

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-000694-WC

WINN-DIXIE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-94-07756

STEVEN HEIL;  
MARCEL SMITH,  
ADMINISTRATIVE LAW JUDGE;  
WORKERS' COMPENSATION  
BOARD

APPELLEE

OPINION  
AFFIRMING

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BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY, SENIOR  
JUDGE.<sup>1</sup>

HENRY, SENIOR JUDGE: Winn-Dixie appeals from an Opinion of the Workers'  
Compensation Board (Board) vacating the Opinion and Order of the

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<sup>1</sup> Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Administrative Law Judge (ALJ) which determined that the limitations period for Steven R. Heil to file a motion for temporary total disability (TTD) benefits had expired. As a result of this determination, the ALJ also declined to address Heil's claim for medical benefits. The Board's Opinion remanded the cause to the ALJ for a redetermination of all issues upon the merits. For the reasons stated below, we affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

On February 11, 1994, while shoveling snow and ice in a parking lot, Heil sustained a work-related injury to his back and groin. He subsequently filed an application for workers' compensation benefits.

On January 18, 1996, the ALJ issued an opinion and award granting Heil benefits for a 75% occupational disability beginning June 21, 1995, and continuing for a period not to exceed 425 weeks. The award included provisions pertaining to vocational rehabilitation and medical treatment. Between 1996 and October 2002, Heil held a number of different jobs including driving a truck, driving a bus and selling cars. Heil last worked on October 22, 2002.

On March 17, 2003, Heil filed his first motion to reopen under Kentucky Revised Statutes (KRS) 342.125. In his motion, he alleged that he was more disabled, either temporarily or permanently, than he was at the time of the original decision in his claim. In an opinion issued November 10, 2003, the ALJ awarded Heil TTD benefits for the period of October 22, 2002, to December 1, 2003. In addition, the ALJ ordered that Heil was entitled to recover such medical,

surgical and hospital expenses as may be reasonably required for the treatment of his occupational injury including epidural blocks and possible surgery. The ALJ, however, determined that KRS 342.125(8) barred reopening for additional permanent income benefits. Heil filed two motions for reconsideration of the determination, both of which were denied. Heil subsequently appealed the ALJ's decision to the Board.

On December 24, 2003, Heil filed a second motion to reopen, which was also denied. He likewise appealed the denial of the second motion to reopen. The two appeals were consolidated, and the ALJ's determinations were affirmed by the Board, this Court (*see Heil v. Winn-Dixie*, 2005 WL 2469698 (Ky.App. Oct. 7, 2005)), and the Supreme Court (*see Heil v. Winn-Dixie*, 2006 WL 1359671 (Ky. May 18, 2006)).

In the meantime, Heil filed the present motion to reopen – his third – on September 10, 2004. The motion sought additional TTD benefits and the payment of medical expenses. On October 26, 2007, the ALJ issued an Opinion and Order denying Heil's motion to reopen upon the basis that the limitations period for filing a motion to reopen upon a claim for additional TTD benefits had expired. Apparently based upon her determination that the limitations period for TTD benefits had expired, the ALJ also declined to address Heil's claim for the payment of medical expenses. Heil filed a motion for reconsideration, which was denied.

Heil appealed the ALJ's decision to the Board, which determined that because the intervening TTD award for the period of October 22, 2002, through December 1, 2003, interrupted the original 425-week award, the limitations period had not expired. This petition for review followed.

### DISCUSSION

Before us, Winn-Dixie contends that the Board did not have the authority to vacate and remand the ALJ's decision because Heil had failed to properly preserve the issue for the Board's consideration. Winn-Dixie argues that to the contrary, Heil had, in fact, conceded that the limitations period had expired. In her Opinion and Order of October 26, 2007, the ALJ addressed the issue as follows:

The first issue that needs to be considered is whether or not Plaintiff is barred by the applicable statute of limitation with regard to this motion to reopen. I considered the evidence in its entirety and the arguments of the parties. It is clear [from] the Opinion and Award and from the date of the Motion to Reopen that 425 weeks of permanent partial disability benefits ended prior to that date. Plaintiff states that the law in effect at the time of the motion to reopen, KRS 342.125[,] as in effect July 24, 2000[,] states, "[e]xcept for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730[(1)(c)2], or for reducing [a] permanent total disability award when a[n] employee returns to work[,] or seeking temporary total disability benefits during the period of an award[,] no claim shall be reopened more than four (4) years following the date of the original award . . . ." I am persuaded that the period of award ended prior to the date that the Motion to Reopen was filed. Therefore, Plaintiff's Motion to

Reopen for additional temporary total disability benefits is barred by the applicable statute of limitations.

In vacating the foregoing, in its March 13, 2008, Opinion, the Board stated as follows:

From the above language, it appears the ALJ concluded the 425 weeks of Heil's initial award ended prior to the date the third motion to reopen was filed, and Heil's motion to reopen for additional temporary disability benefits was barred by KRS 342.125(3). KRS 342.125(3) reads as follows:

Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

Even though it appears all parties believed Heil's last motion to reopen was filed outside the 425 weeks of the initial award, we believe the ALJ and the parties are mistaken. It is not disputed the first day of the award of benefits for 425 weeks was June 21, 1995. Further, through October 21, 2002, Heil's permanent partial disability benefits had not been interrupted or changed. However, the period of TTD benefits awarded by the ALJ in the opinion and award, dated November 10, 2003 awarding TTD from October 22, 2002 through December 1, 2003, extended Heil's award of permanent partial disability benefits. Therefore, Heil's award of permanent partial disability benefits for 425 weeks was suspended after October 21, 2002, and did not resume until December 2, 2003. The Supreme Court alluded to this in footnote 1 of its opinion rendered May 18, 2006; saying,

“The claimant’s partial disability award extended for 425 weeks from June 21, 1995. Therefore, it would have expired in August, 2003, absent an intervening period of TTD.”

Accordingly, we have computed the period during which permanent partial disability benefits were paid through October 21, 2002, and it appears Heil received PPD benefits for 382 weeks and 6 days. We have also computed the number of weeks PPD benefits were to be paid after December 1, 2003, up until the time Heil’s motion to reopen for additional TTD benefits was filed on September 10, 2004. After December 1, 2003, up to and including September 10, 2004, Heil was to be paid PPD benefits for 40 weeks and 4 days.<sup>2</sup> Therefore, as of the date Heil filed his third motion to reopen, on September 10, 2004, the initial award of 425 weeks had not expired.<sup>3</sup> KRS 342.730(1)(b) reads in part as follows:

Any temporary total disability period within the maximum period for permanent, partial disability benefits shall extend the maximum period but shall not make payable a weekly benefit exceeding that determined in subsection (1)(a) of this section.

Suffice to say, the ALJ, as well as the parties, were mistaken in concluding that the initial award period of 425 weeks had expired at the time Heil’s motion to reopen was filed on September 10, 2004. Accordingly, we remand this matter to the ALJ for a ruling on all issues raised in Heil’s motion to reopen as well as those issues set forth in the hearing order of August 29, 2007. While Heil and Winn-Dixie raise a number of issues in

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<sup>2</sup> (WCB Footnote No. 3) Because the effect of Winn-Dixie’s TTD payments in 2004 is in dispute, we purposely have not considered the effect of Winn-Dixie’s voluntary payment of TTD benefits from April 1, 2004 through July 7, 2004 in making this calculation.

<sup>3</sup> (WCB Footnote No. 4) Without considering the effect of TTD payments made by Winn-Dixie, Heil would have been paid, as of September 10, 2004, PPD benefits for 423 weeks and 3 days.

their briefs, if appropriate, those issues, in light of our ruling, should be addressed to the ALJ on remand.<sup>4</sup>

The Board's conclusion that the limitations period had not expired is correct. As previously noted, the award period commenced June 21, 1995, and was to last for 425 weeks. A period of 425 weeks equates to 8 years, 9 weeks. Thus, in the normal course of events Heil's award period would have ended in late August 2003.<sup>5</sup>

However, the period of Wednesday, June 21, 1995, through Monday, October 21, 2002, equates to 2,680 days, which translates to 382 weeks, 6 days.<sup>6</sup> There followed a 404-day interruption of the permanent partial disability period while Heil drew TTD benefits for the period Tuesday, October 22, 2002, through Sunday, November 30, 2003. Beginning Monday, December 1, 2003, Heil again began receiving his permanent partial disability benefits. As of Friday, September 10, 2004 (the day he filed his present motion to reopen), he had received benefits during this post-interruption period for 284 days, or 40 weeks, 4 days, since the recommencement of the benefits. Adding the first period of 382 weeks 6 days and the second period of 40 weeks and 4 days produces a total duration of permanent

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<sup>4</sup> (WCB Footnote No. 5) While we are cognizant of the cases of *National Southwire Aluminum, Division of Southwire Rod & Cable v. Stephen Veach*, 2002-CA-001605-WC (rendered February 7, 2003 and designated not to be published) and *Officeware v. Stephen Jay Jackson*, 2006-CA-001911-WC, (rendered March 30, 2007 on appeal to the Kentucky Supreme Court and not yet final), in as much as the period for the payment of PPD benefits had not expired when Heil filed his third motion to reopen and since we are remanding, we do not believe it is necessary to discuss those cases as they relate to the issues raised by the parties in their briefs.

<sup>5</sup> June 21, 1995 + plus 8 years + 9 weeks.

<sup>6</sup> We have facilitated our review of this issue with the calendar calculator contained at the website [www.timeanddate.com](http://www.timeanddate.com).

partial disability benefits payments of 423 weeks, 3 days. Accordingly, the Board's calculation is correct. As this is less than 425 weeks, Heil's second motion to reopen was filed "during the period" of his permanent partial disability award in conformance with KRS 342.125(3).

Winn-Dixie alleges that despite the ALJ's error, the Board had no authority to correct it and, it follows, neither does this Court. We disagree.

We first note that Winn-Dixie interposed the limitations period as a defense to Heil's motion to reopen and, accordingly, it had the burden of proof upon the issue. *Whittaker v. Hardin*, 32 S.W.3d 497, 499 (Ky. 2000) (The burden of proving an affirmative defense is on the employer). The evidence of record does not support its defense, and the ALJ's finding that the limitations period had expired was, accordingly, clearly erroneous.

Further, while Heil did not specifically challenge Winn-Dixie's defense for the reasons stated by the Board (clear error by the ALJ in her calculations), he very much sought to rebut Winn Dixie's defense on other grounds. He identified at least four grounds for rebuttal: (1) that the language contained in KRS 342.125(3) "or seeking temporary total disability benefits *during the period of an award*" (emphasis added) be construed to mean during the period of an award, *including* the period of entitlement to medical benefits; (2) waiver of the limitations period by Winn-Dixie; (3) that Winn-Dixie was estopped from asserting the limitations period; and (4) the law of the case doctrine based upon footnote 1 of the Supreme Court's opinion of May 18, 2006. (Footnote 1 stated

“[t]he claimant’s partial disability award extended for 425 weeks from June 21, 1995. Therefore, it would have expired in August, 2003, *absent an intervening period of TTD*. (Emphasis added)).

The Supreme Court has applied the palpable error standard in workers’ compensation cases where failure to do so would result in a manifest injustice. *Durham v. Copley*, 818 S.W.2d 610 (Ky. 1991) (Denial of employee's motion to reopen workers' compensation claim constituted manifest injustice, where employee's counsel did not learn of important new evidence relating to employee's injury until seven weeks after administrative law judge's decision to dismiss claim). *See also* Kentucky Rules of Civil Procedure (CR) 61.02 (A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error).

Because we believe that the palpable error standard is appropriate for application where, as here, the ALJ’s decision is clearly at variance with the statute, we need not decide whether Heil’s various challenges to Winn-Dixie’s limitations period defense precisely preserved for review the issue as framed and decided by the Board. Upon application of the palpable error standard, we affirm the Board’s determination of the limitations period issue. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992) (When reviewing one of the Board's decisions, this Court will only reverse the Board when it has overlooked or

misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice.)

CONCLUSION

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

THOMPSON, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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