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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001346-WC

DONALD COTTLE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-00538

AK STEEL CORPORATION, F/K/A ARMCO STEEL CORPORATION, SPECIAL FUND;
HON. MONICA RICE-SMITH, ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Donald Cottle appeals from the opinion of the Workers' Compensation Board affirming the decision of the Chief Administrative

Law Judge (ALJ), on reconsideration by AK Steel Corporation, to dismiss Cottle's motion to reopen as time-barred pursuant to the four-year statute of limitations as set forth in Kentucky Revised Statutes (KRS) 342.125. We agree that the Board and ALJ correctly decided that Cottle's motion is time-barred and affirm.

Cottle injured his back on August 2, 1992, and subsequently settled his claim by agreement, approved on July 22, 1994, which was based on a 20% impairment. In 2000, he moved to reopen his claim alleging a change in occupational disability. On April 16, 2002, this motion was denied.

In 2016, Cottle filed a second motion to reopen, this time for a medical dispute regarding proposed surgery. On October 3, 2016, the medical fee dispute was resolved in Cottle's favor and he subsequently had surgery.

On December 28, 2017, Cottle filed the present motion to reopen alleging his occupational disability had increased to a 32% impairment. Initially, the ALJ granted the motion to reopen, determining that pursuant to KRS 342.125 the four-year limitations period for reopening starts with any subsequent order granting or denying benefits pursuant to *Hall v. Hospitality Res., Inc*., 276 S.W.3d 775 (Ky. 2008), and the present motion was timely filed within four years of the order granting Cottle's second motion to reopen.

AK Steel filed a petition for reconsideration arguing that KRS 342.125(8) governs the reopening of claims decided prior to December 12, 1996, and reopening for medical fee disputes do not extend the statute of limitations.

The ALJ agreed and issued an order ruling in AK Steel's favor. The ALJ stated she erred by granting the reopening for worsening of condition as it was barred by the four-year limitation contained in KRS 342.125(3) and (8). The ALJ explained that while *Hall* held the four-year limitation restarts with any subsequent order granting or denying benefits, a medical fee dispute does not encompass benefits. Therefore, the October 3, 2016 order regarding a medical fee dispute could not serve to extend the four-year limitation.

Cottle argued to the Board that *Hall* permitted a reopening because he filed his motion within four years of the 2016 order in the medical fee dispute and his reopening was allowed because pursuant to KRS 342.125(8), exceptions in subsections (1) and (3) apply to claims decided prior to 1996, making his present reopening timely.

The Board agreed with the ALJ's reasoning in its second order and furthermore added "Cottle points to no authority stating a motion to reopen filed more than four years after a decision granting or denying benefits revives an action beyond the period permitted in KRS 342.125(3)[,]" explaining, "the motion to

reopen for the medical dispute in 2016 could not revive the already expired period to file a motion to reopen for increased disability."

KRS 342.125 provides in relevant part as follows:

> (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:
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> (a) Fraud;
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> (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;
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> (c) Mistake; and
>
> (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.
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> . . . .
>
> (3) 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 original order granting or denying benefits, when such an award or order becomes final and nonappealable, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party. Orders granting or denying benefits that are entered subsequent

> to an original final award or order granting or denying benefits shall not be considered to be an original order granting or denying benefits under this subsection and shall not extend the time to reopen a claim beyond four (4) years following the date of the final, nonappealable original award or original order.
>
> . . . .
>
> (8) The time limitation prescribed in this section shall apply to all claims irrespective of when they were incurred, or when the award was entered, or the settlement approved. However, claims decided prior to December 12, 1996, may be reopened within four (4) years of the award or order or within four (4) years of December 12, 1996, whichever is later, provided that the exceptions to reopening established in subsections (1) and (3) of this section shall apply to these claims as well.

Cottle argues KRS 342.125(8) allows him to bring his claim at this time. Although he acknowledges that KRS 342.125(8) provides a limitation that claims decided prior to December 12, 1996 may only be reopened within four years of that date, he claims the exception provided in subsection (8) allows his claim to proceed. He interprets the portion of KRS 342.125(8), which states "provided that the exceptions to reopening established in subsections (1) and (3) of this section shall apply to these claims as well" should be interpreted to mean that any of the grounds for reopening specified in KRS 342.125(1) may be brought by a claimant whose claim was decided prior to December 12, 1996, even after the four-year time limit contained in KRS 342.125(8) has expired. This would make KRS 342.125(1)(d), which allows for reopening for a change in disability and is the

ground upon which Cottle sought reopening, available to allow a reopening at any time for claimants to whom subsection (8) applies. Cottle asserts that the Board erred by failing to consider this argument which would entitle him to relief.[1]

We review this purely legal issue of statutory interpretation *de novo*. *Consol of Kentucky, Inc. v. Goodgame*, 479 S.W.3d 78, 81 (Ky. 2015). In doing so, "[w]e must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent." *Commonwealth, Uninsured Employers' Fund v. Gussler*, 278 S.W.3d 153, 156 (Ky.App. 2008). "Only 'when [it] would produce an injustice or ridiculous result' should we ignore the plain meaning of a statute." *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (quoting RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT § 4.2, at 38 (NITA, 2002)).

"KRS 342.125(8) is both a statute of limitation and repose because, by limiting the time for taking action [to a maximum of four years], it may extinguish a cause of action before it arises." *Nygaard v. Goodin Bros., Inc.*, 107 S.W.3d 190, 192 (Ky. 2003). As explained in *Johnson v. Gans Furniture Industries, Inc.*, 114 S.W.3d 850, 856 (Ky. 2003), "[u]nder the 1996 Act, neither a worker nor an

[1] We do not reach Cottle's second argument on appeal, that his right to receive benefits is not adversely affected by 2018 Kentucky Acts Ch. 40, House Bill 2.

employer may reopen a pre-December 12, 1996, award after December 12, 2000, solely upon an allegation of a change of disability."

This pronouncement was altered slightly in *Hall* when the Kentucky Supreme Court held that the four-year limitation on reopening runs anew from an order granting or denying benefits. *Hall*, 276 S.W.3d at 785. However, the Court was very clear in stating that medical fee disputes do not extend the time for reopening, stating: "Nor do we agree that a medical fee dispute encompasses benefits, as benefits relate only to 'income' benefits." *Id.* at 785-86.

The language contained in KRS 342.125(8) about exceptions is a bit confusing as it refers to the "exceptions to reopening established in subsections (1) and (3)" but only section (3) contains any explicit "exceptions." In examining what this statutory language means, in *Meade v. Reedy Coal Co.*, 13 S.W.3d 619, 621-22 (Ky. 2000) (footnotes omitted), the Kentucky Supreme Court stated as follows:

> KRS 342.125(3) lists three situations in which a claim is exempt from the . . . time limitations which it places on reopening. Included are disputes concerning medical expenses, fraud, and a reopening by an employer where the injured worker has been awarded benefits for total disability and has since returned to work. KRS 342.125(1) lists four "grounds" for reopening and does not refer to "exceptions," although fraud is included within both KRS 342.125(1) and KRS 342.125(3). The "exceptions" are incorporated explicitly in the second sentence of KRS 342.125(8), making it apparent that they are intended to apply to the reopening of all claims,

> including those decided prior to December 12, 1996, and that they permit reopening at any time upon proof of the requisite facts.

In discussing that "KRS 342.125(1) lists four 'grounds' for reopening and does not refer to 'exceptions,' although fraud is included within both KRS 342.125(1) and KRS 342.125(3)[,]" the Court stated, "[w]e will refrain from addressing whether any of the 'grounds' for reopening other than fraud may be considered 'exceptions to reopening' because that question is not presently before the Court." *Meade*, 13 S.W.3d at 621 n.2.

This same "exceptions" language of KRS 342.125(8) and how it applies to sections (1) and (3) was also examined in *Johnson*, 114 S.W.3d at 855, with the Kentucky Supreme Court explaining:

> KRS 342.125(1) does not characterize any ground for reopening as an "exception," but KRS 342.125(3) provides an exception to the four-year limitation where the purpose for reopening is to determine the compensability of medical expenses, to determine whether fraud has occurred, to conform the award as set forth in KRS 342.730(1)(c)2, to reduce a permanent total disability award in an instance where the injured worker returns to work, or to permit an injured worker to seek temporary total disability (TTD) benefits within the period of an award.

Although *Meade* suggests that there could be some exception other than fraud contained in subsection (1) which would be an exception entitling an injured

worker to reopen outside of the four-year period,[2] we have no difficulty determining that subsection (1)(d) cannot be intended to be an exception to the time limitation contained in KRS 342.125(8).

Cottle's argument that all the grounds listed for reopening in subsection (1) are to serve as exceptions to the four-year time limitation of KRS 342.125(8) would make every ground for reopening available to any injured worker at any time, so long as the worker's claim was first decided prior to December 12, 1996. This would result in the exceptions swallowing the rule and making the time limitations contained in subsection (8) a nullity. This result cannot be what was intended by the General Assembly in using this "exceptions" language in the statute. Indeed, as previously explained, our case law rejects such an interpretation.[3]

[2] While KRS 342.125(1)(a) (fraud), (b) (newly discovered evidence) and (c) (mistake) are similar to three of the grounds for relief contained in Kentucky Rules of Civil Procedure (CR) 60.02, (a) (mistake), (b) (newly discovered evidence) and (d) (fraud), we note that under CR 60.02 that (a) and (b) are limited to being brought within one year. Therefore, we doubt that 342.125(1)(b) and (c) are intended to constitute exceptions to the four-year limitation.

[3] This would be illogical as making all of KRS 342.125(3) apply to workers whose claims come under KRS 342.125(8), rather than only applying the enumerated exceptions of section (3) to them. This position was rejected in *Meade v. Reedy Coal Co.*, 13 S.W.3d 619, 622 (Ky. 2000), which determined that the "exceptions" contained in section (3) were not intended to make the two-year waiting periods which were then contained in section (3) apply retroactively to claims which arose and were decided before December 12, 1996.

Accordingly, we affirm the Board's opinion affirming the decision of ALJ dismissing Cottle's motion to reopen as time-barred.

CLAYTON, CHIEF JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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