

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000635-WC

RADCO ASBESTOS SPECIALISTS, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-90-36895

THOMAS B. LYONS; HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,¹ SPECIAL
JUDGE.

THOMPSON, JUDGE: This is a workers' compensation case wherein the sole
issue raised is whether the Workers' Compensation Board (Board) erred when it

¹ Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

held that Thomas B. Lyons' reopened claim for temporary disability (TTD) and medical benefits against Radco Asbestos Specialist, Inc. (Radco) was not time-barred under KRS 342.125(3). In view of our Supreme Court's recent pronouncement in *Officeware v. Jackson*, 247 S.W.3d 887 (Ky. 2008), we affirm.

In 1990, Lyons sustained a work-related injury while in the employ of Radco and on August 23, 1993, was awarded permanent partial disability benefits based on a thirty percent occupational disability for 425 weeks from and after June 26, 1991. In 2000, Lyons filed a motion to reopen claiming an increase in occupational disability. Although he received an additional period of TTD, his claim for additional total occupational disability benefits was eventually dismissed.

Lyons filed a second motion to reopen on January 26, 2004, after the original 425 week period for income benefits had expired. In this motion, he alleged that he suffered an increase in occupational impairment and requested authorization for surgery recommended by his treating physician. Radco objected to the motion for TTD benefits asserting that the four-year time limitation on reopening had expired. The ALJ agreed with Radco and dismissed the motion to reopen. The Board reversed.

The issue in this case involves an interpretation of KRS 342.125(3). Although the current version was enacted after Lyons' injury, it is a remedial

statute and its provisions are applicable to all claims for reopening irrespective of the date of the injury. *Id.* at 890. KRS 342.125(8). As amended effective July 14, 2000, and in effect when Lyons filed his second motion to reopen, KRS 342.125(3) provides:

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.

Radco complains that the Board erred as a matter of law when it concluded that the phrase “during the period of an award” included payment of medical benefits. It urges that since the employer is responsible for future medical benefits incurred as a result of a work-related injury, such an interpretation leads to the illogical conclusion that virtually all reopening claims for TTD benefits are without time limitations.

In *Officeware*, the Kentucky Supreme Court approved the construction given the statute by the Board in the present case and rejected the argument Radco advances. When discussing its remedial nature, the Court addressed the purpose of the 2000 amendment to KRS 342.125 and in doing so, contradicted any contention that the Board’s construction lacked logic. The Court stated:

Although the 1996 version of KRS 342.0011(11)(a) provided the first statutory definition of TTD, although KRS 342.730(1)(a) referred to TTD as well as to permanent total disability benefits, and although KRS 342.020(1) entitled a worker to reasonable and necessary medical treatment “during disability,” the 1996 version of KRS 342.125 was silent concerning a reopening to seek TTD. The Board determined in 1998 that the legislature did not intend for that silence to prohibit a worker from enforcing a right to TTD benefits during recovery from surgery. When the legislature met next, in 2000, it amended KRS 342.125(3) to add a motion seeking TTD to the list of exceptions for which reopening is permitted at any time. The amendment became effective on July 14, 2000, which was within four years after December 12, 1996, and before the four-year reopening period expired in any claim. Like the exceptions enacted in 1996, the TTD exception concerns the procedure for reopening. KRS 342.125(8) provides that the exceptions to reopening apply to all claims; therefore, it permits any claim to be reopened at any time upon proof that an injury causes TTD.

Id. at 891 (footnotes omitted). By virtue of its decision, the Supreme Court quieted any debate concerning the General Assembly’s intent in adding temporary total disability as an exception to the four-year limitation on reopening and the meaning of the phrase “during the period of an award.” The exception to the four-year limitation includes an award of medical benefits.

The opinion and order of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James G. Fogle
Denis S. Kline
Louisville, Kentucky

BRIEF FOR APPELLEE, THOMAS
B. LYONS:

Wayne C. Daub
Louisville, Kentucky