

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

2002-SC-0210-WC

FINAL
DATE 3-11-03 EJA/Graffitt, D.C.

LESTER BROYLES

APPELLANT

APPEAL FROM COURT OF APPEALS

2001-CA-0251-WC

V.

WORKERS' COMPENSATION BOARD NOS. 94-39601 & 93-48577

ROBERT L. WHITTAKER, DIRECTOR OF
SPECIAL FUND; J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

In Wheatley v. Bryant Auto Service, Ky., 860 S.W.2d 767 (1993), the Court determined that an Administrative Law Judge (ALJ) was authorized to reopen a final award sua sponte in order to correct a legal error therein. Reversing a decision of the Workers' Compensation Board (Board), the Court of Appeals determined that the December 12, 1996, version of KRS 342.125(3) prevented an ALJ from correcting an error in the final award that was entered at the reopening of this claim until two years after the award's entry. Having concluded, however, that KRS 342.125(3) did not impose a two-year waiting period on a previously reopened award, we reverse.

On May 9, 1996, the claimant was awarded a permanent, partial disability for an injury that had occurred on September 14, 1993. On July 16, 1998, he moved to reopen, alleging a change of disability. He and the employer reached a settlement, but

the matter proceeded to a decision concerning the Special Fund's liability. In an award that was entered on November 18, 1998, an ALJ determined that the claimant had become totally disabled but erroneously calculated the Special Fund's share of the increased income benefit at the 1993 maximum rate for partial, rather than total, disability. Nonetheless, although the claimant was awarded \$133.11 per week rather than the \$177.48 to which he was entitled, he did not petition for reconsideration or appeal. On June 5, 2000, having discovered the error, he filed a motion to re-docket the claim for the purpose of correcting the award. In an order that was entered on July 10, 2000, the ALJ noted that although the time had long since passed for a petition for reconsideration or request for de novo review, there was no response or objection from the Special Fund. Relying on Wheatley v. Bryant Auto Service, *supra*, the ALJ granted the motion, to the extent that the claim was re-docketed, and then entered an order correcting the error in the reopened award from the outset.

After its petition for reconsideration was overruled, the Special Fund appealed. It maintained that the error could not be corrected under the principles of Wheatley v. Bryant, *supra*, or Whittaker v. Reeder, Ky., 30 S.W.3d 138 (2000), because the claimant did not file a timely petition for reconsideration or appeal. Another argument was that KRS 342.125(3) prohibited reopening within two years of the date of the award. In the alternative, the Special Fund maintained that the award could only be corrected prospectively, from the date of the claimant's second motion.

Although the Board reversed with regard to the alternative argument, it affirmed with regard to the others. Again, the Special Fund appealed. Reversing the Board, the Court of Appeals concluded that although the grounds for reopening under Wheatley v. Bryant, *supra*, remained, such a reopening was subject to the two-year waiting period of

KRS 342.125(3) absent one of the listed exceptions. The Court determined, therefore, that the ALJ erred by reopening the claim within two years after the award in order to correct the erroneous benefit calculation because none of the exceptions applied.

Thus, the claimant appeals.

From December 12, 1996, until July 14, 2000, KRS 342.125 provided, in pertinent part, as follows:

(1) Upon motion by any party or upon an arbitrator's or administrative law judge's own motion, an arbitrator or administrative law judge may reopen and review any award or order on any of the following grounds:

(a) Fraud;

(b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;

(c) Mistake; and

(d) Change of disability

. . .

(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, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, or within two (2) years of such award or order, and no party may file a motion to reopen within two (2) years of any previous motion to reopen by the same party.¹

In Wheatley v. Bryant, *supra*, we pointed out that KRS 342.125(1) authorized the reopening of a claim upon an ALJ's own motion. Relying on authority concerning the meaning of the term "mistake" in the context of KRS 342.125 and authority concerning

¹Effective July 14, 2000, KRS 342.125(3) was amended to eliminate the prohibition on reopening within two years of an original award or order and to reduce the mandatory period between a party's successive motions to reopen to one year.

the correction of a legal error in a final award, we determined that an ALJ may amend a final award sua sponte in order to correct an error in applying the law as it existed when the award was made. Id. at 769.

The Special Fund now concedes that the grounds for reopening that were set forth in Wheatley v. Bryant, supra, remain valid. It notes, however, that although the claimant's injury occurred in 1993, the award at reopening that is at issue was rendered after December 12, 1996. Furthermore, it points out that the two-year waiting periods and four-year limitation that are contained in KRS 342.125(3) govern the reopening of claims in which an award was entered on or after December 12, 1996. Meade v. Reedy Coal Co., Ky., 13 S.W.3d 619, 622 (2000). The Special Fund asserts, therefore, that the claimant was not permitted to file a subsequent motion to reopen until two years after the erroneous award was entered, and that the ALJ erred by correcting the reopened award within two years of its entry.

With three exceptions, none of which presently applies, KRS 342.125(3) limits the time during which a workers' compensation award may be reopened by imposing both a four-year period of limitations and two two-year waiting periods. Together with KRS 342.125(8), it limits the period for reopening to the latter of: 1.) four years after December 12, 1996, or 2.) four years following the date of the original award or order granting or denying benefits. Furthermore, it provides that no claim may be reopened "within two (2) years of such award or order," i.e., within two years of the original award or order granting or denying benefits. Finally, it provides that no party may file a motion to reopen within two years of a previous motion to reopen by the same party.

It is apparent that KRS 342.125(3) prohibited the claimant from filing a second motion to reopen, on the ground of "mistake," within two years of his previous motion to

reopen. The fact remains, however, that he did not attempt to file such a motion. Instead, he brought the error in his reopened award to the ALJ's attention via a motion to re-docket the claim, a pleading to which the Special Fund did not object. Thus, the question becomes whether, having been informed of the error, the ALJ was authorized to reopen and correct the award that was entered at reopening on his own motion, before a period of two years had elapsed. In that regard, we note that although KRS 342.125(3) prohibits reopening within two years of an "original" award, an award of increased benefits at reopening is not an "original" award but an amendment to an existing award.² For that reason, the total disability award that was entered at reopening was not an "original" award and was not subject to the two-year prohibition against reopening. Thus, having been informed of the error via the claimant's unopposed motion to re-docket the claim, the ALJ acted within his authority when he reopened the amended award on his own motion and corrected the amount of the claimant's income benefit.

The decision of the Court of Appeals is hereby reversed, and the decision of the Board is reinstated.

Lambert, C.J., and Graves, Johnstone, Keller, Stumbo and Wintersheimer, JJ., concur. Cooper, J., dissents without opinion.

²It is noteworthy that if an award or order that is entered at reopening were viewed as being an original award or order, it would extend the period of limitations for reopening by an additional four years each time the claim was reopened. See KRS 342.125(8).

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