, she was unable to do housework and other activities were extremely limited. Johnson settled her claims with Liberty Mutual and AIK in 1994. The 1989 claim against Liberty Mutual was settled on the basis of a 20% occupational disability with Liberty Mutual and a 17.5% occupational disability with the Special Fund. The 1992 injury was settled on the basis of a 20% occupational disability with both AIK and the Special Fund.

Johnson filed a motion to reopen her claim on April 3, 1998, alleging that her condition had substantially worsened since the settlements were reached. In support of her motion, Johnson testified to increased pain and numbness in her right leg, as well as severe pain in her back. She also testified that she had undergone surgery in 1996 to relieve severe back pain. Johnson

further supported her motion with the affidavit and medical records of Dr. Brooks and Dr. David Jackson. Dr. Brooks reported that he had treated Johnson for her 1989 and 1992 injuries and was of the opinion that Johnson's physical condition had worsened to the point that surgical intervention was needed. Surgery was performed in 1996 by Dr. Brooks' associate, Dr. Steven Keifer. Attached to Dr. Brooks's affidavit was a letter written by Dr. David Jackson who opined that Johnson was totally disabled.

On May 14, 1999, Johnson's motion to reopen was granted pursuant to Kentucky Revised Statute (KRS) 342.125.[1] Evidence presented during the reopened proceedings included the deposition of Dr. Steven Keifer who testified that Johnson had originally come under his care in 1996. After examining Johnson, Dr. Keifer performed surgery that confirmed a large disc rupture in her back at the L5-S1 level. Dr. Keifer also stated that the herniation resulted from long-standing degenerative disc disease that probably predated her 1989 injury. Dr. Keifer believed that Johnson's 1989 and 1992 injuries did not cause her 1996 condition, but only played a role in the progression of her disease.

---

[1] Ky. Rev. Stat. (KRS) 342.125(1)(d) provides that:

> (1) 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: . . .
>
> (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.

Johnson also introduced the testimony of Dr. David Jackson who evaluated Johnson in August 1996. He testified that Johnson had degenerative disc disease that was aggravated by a work condition that progressed from 1989 to 1996. Dr. Jackson believed that Johnson currently had a 10% permanent impairment.

Finally, Johnson testified during the March 3, 1999, hearing that she had not returned to work after the 1992 accident. She said that she now experienced pain worse than it had ever been and had numbness in her right leg all the way down to her foot. As compared to her condition in 1994, Johnson testified that currently she could not do anything but walk, whereas in 1994 her ability to move about was not nearly as limited. Johnson also stated that her back and legs hurt to the point that she could not sleep and that medication did little to alleviate the pain.

The ALJ determined that Johnson's condition had worsened since the 1994 settlement with Liberty Mutual and AIK. Relying on Dr. Keifer's testimony, the ALJ concluded that Johnson was totally disabled and that a combination of the 1989 and the 1992 injuries and a progression of her injured state had led to her total disability. Because Johnson's injuries were the result of a natural progression, the ALJ held that Liberty Mutual and AIK were equally responsible for the increase in income benefits. More specifically, the ALJ ordered Liberty Mutual and the Special Fund to pay for 50% of the amount that would be a 100% award for the 1989 injury. The ALJ went on to explain that even though Liberty Mutual's 425 week period for the permanent partial disability benefits had expired, under a reopening situation where the total

occupational disability is not caused by a subsequent intervening event, Johnson could recover total disability benefits from Liberty Mutual. The ALJ also ordered AIK and the Special Fund to pay 50% of the 100% award for the 1992 injury. In essence, each insurance carrier was ordered to pay 50% of the new award, with each carrier splitting its 50% with the Special Fund. Finally, the ALJ ordered that medical expenses related to Johnson's 1994 surgery and all future medical expenses be paid equally by Liberty Mutual and AIK.

Liberty Mutual appealed to the Board contending that, pursuant to Fleming v. Windchy,[2] it could not be held liable for the portion of Johnson's total disability that exceeds the disability for which she settled her claim against Liberty Mutual. Liberty Mutual also claimed that Johnson's reopening was barred by Commercial Drywall v. Wells.[3] The Board determined that although the ALJ made no explicit findings as to whether Johnson was totally disabled at the time she settled her claims in 1994, his findings implied that Johnson's degree of occupational disability agreed to in the settlements was accurate. Although there was evidence that indicated that Johnson was totally disabled in 1994, the relevant question on reopening, according to the Board, was whether Johnson's actual disability at present was greater than her actual disability at the time she entered into the settlement agreements, not whether her present disability was greater than that to which she had testified. As a result, an increase in disability could be

[2] Ky., 953 S.W.2d 604 (1997).

[3] Ky. App., 860 S.W.2d 299 (1993).

found. Thus, the Board held, the ALJ did not err in reopening Johnson's claim.

Next, the Board determined that the ALJ had erred in apportioning medical expenses equally between Liberty Mutual and AIK. The Board's decision was based on policy reasons and on KRS 342.020, which mandates that "the employer shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, . . . as may be required for the cure and treatment of an occupational disease."[4] The Board thus held that the ALJ erred in apportioning 50% of the medicals to Liberty Mutual, whereas AIK, as Johnson's last employer is responsible for the medical expenses.

Lastly, the Board addressed Liberty Mutual's contention that the ALJ erred in apportioning half of the increased income benefits for Johnson's current total occupational disability against the carrier. The Board held that, pursuant to Fleming v. Windchy[5] and Spurlin v. Brooks,[6] Johnson could only receive increased benefits from her 1989 claim if it could be shown that a worsening of the 1989 injury in and of itself could cause Johnson's total occupational disability. The Board then remanded the claim to the ALJ with instructions to reopen proof to make a factual determination as to whether the 1989 injury alone and its progression could produce total occupational disability. If not,

---

[4] KRS 342.020(1).

[5] Supra, n. 3.

[6] Ky., 952 S.W.2d 687 (1997).

then Liberty Mutual could not be held liable for any increase in benefits.

The Special Fund raises the following issues on appeal: (1) whether the ALJ was required to make a specific finding as to the actual degree of occupational disability on the date of settlement; (2) whether the Special Fund could be required to pay more than the employer when equal liability was stipulated, and whether the claim involves excess liability; and (3) whether the Board has the authority to reorder the ALJ to take additional proof.

On cross-appeal Liberty Mutual argues that the Board erred in holding that there was an increase in Johnson's occupational disability and that it erred in instructing the ALJ to allow the parties to submit additional evidence.

AIK contends on cross-appeal that the Board erred (1) in reversing the ALJ's finding as to apportionment of expenses; (2) in finding that the carrier for the first injury, Liberty Mutual, may only be responsible for additional income benefits if that injury alone would have caused total disability; and (3) in affirming the reopening of Johnson's claim and the ALJ's finding of increased occupational disability.

Reopening of Johnson's Claim

In order to properly reopen and review an award or order, an ALJ must find, inter alia, that the claimant has increased disability "as shown by objective medical evidence of worsening . . . due to a condition caused by the injury since the

date of the award or order."[7] The Special Fund argues that the ALJ was required to make a specific finding as to Johnson's actual degree of occupational disability at the time of the 1994 settlement. If such a finding would have led to a conclusion that Johnson was totally occupationally disabled in 1994, the Special Fund argues, then the ALJ erred in reopening Johnson's case because no increase in occupational disability could be shown. The Special Fund disagrees with the Board's conclusion that the ALJ's findings implied that the degree of occupational disability reflected in the settlement agreement was accurate.

Our function upon review of the Board is to "correct the Board only where [we perceive that] 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."[8] As the Board pointed out, substantial evidence in the original proceeding existed to show that Johnson was not totally occupationally disabled. Both Dr. Brooks and Dr. Gumbert testified that Johnson was capable of performing light to sedentary work. Such evidence supports a finding that the percentages of disability that Johnson settled for in 1994 were accurate. Also, such testimony contradicts Liberty Mutual's argument (which was adopted by AIK) that Johnson was totally disabled after 1993. The relevant question on reopening is whether the claimant has had an increase in occupational disability from the time of her earlier settlement,

---

[7] KRS 342.125(1)(d).

[8] Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687 (1992).

not, in the words of the Board, whether her present disability is greater than that to which she testified. The Board did not err in affirming the ALJ's decision to reopen Johnson's claim.

Liability for Permanent Total Disability

The next issue is whether the Board erred in remanding this claim to the ALJ to reopen proof to establish whether the 1989 injury, standing alone, would have caused total occupational disability. In light of the Supreme Court's decisions in Fleming v. Windchy[9] (Fleming I) and Whittaker v. Fleming[10] (Fleming II), we believe that the Board erred and that remand is not necessary to determine liability for the permanent total disability award.

Fleming I involved two work-related injuries much like the injuries here. In Fleming I, the claimant returned to work after his first injury, only to be injured again.[11] The claimant sought total disability benefits due to the two work-related injuries. The ALJ attributed 84% total disability equally to the two injuries.[12] The Court said that

> a defendant may not be held liable for any additional occupational effect which results from the fact that a subsequent disabling injury is superimposed upon the

---

[9] Supra, n. 3.

[10] Ky., 25 S.W.3d 460 (2000).

[11] Unlike in the present case, however, the claimant in Fleming I returned to work after his second injury as well.

[12] See Fleming I, supra, n. 3. The ALJ determined that 16% of the disability was prior, active and noncompensable. Id. The 84% attributed to the claimant is misleading because of the prior, active disability of 16%. However, the ALJ did find the claimant to be permanently, totally disabled.

> injury for which the defendant is liable. (Citation omitted). Hence, notwithstanding any confusion created by our opinion in Campbell, . . . the award for the 1990 injury may extend only for 425 weeks, with benefits payable at the 1990 rate pursuant to KRS 342.730(1)(b).[13]

The Court held that the first injury, although it accounted for 42% of the permanent, total disability, could only be compensated for 425 weeks. This is analogous to Johnson's 1989 injury. Although the Board believes it necessary to remand to the ALJ to determine whether the 1989 injury alone could have caused a permanent, total occupational disability, there is no question that Johnson did not become totally disabled until after her 1992 injury. Johnson returned to work after her 1989 injury, although she did have a temporary flare-up of the injury. As the Fleming I court stated, "a worker is not entitled to benefits for total disability until such time as he becomes totally disabled."[14] Johnson did not become totally disabled until after the 1992 injury, and the Board erred in remanding to reopen proof on whether the 1989 injury could have alone caused total occupational disability. Consistent with Fleming I, Johnson was entitled to compensation for her 1989 injury for only 425 weeks.

The next step in the analysis is the liability of the two insurance companies and the Special Fund for each injury. Again, we turn to Fleming I for guidance.

---

[13] Id. at 607.

[14] Id.

> [T]he correct method for excluding the percentage of prior, active disability [the 1989 injury] on these facts is to permit an offset against [AIK's] and the Special Fund's liability pursuant to the award of total disability to the extent that benefits paid by the defendants pursuant to the partial disability award overlap the compensable period of the subsequent total disability award.[15]

Because Johnson's injury was to her back, KRS 342.1202 applies to the award.[16] As the court in Fleming II pointed out, "the legislature has determined that, regardless of the extent to which a prior back or heart condition has contributed to a worker's ultimate disability, liability is to be borne equally by the employer and the Special Fund."[17] Hence, AIK and the Special Fund are equally responsible for 50% of the award.

Although Johnson became totally disabled as a result of the 1992 injury, she is entitled to an award of total disability as

---

[15] Id. at 608.

[16] This section was repealed effective December 12, 1996. However, because the injuries involved here predate the repeal, the section applies to this case. After the 1994 amendment to KRS 342.1202, the statute provided, in pertinent part, that:

> (1) An award for income benefits for permanent total or permanent partial disability under this chapter based, in whole or in part, on a pre-existing disease or pre-existing condition of the back or of the heart shall be apportioned, by the administrative law judge, fifty percent (50%) to the employer and fifty percent (50%) to the special fund. Apportionment required by this section shall not be a cause of appeal.

[17] Whittaker v. Fleming, (Fleming II), supra, n. 11.

of the date of the motion to reopen, April 3, 1998.[18] Apportionment of the 1992 award is controlled by KRS 342.1202[19]; therefore, liability for the 100% total occupational disability award must be borne by AIK and the Special Fund. Under the mandate of Fleming I, AIK and the Special Fund would be entitled to a credit against the 1992 award to the extent that benefits payable pursuant to the 1989 partial disability award against Liberty Mutual and the Special Fund overlap the period of total disability. However, the compensable period for the 1989 injury has expired and no offset is available to AIK. Therefore, AIK and the Special Fund are responsible for 100% of the total occupational award as long as Johnson remains totally disabled.[20]

Because both Fleming cases provide guidance in relation to the payment of the total occupational award, we need not discuss the Board's authority to remand for the ALJ to take additional proof. Inasmuch as the Board erred in remanding the issue of whether the 1989 injury would have caused total occupational disability, we reverse that portion of its decision.

Apportionment of Medical Expenses

Finally, AIK argues that the Board erred in reversing the ALJ's apportionment of medical expenses equally between Liberty Mutual and AIK. Relying on KRS 342.020 and Derr Construction Co.

---

[18] See Whittaker v. Allen, Ky. 966 S.W.2d 956, 958 (1998), stating that "an award increasing benefits for a particular disability begins on the date of the motion to reopen . . . ."

[19] This is also consistent with the stipulation that the Special Fund had with the insurance companies that the award would be apportioned 50% to the Special Fund and 50% to the employer.

[20] See Fleming I, supra, n. 3, at 606.

v. Bennett,[21] the Board held that AIK, as the last employer of Johnson, should be entirely responsible for the medical expenses for the 1996 surgery and future medical expenses.

KRS 342.020(1) provides that

> the employer shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease. The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled . . . .

As the Board correctly points out, KRS 342.020 contains no apportionment language. Although AIK argues that since there is no apportionment language there is no statutory bar to apportionment, the Supreme Court explained in Derr Construction that,

> [l]iability for medical expenses requires only that an injury was caused by work and that medical treatment was necessitated by the injury. Regardless of whether an injured worker's disability actually was caused by the arousal of a previous dormant condition rather than by the work-related injury, itself, the employer has been

[21] Ky., 873 S.W.2d 824 (1994).

held liable for the payment of medical benefits relative to the injury.[22]

The Board did not err in reversing the ALJ's apportionment of medical benefits between Liberty Mutual and AIK. As a result, AIK is responsible for medical expenses due to the 1996 surgery and all future medical expenses.

The decision of the Workers' Compensation Board is affirmed in part and reversed in part and this case is remanded to the Board for entry of an award consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joel D. Zakem
DIVISION OF SPECIAL FUND
Frankfort, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT PHOENIX MANUFACTURING AS INSURED BY LIBERTY MUTUAL INSURANCE GROUP:

W. Barry Lewis
LEWIS & LEWIS LAW OFFICES
Hazard, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT PHOENIX MANUFACTURING AS INSURED BY AIK SELECTIVE SELF-INSURANCE FUND:

Carla Foreman Dallas
Louisville, Kentucky

[22] Derr Construction, supra, n. 21, at 827.