

RENDERED: December 13, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2002-CA-001166-WC

ROBERT L. WHITTAKER, DIRECTOR OF
WORKERS' COMPENSATION FUNDS,
SUCCESSOR TO SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-87-25781

CARL S. GLASS; TOWN & COUNTRY FORD
(SETTLED); HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE EMBERTON, CHIEF JUDGE, SCHRODER AND TACKETT, JUDGES.

TACKETT, JUDGE: The Special Fund appeals from a judgment of the Workers' Compensation Board rendered May 8, 2002, which affirmed an opinion and award entered by an Administrative Law Judge on January 3, 2002, finding Carl Glass to be totally occupationally disabled on reopening and apportioned 50% of the liability to the Special Fund. On appeal, the Special Fund argues that the reopening was not timely filed and that it was not joined as a

party in a timely matter. We affirm.

Glass sustained a work-related back injury during the course of his employment with Town & Country Ford on June 18, 1987. This claim was settled between Glass and Town & Country without the participation of the Special Fund. In this settlement, Glass received a lump sum payment of \$62,000.00, representing a 70.5% occupational disability.

On February 23, 1994, Glass filed a motion to reopen, which was voluntarily dismissed. On October 23, 1995, Glass again filed a motion to reopen. This motion was denied due to Glass's failure to establish a prima facie increase in occupational disability. The Special Fund was not named as a party in either motion to reopen.

On December 10, 2000, Glass's wife, Joyce, faxed a letter to the Department of Workers Claims seeking to reopen her husband's claim. Within a week after the date of the fax, Joyce received a letter from the Commissioner's office stating that the Department of Workers Claims had received the fax but Glass needed to mail two original copies of the faxed documents. Joyce immediately mailed the original copies to the Commissioner's Office, which were filed and bear a date stamp of December 13, 2000. The ALJ, after finding that Glass served his motion on his former employer, granted the motion to reopen.

Glass filed a motion to join the Special Fund as a party on March 30, 2001. In support of this motion, Glass argues that no liability accrued to the Special Fund until June 2000,

when Dr. Martyn Goldman performed an independent medical examination on Glass. During his examination, Dr. Goldman diagnosed status postlaminectomy and diskectomy at L4-5 X2 and status post bilateral posterolateral fusion at L4-5. Dr. Goldman assessed a 23% whole person impairment under the AMA Guidelines to Glass, but did not believe Glass's medical condition had worsened since the 1992 settlement. However, in a supplemental report, Dr. Goldman stated that comments from Dr. Timir Banerjee, who opined in 1988 that Glass's work injury probably resulted in an L5-S1 disc herniation and aggravated an old arthritic condition, had nothing to do with the L4-5 lumbar spine level.

In her opinion, award and order, the ALJ found that the parties knew of Dr. Banerjee's report in 1988 and during the attempts to reopen Glass's claim in 1994 and 1995. However, the ALJ accepted Dr. Goldman's opinion that Dr. Banerjee probably referred to pre-existing arthritic changes at a level different from that of the work injury. Relying on this interpretation, the ALJ found that no basis for joining the Special Fund existed prior to 1992 and that Glass properly joined the Special Fund on March 30, 2001. Further, the ALJ also found that Glass timely filed his motion to reopen by faxing and mailing a hard copy of his motion to the Commissioner's Office prior to the deadline. The Board affirmed the ALJ's decision. This appeal followed.

In workers' compensation, the standard of review is set forth in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992):

The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the the [sic] Court perceives 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.

As the finder of fact, the ALJ has sole authority to assess and to evaluate the quality, character, and substance of the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). If there is substantial evidence to support the findings of fact, they may not be disturbed on appeal. Evansville Printing Corporation v. Sugg, Ky. App., 817 S.W.2d 455 (1991).

The Special Fund argues that the Board erred in holding that Glass's motion to reopen his claim was timely filed, pursuant to Kentucky Revised Statutes (KRS) 342.125, because the hard copy of Glass's letter was not filed in the record until December 13, 2000. We disagree.

KRS 342.125 was amended on December 12, 1996 to mandate that all motions to reopen must be filed within four years of the award or order or within four years of December 12, 1996, whichever is later. KRS 342.125(8). Neither KRS nor the regulations of the Workers' Compensation Board address the filing of an incomplete motion to reopen. The statutes and regulations also fail to provide for filing documents via facsimile transmission. The Board, however, compared Glass's faxed, incomplete motion to reopen to an incomplete Application of

Resolution of Injury Claim. 803 KAR 25:010E Section 3(2) provides that incomplete applications may be rejected and returned to the applicant and if the application is resubmitted by the applicant within twenty days of the date it was returned, the filing shall relate back to the date the application was first received by the Commissioner. Thus, using this analogy, the Board accepted Glass's argument that since the faxed motion to reopen was received by the Commissioner prior to December 12, 2000, with a hard copy being filed on December 13, 2000, the motion to reopen was timely filed.

In the absence of relevant case law, our inquiry is whether the ALJ's decision was permissible pursuant to the administrative regulations. In determining the application of a statute or regulation, the applicable law must be construed reasonably and liberally with the goal of applying the provisions of the statute so as to effectuate its purpose, and to extend the statute to every employee that can be fairly brought within its provisions. Bob White Packing Co. v. Hardy, Ky., 340 S.W.2d 245, 247 (1960); Wilson v. SKW Alloys, Inc., Ky. App., 893 S.W.2d 800, 802 (1995). Furthermore, workers' compensation claims are meant to be practiced in a somewhat flexible manner and the ALJ is not required to follow strict technical rules of procedure so long as the parties are afforded administrative due process. Estill County Farm and Home Supply v. Palmer, Ky., 416 S.W.2d 752 (1967).

We realize that the administrative regulations do not

provide for the filing of pleadings by facsimile transmission. However, we are compelled to agree with Glass's assertion that the filing of the motion to reopen was analogous to the filing of an application for adjustment of claim. Glass' fax was timely received at the Department and the hard copy was filed in the record on December 13, 2000, which is within twenty days of the fax. Also, Joyce Glass testified that she was advised by the Department how to file a reopening on behalf of her husband and indeed followed those instructions. Accordingly, we find that the Board correctly found that Glass's motion to reopen was timely filed.

In the alternative, the Special Fund argues that the ALJ abused her discretion in joining it as a party defendant. We disagree.

From 1987, the date of Glass's injury, until 1990, and from 1994 through the date of this reopening, KRS 342.120(2) provided that the Special Fund should be named as a party, ". . . as soon as practicable, by motion, unless there is a showing of good cause, . . ." The statute does not set out a specific time frame for joining the Special Fund, but requires only that it be joined "as soon as practicable." KRS 342.120(2) vests the ALJ with broad discretion as to the time permitted for joining the Special Fund. Based upon the facts and circumstances of each case, the ALJ must determine what is "as soon as practicable." Martin County Coal Corporation v. Preece, Ky. App., 924 S.W.2d 840, 841 (1996).

In the case before us, the ALJ found that the Special Fund was joined timely pursuant to KRS 342.120(2), reasoning:

. . . However, the law in effect at the time of reopening allowed Special Fund joinder 'as soon as practicable' after potential liability is known. See, KRS 342.120(2). While Dr. Banerjee's report was probably known to the parties in 1988, the Administrative Law Judge adopts Dr. Goldman's opinion that Dr. Banerjee probably referred to pre-existing arthritic changes at a level different from that of the work injury. Therefore, no certain basis for Special Fund joinder existed prior to the 1992 settlement agreement and the record does not establish any later evidence which would have mandated Special Fund joinder prior to Dr. Goldman's June 4, 2000 report and June 14, 2001 supplemental report. Because no evidence of record existed which would have led a prudent party to believe that the Special Fund might have some liability in this claim at the time of the original settlement or at the time of the 1992 reopening, the Administrative Law Judge finds that the Special Fund was joined as soon as practicable. This issue is resolved in favor of Mr. Glass.

The Special Fund contends that the ALJ should have followed KRS 342.120(2) as enacted from April 1990 until April 1994. During this time, KRS 342.120(2) required the Special Fund to be joined as a party no later than forty-five days prior to the first scheduled pre-hearing conference. This assertion is incorrect.

Peabody Coal Co. V. Gossett, Ky., 819 S.W.2d 33 (1991) stands for the proposition that the law in effect on the date of an injury controls the rights and obligations of all parties in a workers' compensation proceeding. A statutory enactment adopted subsequently may apply in some cases depending on whether the

legislation is deemed remedial or procedural or is expressly declared retroactive by the legislature. Id at 36.

In the present case, the vested rights and responsibilities were clearly fixed as of 1987, which was the date of Glass's work-related injury. Also, the ALJ's findings concerning the joinder issue were clearly set forth in her opinion, award and order, with both law and evidence supporting those findings. Consequently, we find no error since the Board properly affirmed the well-reasoned decision of the ALJ.

For the foregoing reasons, the judgment of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joel D. Zakem
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Robert L. Catlett, Jr.
SALES, TILLMAN & WALLBAUM,
LPPC
Louisville, Kentucky