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TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000449-WC

THOMAS RIDGE APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-58317

VMV ENTERPRISES, INC.; HON. THOMAS A.
NANNEY, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

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

BEFORE: COMBS, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Thomas Ridge petitions for review from an opinion and order of the Workers' Compensation Board (Board) which upheld the decision of the Administrative Law Judge (ALJ) dismissing Ridge's claim for a back injury because Ridge failed to join his back injury claim when he filed his knee injury claim. While apparently conceding that KRS 342.270(1) required joinder of the claims, Ridge contends that the employer and its insurance carrier waived the right to assert KRS 342.270(1) as a defense and that the employer was estopped from asserting the defense. We agree with the Board and the ALJ that a letter

written before the filing of the knee injury claim would not waive the joinder requirement nor estop the employer from asserting said defense. Hence, we affirm.

On July 3, 1998, while employed by VMV Enterprises, Ridge sustained a work-related injury to his left knee. Following the knee injury, Ridge returned to light-duty employment. On April 13, 1999, while still on light duty, Ridge sustained a second work-related injury to his lower back. On November 3, 1999, the workers' compensation carrier sent a letter to Ridge's attorney requesting the knee claim be settled and afterwards the parties concentrate on the back claim.

On April 19, 2000, Ridge filed a workers' compensation claim seeking benefits for the knee injury without joining the back injury. The claim relating to the knee injury was settled by way of agreement on August 20, 2000.

Following the settlement of the knee injury claim, on February 26, 2001, Ridge filed a workers' compensation claim seeking benefits for his back injury. On September 13, 2001, the ALJ entered an order dismissing the back injury claim on the basis that the claim violated the jurisdictional provision of KRS 342.270(1) requiring that all causes of action against an employer must be joined, or else the unjoined claims are barred. On February 6, 2002, the Board entered an order affirming the decision of the ALJ. This petition for review followed.

Ridge appears to concede that KRS 342.270(1) applies to his claims; however, he asserts that the case should be remanded to the ALJ for additional review and findings concerning his

allegation that VMV and its insurance carrier are estopped from relying upon KRS 342.270(1) because they initiated and agreed to the bifurcation of the knee injury from the back injury claim. KRS 342.270(1) provides, in relevant part, as follows:

> When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

Both the requirement that all claims against an employer be joined and the provision that failure to do so will result in waiver of the claim are couched in clear, plain, mandatory language. There is no equivocation or lack of clarity in the wording. The meaning is simply that all claims must be joined, and the failure to do so will bar any claims not joined. There is no room for interpretation here. Moreover, KRS 446.080(4) states that all words shall be construed "according to the common and approved usage of language." "Shall" means shall, and "will" means will. Bowen v. Commonwealth ex rel. Stidham, Ky., 887 S.W.2d 350, 352 (1994).

The only viable interpretation of KRS 342.270(1) is that in order to preserve his back injury claim, Ridge was required to join the claim to the knee injury claim. Having failed to do so, it is mandatory under the statute that the back injury claim be barred.

However, while KRS 342.270(1) is mandatory, nevertheless, mandatory procedural requirements may, under the

proper circumstances, be deemed as waived. See Carroll County Memorial Hospital v. Yocum, Ky., 489 S.W.2d 246 (1972)(where uncontradicted evidence was that an adjuster for the employer's workmen's compensation insurer stated in telephone conversation with claimant's attorney to not worry about statute of limitations and to send him additional information regarding the claim, employer and its insurer were estopped to rely upon expiration of the limitations period). However, "a strong case is necessarily required when a party seeks to avoid the plain provisions of a [procedural] statute." Id. at 248.

Ridge is vague in describing his estoppel theory and cites us to no authority in support of his estoppel claim. His only evidence is the letter of November 3, 1999. We construe Ridge's argument as relying upon the doctrine of equitable estoppel.

> The essential elements of equitable estoppel are[:] (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Weiand v. Board of Trustees of Kentucky Retirement Systems, Ky., 25 S.W.3d 88, 91 (2000), quoting Electric and Water Plant Board of City of Frankfort v. Suburban Acres Development, Inc., Ky., 513 S.W.2d 489, 491 (1974)(internal quotation marks omitted).

The only basis for Ridge's estoppel claim is the letter dated November 3, 1999, (after both injuries and before either claim was filed) from the insurance carrier to Ridge's counsel. The letter stated, in relevant part, as follows:

> Regarding [Ridge's] knee claim. We have an impairment rating of 5% whole person. Can we get the knee claim 565/24333 settled and concentrate on the back claim. Please contact me to discuss settlement of the knee claim.

We are persuaded that the statements made by the insurance carrier in the November 3, 1999, letter do not meet the criteria for relief under the doctrine of equitable estoppel.

First, the letter was written before either of the two claims was filed, and the statements suggest nothing as to how or when Ridge should file his claims. Second, the statements do not suggest that Ridge should not join the claims or otherwise comply with KRS 342.270(1). Third, the statements contain no false misrepresentations or concealment of material facts.
Fourth, Ridge, through counsel, had knowledge of the statutory requirements which needed to be complied with to properly pursue a claim, and there was no lack of knowledge or means of knowledge concerning the requirements of KRS 342.270(1).

Again, aside from the November 3, 1999, letter, Ridge cites us to no other statement or conduct of the insurance

carrier or the employer which could be construed as a waiver of KRS 342.270(1). As previously noted, "a strong case is necessarily required when a party seeks to avoid the plain provisions of a [procedural] statute." Yocum, 489 S.W.2d at 248. In this case, Ridge's evidence of waiver does not meet this threshold.

For the foregoing reasons, the decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John T. Carneal
Paducah, Kentucky

BRIEF FOR APPELLEE, VMV ENTERPRISES, INC.:

Lyn A. Douglas
Louisville, Kentucky