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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: December 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-1048-WC

FINAL

DATE 1-8-04 Darla Yeast CDC

TRANSPORTATION CABINET AND GAB — APPELLANTS

V.

APPEAL FROM COURT OF APPEALS
2001-CA-2582-WC
WORKERS' COMPENSATION BOARD NO. 98-66128

EDWIN DALE MCGAUGHEY; SPECIAL FUND; HON. RONALD JOHNSON, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board (Board) and the Court of Appeals affirmed an award of benefits for permanent total disability at the reopening of the claim for a 1992 back injury. In doing so, they rejected an argument that the ALJ erred by failing to apply the December 12, 1996, version of KRS 342.125(1). We affirm.

The claimant was born in 1943. He left school at age 15 to work on his father's farm and had a history of medium to heavy labor. He began working for the defendant-employer in 1987 and has been a rest area foreman since 1990. In October, 1992, he sustained low back and neck injuries while working. He settled the claim in October, 1994, for a lump sum that represented a 5% occupational disability, apportioned equally between the employer and the Special Fund.

A subsequent claim alleged that in August, 1998, the claimant injured his lower back while picking up a lawn mower. In taking proof with respect to that claim, the employer produced evidence from Dr. Zerga that the 1998 incident caused only a temporary worsening of the claimant's condition and no permanent impairment. On that basis, the employer moved to join the Special Fund, asserting that the new claim should be treated as a motion to reopen the 1992 claim and also should be subject to the December 12, 1996, amendment to KRS 342.125(1)(d).

The employer's witness list and stipulations, filed shortly before the November 10, 2000, benefit review conference summarize medical testimony taken in the 1992 claim. Dr. Crocklin was one of the physicians whose testimony was summarized and the only one who assessed an impairment rating at the time. He examined the claimant on July 26, 1994, with regard to the 1992 injury and reviewed various medical records. He diagnosed chronic lower back strain and indicated that the 1992 incident contributed to the condition. Dr. Crocklin assigned an 8% whole-person impairment and testified that the AMA Guides permitted an 8% rating to be rounded up to 10%; however, on cross-examination, he stated that he would change the impairment from 8% to 7%.

Shortly after the witness list was filed, the claimant moved to reopen the 1992 claim, to consolidate it with the 1998 claim, and to join the Special Fund. The motion to reopen was accompanied by the claimant's affidavit which indicated that he worked within his restrictions after the 1992 injury and that his symptoms intensified after the 1998 incident. The affidavit stated that he returned to work after the 1998 incident, but that in May, 2000, Dr. Ballard increased his restrictions. His employer sent him home because it had no work that complied with his restrictions, and he has not worked since then. Also accompanying the motion was a September 28, 2000, medical report from

Dr. Stewart. In the report, Dr. Stewart summarized the claimant's medical treatment following the 1998 injury and diagnosed multi-level low back radiculopathy, worse on the left side; mechanical low back pain; and degenerative joint disease, more pronounced on the weight-bearing joints. Dr. Stewart assigned a 10% AMA impairment and imposed various work restrictions.

The employer's response indicated that it did not object to the motion to reopen the 1992 injury claim and to consolidate it with the claim for the 1998 injury. Ultimately, the ALJ joined the Special Fund and reopened the claim for the 1992 injury. The order granting the motion to reopen notes that at the benefit review conference, all parties determined that the claim should be reopened. Further proof was taken thereafter, and the matter was submitted for a decision on the merits.

After reviewing the lay and medical evidence, the ALJ noted that Dr. Stetton examined the claimant on the employer's behalf in 1994. When deposed at reopening, Dr. Stetton testified that the claimant would have warranted a 5% impairment in 1994 and the same impairment at reopening. Noting the 5% settlement, the ALJ determined that the claimant's actual occupational disability at that time was 5%. Taking into account the claimant's multiple physical problems (diabetes, bulging discs, degenerative disc disease, knee problems, and depression), his age, and the fact that he tested at a third-grade educational level, the ALJ determined that his occupational disability had increased since the settlement of the 1992 injury claim and presently was total. Teledyne-Wirz v. Willhite, Ky.App., 710 S.W.2d 858 (1986). However, noting the lack of objective medical proof to show a change in the claimant's back as a result of the 1998 incident, the ALJ determined that the incident did not amount to an injury as defined by KRS 342.0011(1). Instead, the ALJ attributed 50% of the present disability

to the 1992 injury and subsequent worsening of its effects, and the remaining 50% to noncompensable conditions. The ALJ apportioned the increased benefits equally between the defendants and ordered them payable from November 2, 2000, the date of the employer's motion to reopen.

In a petition for reconsideration, the employer asserted that the ALJ committed a patent error by considering the reopening under the version of KRS 342.125(1) that was in effect in 1992 rather than the version in effect at reopening. The petition was overruled, and the decision was later affirmed on appeal. Appealing to this Court, the employer maintains that the ALJ erred by failing to apply the December 12, 1996, version of KRS 342.125(1)(d) at reopening because the amended statute is remedial.

Reopening is the remedy for addressing certain changes that occur or situations that come to light after benefits are awarded. Under KRS 342.125, a motion to reopen is the procedural device for invoking the jurisdiction of the Department of Workers' Claims to reopen a final award. In order to prevail, the movant must offer prima facie evidence of one of the grounds for reopening that are listed in KRS 342.125(1). Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972). Only after the motion has been granted will the opponent be put to the expense of litigating the merits of an assertion that the claimant is entitled to additional income benefits under KRS 342.730. Id.

The grounds for reopening and the standards for awarding increased benefits after a motion to reopen is granted are not necessarily consistent. In Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991), the 1987 amendment to KRS 342.125(1) aligned what, at the time of Mr. Gossett's injury, had been inconsistent standards for reopening and awarding income benefits. Relying on the principle that statutes relating

to remedies or modes of procedure do not normally come within the legal conception of a retrospective law, the Court determined that the amendment was remedial. Thus, it governed motions to reopen that were filed on or after its effective date and was the standard by which Gossett's motion to reopen his 1981 award should have been decided. Since Gossett had offered prima facie evidence of increased occupational disability, as required by the amended standard, we remanded the claim for the taking of further proof and a decision on the merits.[1]

Effective December 12, 1996, the legislature amended KRS 342.125(1) by enacting KRS 342.125(1)(a) - (d). KRS 342.125(1)(d) permits the reopening of a final award upon evidence of a "[c]hange 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." This requirement differs from the previous standard for granting a motion to reopen where increased income benefits are sought under KRS 342.730. It also differs from the standard for awarding such benefits in a pre-December 12, 1996, claim. As we attempted to explain in our recent decision in Woodland Hills Mining, Inc. v. McCoy, Ky., 105 S.W.3d 446 (2003), the amendment does not govern the type of evidence necessary to establish the right to greater benefits under KRS 342.730 with respect to a reopened claim. It changes only a procedural requirement, i.e., one of the grounds upon which a motion to reopen may be granted. In other words, KRS 342.125(1)(d) addresses the necessary prima facie showing in order to prevail on a motion to reopen that is filed on or after December 12, 1996. See KRS 342.0015. It has no effect on the substantive proof requirements for a claim that

[1] See also Campbell v. Universal Mines, Ky., 963 S.W.2d 623 (1998) and AAA Mine Services v. Wooten, Ky., 959 S.W.2d 440 (1998), which involved standards for reopening under KRS 342.125(2) [now KRS 342.125(5)] that differed from the applicable standards for proving an entitlement to increased benefits when the merits were considered.

arose before its effective date. Id. The merits of a worker's right to receive additional income benefits at reopening are governed by the version of KRS 342.730 that was effective on the date of injury. See KRS 342.125(6); Maggard v. International Harvester Co., Ky., 508 S.W.2d 777 (1974). Thus, reliance on Peabody Coal Co. v. Gossett, supra, is misplaced where an appeal concerns the decision on the merits of a reopening for additional benefits under KRS 342.730.

Asserting that the question on appeal concerns "which standard for reopening under KRS 342.125 is to be applied to a motion to reopen," the employer later states that the law on the date of injury controls the claimant's right to additional benefits at reopening "should he prevail on his motion to reopen." This argument overlooks the fact that the claimant did prevail on his motion to reopen. Furthermore, the order reopening the claim clearly indicated that all parties agreed to the reopening, and the employer raised no objection to the order. Under those circumstances, the ALJ determined correctly that no further findings were required under KRS 342.125 and that the merits must be decided under the version of KRS 342.730 that was effective on the date of injury.

The decision of the Court of Appeals is affirmed.

All concur.

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