

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001655-WC

KROGER COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-87958

YVONNE JONES; JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: BARBER, DYCHE, TACKETT, JUDGES.

TACKETT, JUDGE: Kroger Company (Kroger) petitions for review from an opinion of the Workers' Compensation Board (Board) which affirmed an award of occupational disability benefits by the Administrative Law Judge (ALJ). Kroger contends that the Board erred in affirming an award for an occupational left shoulder injury which was not pled by appellee Yvonne Jones. For the reasons stated below, we vacate and remand.

In May 2000, Jones became an employee of Kroger. On April 25, 2001, while scanning a case of soft drinks which had become hung on the lip of the scanner, Jones felt a burning pain

in her right arm and shoulder. Following treatment, Jones returned to one-handed duty and was assigned to cleaning duties. On May 26, 2001, while engaged in her cleaning duties, Jones felt pain in her left shoulder. Following the injury to her left shoulder, Jones was again taken off work. On both occasions, Jones gave proper notice of her injury to Kroger.

On August 17, 2001, Jones filed an application for resolution of injury claim with the Department of Workers Claims. A medical report attached to the application reflected that the claim was for the April 25, 2001, injury to her right shoulder; the May 26, 2001, injury to Jones' left shoulder was not referenced in the application or the attachments. On September 28, 2001, Kroger filed a notice of claim denial.

On December 6, 2001, a benefit review conference was held. In conjunction with the conference, a benefit review conference order and memorandum was filed into the record. The order and memorandum did not specify as a contested issue that Kroger challenged Jones's pleading of the left shoulder injury; however, at the December 18, 2001 hearing, counsel for Kroger objected to any testimony in regard to the left shoulder injury on the basis that Jones had failed to properly plead the injury. The ALJ acknowledged that perhaps the left shoulder injury had not been pled properly but, nevertheless, overruled the motion on the basis that Kroger was aware of the claim from the medical reports and was not prejudiced as a result of the deficient pleadings. The ALJ agreed, however, to permit Kroger to assert

failure of pleading as an issue to be considered in the case on the merits.

On February 6, 2002, the ALJ entered an opinion and award on Jones's claim. The opinion and award determined that Jones had properly pled her left shoulder injury and determined that she had a 12% impairment as a result of the injuries to her left and right shoulders. Kroger filed a motion for rehearing on the issue of failure to plead, which was denied.

Kroger subsequently filed an appeal with the Board objecting to any award relating to the left shoulder injury. On July 3, 2002, the Board rendered an opinion affirming the ALJ's award of benefits as to the left shoulder injury. This petition for review followed.

In its petition for review, Kroger contends that the ALJ and the Board erred by holding that Jones was entitled to benefits for her left shoulder injury on the basis that she had failed to properly comply with the statutes for filing a workers' compensation claim for the injury. In her brief, Jones concedes that "she did not include a left shoulder injury in her Form 101, and that she did not file a formal amendment to her Form 101."

The ALJ addressed the issue as follows:

At issue is whether plaintiff properly pled a left shoulder injury. The Administrative Law Judge notes that plaintiff's Form 101 indicates that she had shoulder pain on April 25, 2001 and it is undisputed that injury involved plaintiff's right shoulder. However, it appears to the undersigned that the defendant-employer was aware by at least November 8, 2001, the date of Dr. Schiller's examination, that plaintiff was alleging a left shoulder injury while cleaning on May 26, 2001. Further, the defendant-employer

was served a copy of Dr. Patrick's report on October 29, 2001 and Dr. Patrick notes an injury on May 19, 2001 to the left shoulder. While the better procedure would have been for plaintiff to have filed a formal amendment to her application, The Administrative Law Judge cannot conclude that the defendant-employer suffered any prejudice as a result of the improper pleading and therefore cannot conclude that the plaintiff waived her [left] shoulder injury on such a technical ground. Wherefore, the Administrative Law Judge concludes that plaintiff's left shoulder claim is not barred by a failure to properly plead it.

In opposition to the ALJ's holding, Kroger cites us to two statutes: KRS 342.185(1), which requires an application for adjustment of claim to be filed within a specified time in order to maintain a proceeding for compensation for an injury, and KRS 342.270(1), which requires all causes of action against a single employer to be joined, and further provides that failure to join a claim will result in the claim being barred as waived by the employee. The Board acknowledged that the language of these statutes was constructed so as to be mandatory and that

according to Jones's own testimony, the injuries to her separate body parts occurred on different dates as the result of separate and distinct traumatic events. Her failure to include both injuries in the original application or to file separate applications cannot be chalked up to excusable neglect given the clear and obvious statutory, as well as regulatory violations. See also 803 KAR 25:010 Section 5. Certainly, the ALJ would have been clearly authorized to exclude Jones's left shoulder injury testimony.

Citing to CR 15.02, however, the Board concluded that the ALJ did not abuse his discretion in permitting and considering Jones's testimony and the supporting medical evidence. CR 15.02 states as follows:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Relying on Collins v. Castleton Farms, Inc., Ky. App. 560 S.W.2d 830 (1977) and Nucor Corp. V. General Electric Co., Ky., 812 S.W.2d 136 (1991), the Board reasoned

In the instant claim, while Kroger clearly objected to Jones's testimony at the time of the final hearing, it did not object to Dr. Patrick's testimony when it was sought to be admitted. Further, Kroger's own evidence from Dr. Schiller more narrowly defined the issue. Additionally, the only contested issue reserved at the benefit review conference regarding the left shoulder was notice. At no time was Kroger denied the opportunity to present a defense to the claim, and in fact did present a formidable defense, which included not only the reports of Dr. Schiller but also the cross-examination of Dr. Patrick. In summary, Kroger took advantage of a fair opportunity to defend the entirety of Jones's claim and we perceive no prejudice to Kroger. The ALJ's decision to decide the claim on the merits does not, in our opinion, constitute a clear abuse of discretion.

KRS 432.185 provides that "no proceeding under this chapter for compensation for an injury or death shall be

maintained . . . unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident[.]” (Emphasis added.). 803 KAR 25:010 § 5 (1) similarly provides that “[t]o apply for resolution of an injury claim, the applicant shall file Form 101 with the following completed documents . . .” (Emphasis added.). 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.

Workers' compensation is a creature of statute and the remedies and procedures described therein are exclusive.

Pinkston v. Teletronics, Inc., Ky., 4 S.W.3d 130, 135 (1999).

A right created by statute cannot be defeated by the application of a common law principle. Eversole v. Eversole, 169 Ky. 793, 185 S.W. 487, 488 (1916). Thus, any analysis of a workers' compensation issue is necessarily an exercise in statutory interpretation. Williams v. Eastern Coal Corp., Ky., 952 S.W.2d 696, 698 (1997).

The requirement of KRS 342.185 that no proceeding under KRS Chapter 342 may be maintained unless an application is timely filed, and the requirements of KRS 342.270 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 initiated by the filing of an application and if there are multiple claims pending, the claims must be joined, and the failure to do so will bar any claims not joined. There is no room for interpretation here. KRS 446.080(4) states that all words shall be construed "according to the common and approved usage of language." Bowen v. Commonwealth ex rel. Stidham, Ky., 887 S.W.2d 350, 352 (1994).

In light of the above, we are persuaded that the Board improperly applied CR 15.02 to circumvent the statutory requirements of KRS 342.270 and KRS 342.185. Inasmuch as workers' compensation is a creature of statute, and the relevant statutes clearly set forth the procedures both for initiating a claim and for the treatment of multiple claims, we are persuaded that CR 15.02 cannot be employed to avoid the statutory requirements.

With regard to the cases relied upon by the Board, we note that Collins v. Castleton Farms, Inc., supra, applied CR 15.02 to an employer's failure to raise an affirmative defense, which is distinguishable from the failure to comply with a mandatory statute to initiate a claim. Further, Nucor Corp. V. General Electric, supra, involved a civil lawsuit in circuit court for negligence, breach of contract, breach of warranty and strict liability in tort, which is also distinguishable from the present workers' compensation case.

Based upon the foregoing, we conclude that the Board erred in applying CR 15.02 to circumvent the statutory requirements of KRS 342.270 and KRS 342.185. Nevertheless, we note that

[workers'] compensation laws are fundamentally for the benefit of the injured work[er], a just claim must not fall victim to rules of order unless it is clearly necessary in order to prevent chaos. . . . The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it.

Riddle v. Scotty's Development, Inc., Ky. App. 7 S.W.3d 385, 387 (1999) (quoting Messer v. Drees, Ky., 382 S.W.2d 209, 212 - 213 (1964)). With this principle in mind, we note that the statute of limitations is yet to expire on either the left shoulder or the right shoulder injury. Under the circumstances of this case, we are persuaded that Jones remains in a posture to correct the procedural problems identified herein. As such, we remand the case to the ALJ with directions to, upon proper motion, permit Jones to correct the procedural deficiencies surrounding her May 26, 2001, injury to her left shoulder.

For the foregoing reasons the case is remanded to the ALJ for additional proceedings consistent with the opinion.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BARBER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BARBER, JUDGE, DISSENTING. I respectfully dissent.

Since the statute of limitations had not run, I believe it was within the ALJ's prerogative to *sua sponte* amend the application to conform to the pleadings. Therefore, it would be in the

interest of judicial economy to affirm the Workers' Compensation Board.

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