

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000363-WC

BILL R. NYGAARD

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-91-10449

GOODIN BROTHERS, INC.;
WAUSAU INSURANCE COMPANY;
IRENE STEEN, Administrative Law Judge;
DIVISION OF WORKERS' COMPENSATION FUNDS
SUCCESSOR TO SPECIAL FUND); and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, McANULTY, and SCHRODER, Judges.

COMBS, JUDGE: Bill Nygaard petitions for review of an opinion of the Workers' Compensation Board entered January 16, 2002, affirming the dismissal of his motion to reopen as time barred pursuant to KRS¹ 342.125(8). We affirm.

In 1990, Nygaard sustained a back injury while working for the appellee, Goodin Brothers, Inc. He settled his workers' compensation claim with his employer for benefits based upon a

¹Kentucky Revised Statutes.

72% occupational disability in 1994. At that time, there was no time limitation on his right to reopen his claim for a worsening of his condition. However, effective December 12, 1996, KRS 342.125 was amended as follows:

The time limitation prescribed in this section shall apply to all claims irrespective of when they were incurred, or when the award was entered, or the settlement approved. However, claims decided prior to December 12, 1996 may be reopened within four (4) years of the award or order or within four (4) years of December 12, 1996, whichever is later, provided that the exceptions to reopening established in subsections (1) and (3) of this section shall apply to these claims as well.

In Meade v. Reedy Coal Co., Ky., 13 S.W.3d 619, 622 (2000), the court held:

It is clear [] that the legislature intended for the four-year limitation on re-opening which is contained in KRS 342.155(8) to apply, retroactively, to claims which arose and were decided prior to December 12, 1996.

On August 23, 2001, many months after maximum expiration date of December 16, 2001, for reopening pre-amendment claims, Nygaard filed a motion to reopen, alleging that he was totally disabled. The ALJ dismissed the motion as time-barred. The Board affirmed. This appeal followed.

The crux of Nygaard's appeal is that KRS 342.125(3) is unconstitutional as applied to him because it acted as a statute of repose, extinguishing his right to reopen before he became totally disabled -- an event that he contends occurred at the "end of 2000." He relies on Saylor v. Hall, Ky., 497 S.W.2d 218 (1973), which holds that the legislature does not have the power "under the guise of a limitation provision, to cut off an

existing remedy entirely." However, as Goodin correctly points out, while the principles articulated in Saylor concern "a constitutionally protected right of action," (Id. at 225), "there is no constitutional impediment to repose provisions in the workers' compensation scheme." Wright v. Oberle-Jordre Co., Inc., Ky., 910 S.W.2d 241, 245 (1999).

KRS 342.125 survived constitutional challenges in Brooks v. University of Louisville Hospital, Ky., 33 S.W.3d 526 (2000), and in McCool v. Martin Nursery & Landscaping, Inc., Ky., 43 S.W.3d 256 (2001). In McCool, the court held that application of the 1996 amendments to claims of increased disability that occurred after December 12, 1996, did not violate any provision of the Kentucky Constitution.

Although it is true that when the claimant was injured reopening was permitted at any time upon evidence of increase in disability that occurs after an award is entered. Any right that a worker has to be compensated for a post-award increase in disability is inchoate until such time as he sustains a post-award change of occupational disability, at which point the right becomes vested. The claimant's award was entered after December 12, 1996, and what he sought to redress was an increase in occupational disability that occurred after December 12, 1996. Because the alleged increase in disability occurred after the effective date of the amendment, applying the amendment and dismissing the motion to reopen did not affect a right that vested before the amendment's effective date.

Id., at 258. (Emphasis added.)

As McCool is dispositive of Nygaard's appeal, we perceive no error in the decision of the Workers' Compensation Board. See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rodger W. Lofton
Paducah, Kentucky

BRIEF FOR APPELLEES GOODIN
BROTHERS, INC. AND WAUSAU
INSURANCE COMPANY:

Daniel S. Stratemeyer
Paducah, Kentucky

BRIEF FOR DIVISION OF WORKERS'
COMPENSATION FUNDS:

Joel D. Zakem
Frankfort, Kentucky