RENDERED: October 12, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000625-WC

CARL KISHPAUGH — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-79456

TECO COAL CORPORATION D/B/A
RICH MOUNTAIN COAL COMPANY;
RONALD W. MAY, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

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

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM, AND McANULTY, JUDGES.

McANULTY, JUDGE: Carl Kishpaugh (Kishpaugh) petitions for our review of an opinion of the Workers' Compensation Board (Board) which affirmed an opinion and order of an administrative law judge (ALJ) finding Kishpaugh 100% occupationally disabled but awarding only 10% occupational disability benefits due to notice and statute of limitation issues. KRS 342.185. We agree with the Board and the ALJ and thus affirm.

Kishpaugh is a 48 year old male. He worked for 26 years as a dozer operator in coal mine operations. Kishpaugh was

employed by Teco Coal Corporation (Teco) the last 24 years of his career. On June 5, 2000, Kishpaugh filed a resolution of injury claim for cumulative trauma with an onset date of December 1997. The ALJ rendered an opinion and order on November 17, 2000. The Board affirmed the ALJ by opinion rendered February 21, 2001. This petition for review follows.

The record indicates that Kishpaugh was placed on short-term, non-work related disability in June of 1997. He returned to work in September of 1997, and again went on short-term, non-work related disability in December of 1997. Kishpaugh sought medical treatment and underwent surgery for a ruptured disc in February of 1998. Kishpaugh returned to work June 17, 1998, on light duty. Kishpaugh returned to normal dozer operations in September of 1998, and sustained a specific injury on or about December 19, 1998. After this December 1998 injury Kishpaugh began collecting long-term, workers' compensation related benefits.

Before reviewing Kishpaugh's claims of error, we shall address Teco's argument that Kishpaugh failed to properly preserve the issues in this petition for review. Teco argues that in failing to file a petition for reconsideration, Kishpaugh lost his opportunity to seek appellate review. Teco relies on this Court's recent holding in Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000), that the 1996 amendment to KRS 342.281 reinstated the requirements of Eaton Axle Corp. v. Nally, Ky. 688 S.W.2d 334 (1985). Eaton requires that a petition for rehearing be filed to preserve "errors which

are patent upon the face of the award." Id. at 338. While Teco correctly cites this Court's holding in Halls Hardwood, we find that the review Kishpaugh seeks is not of potential patent errors. Therefore, Teco's argument fails.

Kishpaugh argues on appeal that the Board and ALJ erred in their application of KRS 342.185. Specifically, Kishpaugh argues (1) that the two year statute of limitations was tolled by Teco's voluntary payment of benefits and (2) that any failure to give proper notice was exempted by KRS 342.200.

Both the notice and statute of limitation questions were recently addressed by the Kentucky Supreme Court in Special Fund v. Clark, Ky., 998 S.W.2d 487 (1999) and Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999). The Court in Alcan held that once a worker becomes aware of a work-related condition, he or she is required to give adequate notice and the two year statute of limitations begins to run. The employee may be aware of the condition prior to the manifestation of a disability related to that condition.

With regard to the statute of limitations, it is clearly evident from the record that Kishpaugh knew his back problems were at least partially work-related in 1997. Thus the two year period began to run at that time. Kishpaugh claims the voluntary payment of short-term disability benefits in 1997 tolled the statute. This is not accurate. As the Board aptly stated in its opinion, "voluntary payments which toll the statute of limitations are those which either the employer intends, or the employee had reasonable grounds to believe, are in lieu of

workers' compensation payments. Kentucky West Virginia Gas Co. v. Spurlock, Ky., 415 S.W.2d 849 (1967)." The record clearly indicates that the short-term disability benefits paid by Teco were for non-work related illness or injury.

Moving to the notice issue, notice is important because it gives the "employer an opportunity to take measures to minimize the worker's impairment, and, hence liability." Special Fund v. Clark, 998 S.W.2d 487, 490. As the Board stated, "notice has two components, one being the notice of the accident or incident and the second being notice of the injury. Procter & Gamble Mfg. Co. v. Little, Ky., 357 S.W.2d 866 (1962)." The ALJ in this case found that Kishpaugh gave notice of his back problems in 1997, but failed to give notice that the condition was work-related. Teco had procedures in place allowing workers to elect whether to proceed with short-term, non-work related benefits or long-term, workers' compensation type benefits. The record clearly shows that Kishpaugh proceeded with the non-work related benefits in 1997, thus failing to give notice to Teco that his back ailments were related to work.

Kishpaugh argues that KRS 342.200 which provides:

> Want of notice or delay in giving notice shall not be a bar to proceedings under this chapter if it is shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or reasonable cause.

exempts any failure to give proper notice. Kishpaugh's decision to seek short-term, non-work related disability in 1997 refutes the argument that Teco knew about the work-related aspect of his

injury in 1997. Thus, we are not persuaded that the case *sub judice* fits within the provisions of KRS 342.200.

Pursuant to Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986), since Kishpaugh had the burden of proof and the initial fact-finder found against him, his burden on appeal is to show that the evidence makes the prior decision unreasonable. In the case *sub judice,* the ALJ's decision and the Board's decision to affirm were clearly reasonable based on the evidence. Therefore, we must affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Phillip Lewis
Hyden, Kentucky

BRIEF FOR APPELLEE TECO COAL CORPORATION D/B/A RICH MOUNTAIN COAL COMPANY:

W. M. Cox, Jr.
Williamsburg, Kentucky