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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000862-WC

CARL Q. QUIRE — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-93-91805

SHELBY MOTOR CO., INC.; HON. J. LANDON OVERFIELD, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Carl Q. Quire petitions for review of an opinion of the Kentucky Workers' Compensation Board, which affirmed an opinion and order of an Administrative Law Judge (ALJ). The ALJ had concluded that Quire's claim for permanent partial disability benefits was untimely filed under

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

the provisions of Kentucky Revised Statues (KRS) 342.185. The statute provides the time-frames within which a claim for workers' compensation benefits must be made as follows: (1) either within two years of the date of the work-related accident; (2) or within two years following the suspension of income benefits if any were made to the injured employee.

Quire received temporary total disability (TTD) benefits following a workplace accident that occurred on February 26, 2003. The ALJ determined that this accident merely exacerbated an earlier injury that had occurred on October 9, 2002. The issue on appeal is whether the payment of benefits for the second injury served to toll the two-year deadline for filing the claim for workers' compensation benefits for the first injury. The appellee, Shelby Motor Company, Incorporated, argues that the tolling issue was not adequately preserved for our review.

Quire has been employed as an automobile technician by Shelby Motor Company, a Chevrolet dealership, since 1995. On February 26, 2003, he slipped on a puddle of oil while he and a co-worker were carrying an automobile transmission. Quire fell onto another transmission, striking his head and shoulders; meanwhile, the transmission that he and his co-worker had been carrying fell onto his lower body. He was rendered unconscious for a few minutes, and a clear fluid oozed from his nose and

eyes. He was taken to the hospital emergency room where he was described as conscious but dazed.

After X-rays and CT scans were performed at the hospital, he was advised to consult his family physician, Dr. David Wallace. Quire complained of pain in his neck, shoulders, and back. Dr. Wallace sent Quire to physical therapy and took him off work. The therapy eased the pain in Quire's shoulders and neck, but the pain in his back persisted and intensified. Quire received TTD benefits for approximately one month following the accident; he returned to work on March 30, 2003. Dr. Wallace instructed him to avoid bending and restricted him to lifting no more than twenty pounds.

Prior to the accident of February 26, 2003, Quire had been working between eighty (80) and one hundred twenty (120) hours every two-week pay period on a commission basis. After returning to work, he was able to average only forty (40) to sixty (60) hours every two weeks due to the restrictions on bending and lifting. His supervisor, Mark Stivers, the general manager of Shelby Motor Company, testified that Quire is "as straight as they come" and a "topnotch mechanic" who performs most of the dealership's important warranty work.

Because Shelby Motors wanted to keep Quire in its employment, it placed him on a salary about two months after his injury. As a result, he now earns the equivalent of what he

would have earned if he were still working eighty (80) hours bi-weekly on a commission basis. Even under this arrangement, however, Quire testified that he earns approximately $4,000.00 to $5,000.00 less per year than he did before the accident. Quire filed a claim for workers compensation benefits on March 16, 2005 -- two weeks shy of two years of the last payment of the TTD benefits.

Prior to the hearing, the employer stipulated: (1) that the injury occurred or became disabling on February 26, 2003; and (2) that Quire had given due and timely notice of the injury.

In the medical reports submitted by Quire and through his own testimony, evidence was revealed that he had suffered other back injuries at work about five months before the accident of February 26, 2003. The first of these incidents occurred on October 9, 2002, when Quire strained his back working with a transmission. He did not seek any medical attention at that time. Two days later, he slipped in a puddle of oil and went down on his knee. He consulted a physician and was placed in physical therapy for two weeks. No medical restrictions were placed upon him. He missed one day of work and testified that he recovered completely from the fall -- except that his back would become slightly sore when he

performed heavy work. He did not file workers' compensation claims in connection with either of these accidents.

Some of the medical evidence, however, indicated a connection between the accidents of October 2002 and the fall on February 26, 2003. Dr. Mark A. Myers, an orthopedic specialist who saw Quire at the recommendation of Dr. Wallace, stated in his report of April 24, 2003, that:

> [Quire] reports a 3 or 4 year history of episodic, mild back pain with no prior severe symptoms. In October of last year, he developed severe back pain after lifting. His symptoms then resolved in about three weeks. In February of this year, he was lifting and fell when he developed a recurrent pain "everywhere." He reports a constant, dull lumbosacral pain since then with no change over time.

In a report dated August 19, 2003, Dr. Tinsley Stewart, a specialist in physical medicine and rehabilitation, stated that Quire "was injured in two separate accidents on the job. The first occurred on October 9, 2002." Dr. Stewart noted that Quire experienced significant low back pain immediately after the October injury, that he was treated with physical therapy, and that the pain had resolved by the time he returned to work. Dr. Stewart assigned a permanent 13% impairment of the whole person and found that "[i]t is within reasonable medical probability that the patient injured himself in the first

[October 2002] and reinjured himself in the second [February 2003] fall while on the job."

At the hearing, the ALJ, *sua sponte*, raised the issue of amending the claim to include the October injury. The following exchange took place:

> ALJ: I've got a question here, guys.
>
> Mr. Levy [attorney for the claimant]: Okay.
>
> ALJ: Are we dealing with two injuries? I seem to keep hearing about an October 9, 2002 injury.
>
> Mr. Levy: We – we didn't make a claim for it, and I don't think that there was ever . . .
>
> ALJ: Okay.
>
> Mr. Levy: We didn't make a claim for it, and I think it's probably too late to amend.
>
> ALJ: Do what?
>
> Mr. Levy: Too late to amend.
>
> ALJ: Okay.
>
> Mr. Levy: I mean, I – I can ask to amend and include that, but I think that's putting Pete on – that's putting Pete on – that's putting Mr. Glauber on the spot too, because . . .
>
> Mr. Glauber [attorney for the employer]: Well, I mean, by this point in time . . .
>
> ALJ: It's barred anyway.
>
> Mr. Glauber: It's barred by the statute of limitations, but – year, 2002, it would be over two years.

Mr. Levy: Unless it could relate back to when we filed this claim on time.

ALJ: Which was March 16, 2005.

Mr. Levy: Which is when he stopped receiving TTD.

Mr. Glauber: Well, he wasn't paid TTD from the first injury, so . . .

Mr. Levy: Correct.

Mr. Glauber: So, basically . . .

Mr. Levy: But I – I . . .

Mr. Glauber: I would object. I'm just objecting.

Mr. Levy: I guess if – the question is, if he hasn't – he has one incident and then – but returns to work, and then has another incident all within the same time frame, and then is on – is drawing TTD, he wouldn't be thinking to file any claim for the first incident either, and would that – would that hold the statute for the first claim, but . . .

ALJ: Well, I'm not going to do anything unless somebody makes a motion, and – and all that kind of stuff, so . . .

Mr. Levy: Can I – can we – if it's not – if it's a questioning of time, why don't I file a motion within five days – oh, by the end of the week?

ALJ: Well, because nothing's going to be filed after today, that's why, because . . .

Mr. Levy: I just don't want to put it – okay, I just don't want to put Mr. Glauber on the spot. I mean, I – I could make the motion and make sure, but what I wanted to

make sure of, for their sake too, is that if there's other prejudice because there could be other matters investigated in between, then it's not fair to raise it, but if we have everything before the Court any how, and it's just a question of whether it's time barred, then I would make the motion. And I don't know that – if Mr. Glauber has had the case long enough to be able to make that evaluation.

Mr. Glauber: Well, don't worry about me. I'll just . . .

Mr. Levy: I'm always worried about you.

Mr. Glauber: If there's a motion, I – we would object on the basis of the statute of limitations if there is a motion.

Mr. Levy: I'd make the motion to – to also consider the October 2002 . . .

ALJ: So, you have moved to amend to add the – the injury date of October 9, 2002?

Mr. Levy: It appears to be like October 9 and October 11 of 2002.

ALJ: Okay.

Mr. Glauber: Let me object, and I'm going to object, because it is barred by the limitations. And, then, there was no time loss . . .

ALJ: Well, wait a minute now. Wait – wait – now, you – let's handle first the motion to amend.

Mr. Glauber: Yes, sir.

ALJ: And whether or not it's time barred, you know.

Mr. Glauber: Okay.

ALJ: Do you object to the motion to amend?

Mr. Glauber: Not to the objection to amend.

ALJ: I'm sorry?

Mr. Glauber: I won't object to the motion to amend.

ALJ: All right; well, all that evidence has come in anyway, so . . .

Mr. Glauber: yes, sir; that's right.

ALJ: We're going to amend it to conform to the evidence, all right? And, the claim is amended to add an injury of October 9 or 11 of 2002.

Mr. Levy: Okay; another issue then for briefing?

ALJ: Now, you need to file a – a special answer. I assume you're going to file an answer – a special answer asserting the statute.

Mr. Levy: We'll waive it if – if that's okay with – with the Court. I don't – I mean, if that's the only special answer that you're filing is the time statute . . .

Mr. Glauber: That's with the statute – that's what the answer would be is – is . . .

ALJ: I'm going – I'm going to then allow the – the employer to, on the record state a special answer.

Mr. Glauber: All right.

ALJ: And I assume your special answer is . . .

> Mr. Glauber: It's barred by the statute of limitations in KRS 342.185 – I believe it is.
>
> ALJ: All right – all right; then, I'm going to make the decision based on that, okay?
>
> Mr. Glauber: Thank you; so, I won't have to file a written one now?
>
> ALJ: You don't have to file a written response.
>
> Mr. Glauber: Okay.
>
> Mr. Levy: Can we brief – can we just include a . . .
>
> ALJ: That's going to be included in your briefs. Your briefs will be due September 12, 2002, okay?
>
> Mr. Levy: Okay.
>
> ALJ: So include all that in there.

Although the ALJ verbally instructed the parties to brief the issue of the October 2002 injury in an amended claim, Quire submitted a brief which addressed only the injury of February 26, 2003. Similarly, in its brief, Shelby Motor did not allude to the October 2002 injury. Shelby argued only that since Quire had fully recovered from the February injury, he was not entitled to any permanent partial disability benefits.

After reviewing the evidence, the ALJ agreed that Quire was permanently, partially disabled. However, he concluded that Quire's claim was barred by the statute of limitations since it had been filed on March 16, 2005 -– more

than two years after the October 2002 injury. His opinion linked the two injuries as follows:

> Both Plaintiff and his employer were excellent witnesses. There is no doubt that Plaintiff is a valued and trusted employee of Defendant Employer. There is also no doubt in my mind that Plaintiff is telling the truth as is Mr. Stivers. The problem is, from all of the medical evidence, **it appears that Plaintiff's low back injury causing impairment occurred in October of 2002 and was exacerbated in February of 2003.** . . . It is my impression, from the totality of the evidence, that Plaintiff did have an injury in October of 2002 which resulted in a functional impairment rating [of 13%] as assigned by Dr. Stewart. However, that injury is barred by the applicable statute of limitations [KRS 342.185]. **The work related injury which occurred February 26, 2003 exacerbated the low back condition caused by the October of 2002 injury and, as an exacerbation, was not a compensable injury.** Calloway County Fiscal Court v. Winchester, 557 S.W.2d 216 (Ky. 1977).

(Emphasis supplied.)

Quire filed a petition for reconsideration in which he argued that the two-year limitations period pertaining to the October 2002 injury had been tolled under KRS 342.185 by the payment of TTD benefits for the February 2003 injury. He also raised the issue of the statute of limitations, contending that Shelby Motors was barred from raising the statute of limitations as a defense because the company had failed to comply with the terms of KRS 342.040(1). That statute provides that upon the

termination of a worker's compensation benefits, and employer **must** "notify the executive director . . . and the executive director **shall, in writing, advise the employee** . . . of right to prosecute a claim under this chapter." KRS 342.040(1). (Emphasis added.) Shelby Motors failed to make that statutorily mandated notification after the termination of Quire's TTD payments following the February injury.

> [A]n employer's failure to strictly comply with KRS 342.040(1) estops it from raising a limitations defense, without regard to whether the failure is attributable to bad faith or misconduct.

Akers v. Pike County Bd. of Educ., 171 S.W.3d 740, 743 (Ky. 2005).

The ALJ denied the petition for reconsideration. The Board also rejected Quire's arguments regarding estoppel as to Shelby Motor and its limitations defense. The ALJ reasoned that these arguments were procedurally barred because Quire asserted them in his petition for reconsideration rather than raising them in his original brief. Despite the preservation problem, however, the Board nonetheless reviewed his first argument: that the payment of the TTD benefits for the second injury had tolled the limitations period for the first injury. The Board concluded that the tolling argument lacked merit. This appeal followed.

The function of the Court of Appeals in reviewing a decision of the Board is "to correct the Board only where the 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." Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

The first issue before us on appeal concerns the procedural problem of the preservation of Quire's arguments. The arguments allegedly barred by preservation concern: (1) the tolling of the limitations period and (2) the effect of the employer's failure to follow the notification procedure of KRS 342.040.

The Board discussed and rejected Quire's tolling arguments -- despite the alleged problem of preservation. This review by the Board was sufficient to preserve it for our consideration. In Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81 (Ky. 2005), the Kentucky Supreme Court emphasized the crucial role played by the Board in insuring that decisions of an ALJ are "in conformity with Chapter 342 (the Workers' Compensation Act) and that such determinations constitute questions of law, and not fact." Id. at 83 (citation omitted). While the Board accords great deference to the ALJ's discretion and judgment concerning the weight of evidence on questions of

fact, questions of law are another matter: "issues regarding questions of law need not be preserved pursuant to a petition for reconsideration, but rather, may be appealed directly to the Board." Id.

While Quire failed to raise his arguments in his brief to the ALJ, he did raise them in his petition for reconsideration. His tolling argument presented a question of law properly subject to review by the Board. The Board **did** elect to address it -- additionally preserving it for our review.

The substantive portion of Quire's first argument is that the payment of TTD benefits following the February 26, 2003, injury tolled the running of the two-year period following the October 2002 injury. The Board rejected that reasoning on the ground that there was no relation between the TTD benefits and the October injury, discussing the implications of the February 2003 injury as follows:

> Although the ALJ found the February 26, 2003 work incident was only a temporary exacerbation, it was technically nevertheless viewable, by statutory definition, as an "injury." KRS 342.0011(1). Indeed, since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held that following the December 12, 1996, amendments to the Workers' Compensation Act, it is possible for a claimant to submit evidence of a temporary injury for which TTD and temporary

> medical benefits may be paid and yet fail in his burden to prove a permanent harmful change to the human organism as a result of that injury for which permanent benefits are appropriate. Hence, even though permanent benefits were not awarded herein for the February 26, 2003 incident since it was a temporary injury, it does not follow as a matter of law that the TTD benefits paid from February 26, 2003 through March 30, 2003 were for the October 2002 injury rather than a February 26, 2003 injury.

Thus, according to the Board, the TTD payments were a discrete benefit paid only for the temporary injury that occurred on February 26, 2003, and having no connection with the October injury. The ALJ, however, had characterized the February 2003 injury as an "exacerbation" of the earlier October 2002 injury. The Board directly and deliberately departed from the linkage of the injuries.

Quire thus finds himself in a legal "no man's land." If the ALJ was correct in linking the two injuries, the statute of limitations is a problem. If, however, the Board is correct in refusing to connect the two, the ALJ's computation of time for the October 2002 injury is erroneous, rendering Quire's tolling argument unnecessary as the February 2003 reference point would render his claim automatically timely. Despite the inherent contradiction between the ALJ and the Board, we shall address this unique issue on tolling as addressed by the Board.

The Board relied on Robertson, supra, in reaching its conclusion, but we have found Robertson to be significantly distinguishable from the case before us. In Robertson, the claimant had a pre-existing, non-work related condition that was temporarily exacerbated by a workplace injury. He received TTD benefits for the injury. The Court concluded that upon his return to work, he was not entitled to future benefits and was limited to compensation solely for the transient, "temporary flare-up" of the pre-existing condition resulting from the workplace injury. Robertson, 64 S.W.3d at 286. Quire, by contrast, was first injured at work and then was injured again at work. The second injury actually led to a considerable worsening of his back problems; that worsening has not abated.

The issue of the tolling of the limitations period under these precise factual circumstances is a matter of first impression. This Court has addressed a situation in which TTD benefits were paid for a second injury that occurred **after** the running of the original two-year period for filing a claim for the first injury. See Lawson v. Wal-Mart, 56 S.W.3d 417, 419 (Ky.App. 2001). We reviewed that question in light of the policy underlying KRS 342.185 as it was explained by our Supreme Court:

> 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.

Id. at 419, citing Newberg v. Hudson, 838 S.W.2d 384 (Ky. 1992). In Lawson, we held that the limitations period was not tolled, relying heavily on the fact that the first limitations period had expired **before** the second injury occurred. Therefore, there was no likelihood that the claimant's receipt of TTD had lulled him into believing that he need not file a claim according to the analysis of Newberg v. Hudson, supra.

Quire's case, however, is both distinguishable and unique. The TTD benefits for the second injury were paid **within** the two-year period in between his two injuries. Thus, the two-year period following the first injury **never expired** before TTD payments were made (assuming that we accept the reasoning of the ALJ that the first injury was a necessary point of temporal reference under his "exacerbation" theory). All of the evidence indicated that Quire's symptoms became permanently disabling only after the February 26, 2003 injury.

Shelby Motor has pointed out that Quire was represented by counsel as early as August 2003. At that time, he was examined by Dr. Tinsley Stewart, who made a connection between the October 2002 and February 2003 injuries. Therefore, Shelby Motor argues that:

> it is obvious that Appellant was aware of and/or should have been aware of the need to file a claim for workers' compensation benefits for his October 2002 injury by October 2004, and, for whatever reasons, chose not to do so.

(Appellees' Brief at 8). The language of the medical reports is by no means conclusive regarding the nature of the connection between the October and February injuries. Much more significantly, Shelby Motor received copies of the medical reports and **never raised** the issue of the October injuries. As noted earlier, Shelby Motor **stipulated** that Quire's injury occurred or became disabling on February 26, 2003. The ALJ, *sua sponte*, made the linkage.

The contradiction between the ALJ and the Board is essentially incapable of resolution. The ALJ linked the injuries, holding that the latter injury was an exacerbation of the earlier -- and thus non-compensable since the significant time from which to measure the necessary filing was October 2002. Because of that reasoning, Quire raised his tolling issue. The Board then concluded that there was no connection between the injuries at all, thus rejecting the tolling issue -- which would indeed become unnecessary under the Board's analysis.

We could simply conclude that the Board erred in failing to address the ALJ's exacerbation ruling and further in

rejecting the tolling issue. However, we have instead analyzed and distinguished Robertson upon which the Board relied. We hold that this case presents an issue of law unique from the Robertson case. We hold that the Board clearly erred in construing Robertson to bar the claim asserted by Quire. Its factual underpinnings are wholly distinguishable, and it simply cannot serve as precedent for this case.

Under these circumstances, and in light of the principle that our workers' compensation laws should be interpreted liberally "[i]n light of the munificent, beneficent and remedial purposes of the Workers' Compensation Act," Coal-Mac, Inc. v. Blankenship, 863 S.W.2d 333, 335 (Ky.App. 1993), we reverse the opinion of the Board and remand this case for entry of an award consistent with this opinion.

PAISLEY, SENIOR JUDGE, CONCURS.

HENRY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, JUDGE, DISSENTING: I respectfully dissent. In my view, the Administrative Law Judge's finding that Quire's injury of February 2003 was an exacerbation of his earlier October 2002 injury is a purely factual finding and is based upon substantial evidence. That being so it is conclusive and binding upon both the Board and this Court. "The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of

the evidence." Square D. Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993). I find no error in the ALJ's conclusion that the case is controlled by Calloway County Fiscal Court v. Winchester, 557 S.W.2d 216(Ky. 1977), nor in the Board's affirmance of the ALJ's decision. In my view, the Board's brief discussion of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001) at the end of its opinion is dictum. Applying the standard of Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky.1992), I cannot agree with the majority that in this case "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." Id at 687-688. Hence, we are bound to affirm. I therefore dissent.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE SHELBY MOTOR COMPANY, INC.:

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