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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000344-WC

JANICE LAWSON — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-97-69523

WAL-MART STORES, INC.; HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD; AND SPECIAL FUNDS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: PAISLEY AND TACKETT, JUDGES; AND HUDDLESTON, SENIOR JUDGE.[1]

TACKETT, JUDGE: Janice Lawson appeals from an opinion and order of the Workers' Compensation Board (Board) affirming the findings of the Administrative Law Judge (ALJ) limiting her recovery to thirty percent of her permanent total disability award. The ALJ previously found that seventy percent of Lawson's permanent total disability was attributable to the

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

first of three work-related injuries. In a previous opinion, this Court determined that recovery for Lawson's first injury was time barred. We affirm the Board, finding that its decision is supported by our previous opinion in this case.

Lawson was employed by Wal-Mart from September 21, 1980, through July 2, 1998. At various times during her employment, she worked as a cashier, sales clerk, service desk clerk, layaway clerk, and manager of the layaway department. Lawson injured her lower back in August 1994 while turning to place a cd player on a stack of boxes. Initially, she sought chiropractic care which lessened her pain. However, her pain continued to worsen and, in 1997, her doctor restricted her from lifting more than twenty pounds occasionally and recommended epidural steroid blocks.

On July 14, 1997, Lawson suffered a second injury, this time to her right arm, while taping a box closed in the layaway department. She sought medical attention, was removed from work three months later, and finally diagnosed with carpal tunnel syndrome. She returned to work in September, after her treating physician concluded that she was capable of doing jobs which did not require the use of her right arm, and suffered an additional injury on September 26, 1997.

In January 1998, Lawson was restricted from lifting more than five pounds or using her right arm in a repetitive

fashion. Wal-Mart assigned her to the position of customer service manager in an effort to accommodate her medical work restrictions. Lawson's new duties required some heavy lifting in that she was required to carry bags and trays of change. Her pain continued to worsen throughout the remainder of her employment. She last worked on July 2, 1998, when, due to physical exertion, she suffered severe pain in her lower back and legs at the end of her shift. Lawson stayed in bed throughout her vacation, which began the next day, and never returned to work.

Lawson filed an Application for Resolution of Injury Claim on March 18, 1999. Initially, she listed injuries to her lower back and right wrist, arm, and shoulder and gave injury dates of July 14, 1997, and September 26, 1997. Lawson later amended her application to include a claim for the 1994 back injury. Wal-Mart filed an affirmative defense arguing that the 1994 claim was time barred. On August 16, 1999, Lawson moved to join the Special Fund as a party and the Special Fund filed a notice denying her claim.

The presiding ALJ, in an opinion entered February 28, 2000, found Lawson to be totally and permanently occupationally disabled as the combined result of her 1994 and 1997 injuries. The ALJ found that seventy percent of the disability was attributable to the 1994 injury and apportioned this amount

equally between the Special Fund and Wal-Mart. In March 1998, which was after the two-year statute of limitations had expired, Wal-Mart had voluntarily paid Lawson temporary disability benefits for the 1994 injury. Kentucky Revised Statute (KRS) 342.185 states as follows:

> No proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and 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, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself for compensation. . . . If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.

The ALJ concluded that Wal-Mart's voluntary payment after the statute of limitations had expired rendered Lawson's claim for the 1994 injury timely.

The Board reversed the ALJ's determination, finding that Lawson's failure to bring her claim prior to the expiration of the statute of limitations extinguished her right to bring a claim for the 1994 injury. Further, the Board's decision relieved the Special Fund of liability since its obligation to

compensate Lawson flowed solely from the 1994 injury. We affirmed in a published decision wherein this Court analyzed the issue presented in Lawson's original appeal as follows:

> The . . . issue presented in [this appeal] is whether after the limitations period has run for a claim the payment of TTD [temporary total disability] benefits revives the claim as to allow an extension of the period for filing the claim. In other words, does a claimant have two years after the last voluntary payment of TTD benefits by an employer to file a claim if the limitations period has run on the original injury?
>
> Although there are no Kentucky cases directly on point, we have been directed to a number of sources that lend support to the proposition that the voluntary payment of benefits subsequent to the running of the filing period for an original injury does not extend the filing period for a claimant. As the Supreme Court said in [Newberg v. Hudson, Ky., 838 S.W.2d 384, 387 (1992)]: "While statutes of limitation protect employers from the problems associated with litigating stale claims, the statutory exception recognizes that a worker may be lulled into a false sense of security by voluntary payments and might fail to actively pursue a claim." Therefore, the rationale behind KRS 342.185(1), which provides that if TTD payments have been made the claimant has two years from the last payment to file the claim, is to prevent an employer from paying TTD for two years and lulling the claimant into believing that the claimant need not file a claim. As the Board has pointed out, this rationale no longer exists if the original time period for filing a claim has passed.
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> . . .

> Further, Professor Larson has noted that
>
> > voluntary payment leads the claimant to refrain from making claim and renders purpose disappears, it may be doubted whether the waiver can survive. Thus, if the voluntary payment of after the entire claim period has run, it cannot be accused of influencing the claimant as a reasonable person to withhold making claim. Therefore, just as actual knowledge acquired for the first time waiver of statutory notice, so voluntary payment or promise of compensation made only after the claim period had expired has been held ineffectual to waive the statutory bar.
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> [ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION § 78.70 (Desk ed. 1998)](citations omitted).
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> We find the rationale of the Board [and] Professor Larson . . . persuasive. Once the time period within which a potential claimant may file a claim has expired, the claim is "forever barred." Because no benefits were paid [to Lawson] within the two years after [her] accident, it cannot be contended that [she was] "lulled" into believing that [she] did not need to file [a claim] within the two years following [her 1994 injury], as required by KRS 342.185(1).

Lawson v. Wal-Mart Stores, Inc., Ky. App., 56 S.W.3d 417, 419-420 (2001)(footnotes omitted).

After our decision in the previous appeal became final, the Board remanded the case to the ALJ to determine Lawson's claim in accordance with our decision. On remand, a second ALJ issued an opinion and order finding that the parties

had not challenged several aspects of the original ALJ's decision. On appeal, neither party had contested that Lawson's total disability was the result of the combined injuries from 1994 and 1997 or that her disability was seventy percent attributable to the 1994 injury. Lawson argued that her entire injury is compensable under KRS 342.730(1)(a), which states in part that "Nonwork-related impairment . . . shall not be considered in determining whether the employee is totally disabled for purposes of this subsection." However, the ALJ found that the seventy percent impairment from her 1994 injury, while not compensable due to her untimely filed claim, was still work-related and, therefore, ordered Wal-Mart to pay thirty percent of Lawson's permanent total disability award. The Board affirmed this second opinion and order from the ALJ, and this appeal followed.

On appeal, Lawson still argues that KRS 342.730(1)(a) prevents the Board from considering the seventy percent of her disability attributable to the noncompensable 1994 injury. Lawson contends that, as a consequence of that statute, Wal-Mart should be ordered to pay her the entire permanent total disability award. We believe that the Board properly found Lawson was only entitled to thirty percent of the permanent total disability award and adopt its reasoning as expressed in the following portion of the Board's opinion affirming the ALJ:

Citing Spurlin v. Brooks, Ky., 952 S.W.2d 687 (1997), and Fleming v. Windchy, [Ky.,] 953 S.W.2d 604 (1997), Lawson argues that since the 1994 injury was found noncompensable, there would be no overlapping benefits payable as a result of that claim for which an offsetting reduction in benefits payable on the 1997 injuries should be taken. She points out that the purpose of the reduction would be to avoid duplication of benefits that might otherwise result from an award of benefits that arises during the compensable period of a previous award. Because the 1994 injury was found noncompensable, she argues Wal-Mart is not entitled to credit for any benefits that might otherwise have been payable as a result of that claim. Wal-Mart responds that Spurlin and Fleming are inapposite because they involve consecutive "compensable" injuries. Wal-Mart directs our attention to Kern's Bakery v. Tackett, Ky. App., 964 S.W.2d 815 (1998), which does address the situation of a compensable work-related injury superimposed upon a prior work-related but noncompensable injury. Although the issue presented to us here was not directly decided in Tackett, Wal-Mart asserts that the court of appeals' decision nonetheless implicitly endorses its position that Lawson is entitled only to lifetime benefits at the rate of 30% of a PTD [permanent total disability] award and not 100%. After thoroughly reviewing once more the evidence of record and the applicable law, we disagree with the reasoning put forward by Lawson and agree with the position taken by Wal-Mart. To be more precise, we are convinced that the outcome reached by the ALJ finds support in the supreme court's holding and rationale set out in Spurlin and its progeny. We, therefore, affirm the ALJ's determination.

. . .

Both Spurlin, supra, and Fleming, supra, involved consecutive compensable work injuries that combined to render the employees permanently and totally disabled. The rule established by the supreme court in such cases is that the employer at the time of the first injury is responsible for permanent partial disability benefits at the rate and for the duration commensurate with the occupational disability that arose after that date. To this extent, the court overruled its prior holding in Campbell v. Sextet Mining Co., Ky., 912 S.W.2d 25 (1995).

. . .

It will be noted that, had the 1994 back injury not been work-related, then Lawson would have been entitled to only 30% permanent partial disability benefits, payable for 425 weeks, as a result of the 1997 injuries. Prior to the 1994 amendments to the Workers' Compensation Act, the fact-finder was permitted to consider pre-existing, noncompensable disability resulting from the work injury in question during the initial determination of extent and duration. Teledyne-Wirz v. Wilhite, Ky. App., 710 S.W.2d 858 (1986). Citing Transport Motor Express, Inc. v. Finn, Ky., 575 S.W.2d 277 (1978), the Teledyne court explained that the procedure for determining the final amount of income benefits to be paid involves two steps. The first step is to determine whether the claimant is disabled and, if so, whether the disability is partial or total. In this part of the analysis, explained the court, it is proper for the fact-finder to consider the whole of the claimant's disability, regardless of the source. In other words, the ALJ was permitted to consider the disabling effects of a noncompensable injury along with the disability resulting from the work-related injury at issue. It was in the second step, the apportionment process, that any

disability due to a noncompensable injury was to be excluded, in accordance with the principles set forth in Young v. Fulkerson, Ky., 463 S.W.2d 118 (1971). Teledyne at 859-860.

The Legislature statutorily overruled Teledyne, Id. as part of the 1994 amendments to the Act to the extent that the holding permitted the fact-finder to consider pre-existing disability from nonwork-related causes in determining the extent and duration of the claimant's disability. With respect to disability attributable to prior work-related causes, however, Teledyne remains viable to this day. This is even true where the prior work-related disability is noncompensable. Kern's Bakery v. Tackett, supra. It is by virtue of this rationale that Lawson is entitled to benefits for the duration of her disability, subject to the limitation set out in KRS 342.7130(4), rather than the 425-week period for which permanently partial disability benefits at the rate of 30% would otherwise be payable. While Lawson would have us adopt the first step of the above-described process outlined in Teledyne, she nevertheless would have us discard the second step, the process of apportionment pursuant to Fulkerson, supra. Rather, Lawson seeks to replace the apportionment rule set out in Fulkerson, supra, with the more favorable method outlined in Spurlin and Fleming. As previously stated, however, the case *sub judice* is materially distinguishable from the latter two cases, inasmuch as the prior injuries involved therein were both "work-related" and "compensable."

Where the pre-existing active disability is the result of a noncompensable injury, we believe the apportionment step of the process is governed by Fulkerson, Id., just as Teledyne, Id., remains the rule of law for the first step when the pre-existing disability is work-related. . . .

> Once it was determined that Lawson's 1994 back claim was time-barred, any disability resulting from that injury essentially became a pre-existing, active disability for which a carve-out is still mandated. It will be noted that Fleming v. Winchy, supra, also involved pre-existing, active disability resulting from work-related injuries. The injuries at issue in Fleming occurred in 1990 and 1991. The ALJ concluded that the claimant was permanently and totally disabled as a result of those two injuries, along with prior work-related injuries occurring on 1977 and 1988, for which the claimant had previously been compensated. Of the claimant's 100% disability, 16% was attributed to the 1977 and 1988 injuries, and there was no question but that this amount was to be excluded as prior active disability. If Lawson's argument in the case *sub judice* were taken to its logical conclusion, then the claimant in Fleming would be entitled to recover from the 1991 employer that additional 16% of his permanent total disability attributable to the 1977 and 1988 injuries, as there would be no overlap in benefits for which a reduction in the last employer's liability would be taken. The absurdity of this outcome is apparent and, yet, careful inspection reveals that this is precisely the logic offered by Lawson in the instant appeal. We believe it misses the mark.

For the forgoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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