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NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-13-03 ElAGrant, D.C.

2003-SC-0002-WC

ROBERT L. WHITTAKER, DIRECTOR OF WORKERS' COMPENSATION FUNDS, SUCCESSOR TO SPECIAL FUND — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1166-WC
WORKERS' COMPENSATION BOARD NO. 87-25781

CARL S. GLASS; TOWN & COUNTRY FORD; HON. DONNA H. TERRY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

KRS 342.125(8) limits the period for reopening a pre-December 12, 1996, award to within four years of December 12, 1996. Although the Department of Workers' Claims filed the claimant's motion to reopen his 1992 award on December 13, 2000, the Court of Appeals and a majority of the Workers' Compensation Board (Board) have affirmed a decision that the motion was timely under the circumstances. They have also affirmed a decision that the claimant's motion to join the Special Fund in 2001 was timely despite evidence of pre-existing arthritic changes in his back as early as 1988. Appealing, the Workers' Compensation Funds (WCF) maintains that both the motion to reopen and joinder of the Special Fund were untimely. We reverse with respect to the first issue; therefore, the second issue is moot.

The claimant was born in 1951 and completed high school with vocational training in auto body repair. On June 18, 1987, he fell backward off a frame rack while working and experienced low back pain. Although in pain, he continued working until July 31, 1987. He has not worked since then.

Conservative treatment by Dr. Sexton was unsuccessful, and the claimant's symptoms increased over time. A 1988 myelogram revealed a large disc herniation at L4-5 with a free fragment on the left side of L4-5, after which Dr. Guarnaschelli performed surgery in 1988 and 1989. Although the second procedure alleviated some of the claimant's leg pain, it did not resolve all of his symptoms, nor did work hardening, physical therapy, or epidural nerve blocks. A 1989 myelogram showed bilateral nerve root compression and impingement and suggested a recurrent herniation. Thus, in 1990, Dr. Guarnaschelli, a neurosurgeon, and Dr. Ramsey, an orthopedic surgeon, performed a decompressive hemilaminotomy and posterior lateral fusion at L4-5.

At some point, the claimant sought workers' compensation benefits from his employer. At the time, he expected to recover from his injury and to resume either his previous work or lighter work. In an agreement that was approved on March 17, 1992, he settled with the employer for a lump sum that represented a 70.5% occupational disability. The claimant's condition worsened thereafter. In 1994, he was granted leave to reopen the claim, but he later dismissed the reopening voluntarily. A second motion to reopen was overruled in January, 1996, because the MRI report that accompanied it was inadequate prima facie evidence of an increase in occupational disability.

With respect to the present motion, the claimant's wife testified to learning from a friend that in order to reopen her husband's claim, a letter must be sent by December 10 or 11, 2000. Therefore, on Sunday, December 10, 2000, she faxed a letter to the

Commissioner of the Department of Workers' Claims in which she requested leave to reopen the claim. She testified that she called the Commissioner's office on Monday, December 11, at which time she was told that original documents were required and that she would be receiving a letter to that effect. She stated that she received a letter from the Commissioner's office, probably on December 12, confirming receipt of the fax and instructing her to send the original copies. At that point, she sent the originals.

The record contains a letter from Mrs. Glass that was filed by the Department on December 13, 2000. Attached to the letter is a note to the Commissioner from Mrs. Glass which indicates that she sent a fax on December 10, 2000. The letter, itself, indicates that the claimant was dissatisfied with his legal counsel after the second unsuccessful attempt to reopen, that he had terminated the attorney-client relationship, and that he would obtain new counsel if reopening were permitted. Among the items that accompanied the letter was an April, 1996, medical report from Dr. Petruska, Dr. Guarnaschelli's partner.

The Department treated the December 13, 2000, filing as a motion to reopen, and on January 22, 2001, an Administrative Law Judge (ALJ) passed the motion for a period of 30 days, pending receipt of a current medical release and notification that the motion had been served on the employer and its carrier. Mrs. Glass later testified that she served the employer on February 14, 2001, and the carrier on February 16, 2001, and her receipts for certified mail were made part of the record. On February 28, 2001, an ALJ determined that the claimant had made the necessary prima facie showing, granted the motion, and assigned the matter for further proceedings.

On March 30, 2001, having obtained new counsel, the claimant moved to join the Special Fund. Although the motion does not indicate that it was served on the Special

Fund, it was granted on April 24, 2001. The order gave the Special Fund 45 days in which to take proof and indicated that the benefit review conference would be conducted, as scheduled, on July 10, 2001. A copy of the order was forwarded to the Special Fund. Eventually, the claimant settled with his employer for a lump sum payment of $10,000.00, and only the liability of the Special Fund remained to be decided. The evidence in that regard included a June 27, 1988, report from Dr. Banerjee; a November 28, 1989, note by Dr. Ramsey; and two reports from Dr. Goldman, who examined the claimant in 2001. Among the issues to be decided were whether the motion to reopen was timely filed and whether joinder of the Special Fund as a party was barred by the statute of limitations.

The ALJ determined that under the "limited and unusual circumstances," the claimant had timely filed a pro se motion to reopen before December 12, 2000, the applicable date of repose. Furthermore, determining that joinder was timely despite evidence from 1988 that referred to arthritic changes in the spine, the ALJ relied upon Dr. Goldman and concluded that the changes to which Dr. Banerjee referred were not at L4-5. Thus, the ALJ determined that "no evidence of record existed which would have led a prudent party to believe that the Special Fund might have some liability in this claim at the time of the original settlement or at the time of the 1992 reopening." After reviewing the lay and medical evidence, the ALJ determined that the claimant's L4-5 injury had worsened substantially since the settlement, that it caused him to become permanently and totally disabled, and that the Special Fund was liable for half of the award. Thus, the Special Fund was ordered to pay the claimant $160.00 per week for 50% of a total disability award, beginning on the date that the latest settlement with the employer was approved.

Although a majority of the Board affirmed, a dissenting opinion expressed the view that both the motion and joinder of the Special Fund were untimely. The Court of Appeals affirmed the Board. This appeal by the WCF maintains, however, that neither the motion nor joinder of the Special Fund was timely.

The initial claim was decided before December 12, 1996, and the second motion to reopen was dismissed in January, 1996. Thus, it is undisputed that KRS 342.125(8) required the present motion to reopen to be filed on or before December 12, 2000. At that time, 803 KAR 25:010E, Section 1(5) defined the date of filing a document as "the date a pleading, motion, or other document is received by the Commissioner at the Department of Workers' Claims in Frankfort, Kentucky. . . ." The regulation does not specify that a document that is transmitted to the Commissioner in electronic form is considered to be received when the electronic transmission is received.

The claimant maintained not only that the Department received her fax but that its receipt of the fax was sufficient for the purpose of filing a claim. In the alternative, the claimant maintained the Department should have applied 803 KAR 25:010E, § 3 (2) and treated the transmission that it received as an incomplete motion to reopen. 803 KAR 25:010E, § 3(2) authorizes a 20-day period during which an injured worker may correct a timely-filed but incomplete application for the resolution of a claim. If the defect is cured within 20 days following the date that the incomplete application is returned to the worker, the regulation provides that the filing will relate back to the date when the Department first received it. Therefore, if a motion to reopen were viewed as being the equivalent of an application for the resolution of a claim, and the receipt of the claimant's fax were viewed as being a timely but "incomplete" filing of such an application, then the document received on December 13, 2000, could be viewed as

relating back to the date the fax was received. We note, however, that the letter that was received on December 13, 2000, also was an incomplete motion to reopen because it was not accompanied by a current medical release [803 KAR 25:010E, § 4(6)(a)] and was not served on the employer [803 KAR 25:010E, §3(3)]. Those defects were not cured until February, 2001, after the ALJ who first considered the motion passed it for 30 days.

We begin our analysis by observing that a notation by the recipient, rather than the testimony of an interested party, is the customary manner for establishing when a document is received for the purpose of filing. The record in this case does not contain a print-out from the Commissioner's fax machine or any other confirmation that the Department actually received the alleged fax. Furthermore, it does not contain a copy of the letter that the Commissioner allegedly sent to the claimant confirming receipt of the fax and instructing him about the filing requirements. The sole evidence that an electronic transmission of the letter in question was received by the Department on or before December 12, 2000, was Mrs. Glass's testimony and her note that was attached to the December 13, 2000, filing.

Assuming that the Department did receive a faxed transmission of Mrs. Glass's letter on or before December 12, 2000, the Department interpreted 803 KAR 25:010E, § 1(5) as requiring receipt of an actual document, rather than an electronic transmission of the document, for the purpose of establishing the date of filing. If receipt of an electronic transmission did not constitute receipt of the document being transmitted for the purpose of filing it, it follows that because an electronically transmitted motion to reopen is not filed, it could not be viewed as being timely filed but incomplete.

Therefore, even if 803 KAR 25:010E, § 3(2) were applicable to a motion to reopen, it would not save the motion.

The regulations set forth different procedures with respect to the processing of an application for the resolution of a claim and the processing of a motion. For example, the Department returns an incomplete application to the applicant, files only a complete application, and serves named parties with an application that has been filed. In contrast, a motion is filed without regard to whether it is complete, and the movant certifies that service was made on all other parties. As evidenced in this case, an ALJ has some discretion with respect to an incomplete motion. 803 KAR 25:010E, § 3(2) is specific. It refers only to the procedures for filing an "application for resolution of claim." We are persuaded, therefore, that it does not apply to motions.

Before December 12, 1996, a claim could be reopened at any time during the period of the worker's award. As amended effective December 12, 1996, KRS 342.125(8) operates as a statute of limitation with respect to the period for reopening claims that were decided before December 12, 1996. KRS 342.125(1) specifies that the filing of a motion to reopen with the Department is the procedural device for invoking the Department's jurisdiction over a final award.

Consistent with KRS 342.125(1), the Department treated neither the alleged fax nor the December 13, 2000, letter as an incomplete application for the resolution of a claim and did not apply 803 KAR 25:010E, § 3(2). Instead, the Department filed the document requesting reopening, as received, treating it as a motion and placing it on the motion docket. An ALJ subsequently passed the motion for 30 days in order to give the claimant an opportunity to submit a current medical release and certify service on the employer and its carrier.

KRS 342.260 vests the Commissioner of the Department of Workers' Claims with the authority to promulgate administrative regulations for implementing Chapter 342. Therefore, after the 1996 amendments became effective, the Commissioner promulgated regulations to govern the orderly and uniform processing of claims under the amendments. An administrative agency's interpretation of a regulation that it has adopted is given great weight in determining the regulation's meaning unless it is clearly erroneous or inconsistent with the regulation. Blanton v. Lowe, Ky., 415 S.W.2d 376, 378 (1967), citing 2 Am.Jur.2d 136 Administrative Law, § 307.

Having considered the arguments of the parties, we are persuaded that the manner in which the Department interpreted its regulations was neither clearly erroneous nor inconsistent with the regulations. It is for the Department to decide whether the electronic filing of documents is to be permitted and, if so, how to implement such a procedure. If the Department concludes that it is appropriate for the receipt of an electronic transmission to constitute a filing, then that option should be included in the regulation and made available to all injured workers. Likewise, if the Department concludes that the imposition of a statute of limitations on motions to reopen warrants the implementation of a "relation back" provision, then a procedure to that effect should be set forth in the regulations.

It is regrettable that the claimant waited for nearly five years after his second unsuccessful attempt to reopen before acting on his dissatisfaction with counsel. The fact remains, however, that he did not file a timely motion to reopen. Under those circumstances, questions concerning the timeliness of Special Fund joinder were moot.

The decision of the Court of Appeals is reversed.

All concur.

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ORDER MODIFYING OPINION ON THE COURT'S OWN MOTION

On the Court's own motion, the Opinion of the Court rendered on October 23, 2003, is modified by the substitution of a new first page, hereto attached, in lieu of page one of the Opinion as originally rendered. Said modification does not affect the holding of the Opinion, but is made only to correct a typographical error on page one: "2002-CA-2266-WC" to "2002-CA-1166-WC".

ENTERED: November 26, 2003.

CHIEF JUSTICE