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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: March 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 4-8-04 ELA, Grow, P.C.

2003-SC-0195-WC

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

APPEAL FROM COURT OF APPEALS
V. 2001-CA-1051-WC, 2001-CA-1062-WC, 2001-CA-1191-WC
WORKERS' COMPENSATION BOARD NOS.: 96-4586, 96-4587 & 96-4588

JAMES D. JOHNSON; JERICOL MINING, INC.; HON. SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND 2003-SC-0212-WC

JERICOL MINING, INC. — APPELLANT

APPEAL FROM COURT OF APPEALS
V. 2001-CA-1051-WC, 2001-CA-1062-WC, 2001-CA-1191-WC
WORKERS' COMPENSATION BOARD NOS.: 96-4586, 96-4587 & 96-4588

JAMES D. JOHNSON; HON. SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION FUNDS; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

These appeals by the employer and the Workers' Compensation Funds stem from a decision overruling the claimant's motion to reopen a settled back injury claim and a previously-dismissed pneumoconiosis claim. Affirming a decision of the Workers' Compensation Board (Board), the Court of Appeals determined that the claimant did not

waive his right to reopen the injury claim and that the motion to reopen the dismissed pneumoconiosis claim should have been considered under KRS 342.125(1). We affirm with respect to the first issue but reverse with respect to the second. Slone v. R & S Mining, Inc., Ky., 74 S.W.3d 259 (2002).

On April 30, 1996, the claimant filed an application for benefits in which he alleged a work-related back injury of November 14, 1994. In a second application, he alleged that he was last exposed to coal dust on January 25, 1996, and that he suffered from coal workers' pneumoconiosis. A third application alleged a work-related hearing loss that is not presently at issue.

On February 11, 1997, an Administrative Law Judge (ALJ) approved an agreement to settle the injury and hearing loss claims. The agreement provided for a 10% occupational disability for the injury, indicating that the sum was inclusive of interest, permanent partial disability, temporary total disability, vocational rehabilitation, and attorney's fees. It provided an additional lump sum of $700.00 from the employer and $500.00 from the Special Fund "as compromise for the plaintiff's agreement to dismiss his claim with prejudice and to waive his right to future medical [benefits] for his injury claim." Similar provisions resolved the hearing loss claim.

The pneumoconiosis claim was fully litigated. X-ray readings introduced into evidence ranged from category 0/0 to 1/1, and the parties stipulated that all of the spirometric studies that were performed were invalid. In a decision rendered on May 1, 1997, an ALJ relied upon one of the two physicians who reported category 0/0 and determined that the claimant did not suffer from the disease. No appeal was taken.

On August 21, 2000, the claimant filed motions to reopen the injury and pneumoconiosis claims. Attached to each motion was an affidavit in which he asserted

that he was totally disabled due to a deterioration or progression of his conditions. When deposed on September 25, 2000, he testified that he had not attempted to return to work since January, 1996.

The motion to reopen the injury claim was supported by a May 18, 2000, report from Dr. Muffly, who diagnosed lumbar radiculopathy with degenerative disc disease and osteoarthritis. Having reviewed Dr. Templin's records from 1996, he was of the opinion that the claimant's back condition had worsened. The report indicated that the claimant's present AMA impairment was 10% and that he could not return to underground coal mining.

In the initial pneumoconiosis claim, Dr. Myers interpreted x-rays as showing category 1/0 and 1/1 disease. In support of his motion to reopen, the claimant submitted a May 6, 2000, report from Dr. Myers who interpreted new x-rays as revealing category 1/1 disease, p/p, affecting all six lung zones. Dr. Myers reported that valid spirometric testing produced a pre-bronchodilator FVC of 54% and FEV1 of 57%. The post-bronchodilator FVC was 49% and FEV1 was 53%. In Dr. Myers' opinion, the decrease in pulmonary function was caused by the claimant's exposure to coal dust while working in the severance and processing of coal.

Construing the settlement agreement as providing that the claimant "agreed to dismiss his claim with prejudice and waived his right to reopen" in return for payment, the ALJ dismissed the motion to reopen the injury claim. After determining that the claimant failed to make the necessary prima facie showing, the ALJ also dismissed the motion to reopen the previously-dismissed pneumoconiosis claim. Although the defendants maintained that the claimant waived his right to reopen the injury claim in exchange for cash and that the dismissed pneumoconiosis claim could not be reopened

absent additional exposure to coal dust, the Board and the Court of Appeals determined that both decisions were erroneous.

A legal waiver is a voluntary and intentional relinquishment of a known right. See Barker v. Stearns Coal & Lumber Co., 163 S.W.2d 466 (1942). Although the principles of res judicata apply to settled workers' compensation awards, KRS 342.125 permits an ALJ to reopen and increase an otherwise final award upon proof of one of the stated grounds. See Newberg v. Davis, Ky., 841 S.W.2d 164 (1992); Beale v. Faultless Hardware, Ky., 837 S.W.2d 893 (1992). The agreement to settle the back injury claim did not contain an express waiver of the claimant's right to reopen. Therefore, what is at issue is whether the phrase "agreement to dismiss with prejudice" could reasonably be construed as implying that the claimant agreed to waive his right to reopen.

We think not. The terms of the agreement are detailed and explicit, and the disputed phrase was followed immediately by an express agreement to waive the right to future medical benefits. Therefore, it is likely that had there been an agreement to waive reopening, it would have been explicit, too. The same consideration applied to both the agreement to dismiss with prejudice and the waiver of future medical benefits, and the amount was not so great as to imply that a waiver of the right to reopen was included. Finally, even a claim that a fact-finder has dismissed with prejudice may be reopened if the claimant makes a reasonable prima facie showing of a substantial possibility that one of the conditions that are specified in KRS 342.125 exists and warrants a change in the previous decision. See Slone v. R & S Mining, Inc., supra; Stambaugh v. Cedar Creek Mining Co., Ky.488 S.W.2d 681, 682 (1972). Therefore, it cannot be assumed that by agreeing to dismiss a claim with prejudice, a worker also

agrees to waive the right to reopen. Under the circumstances, the decision to remand the motion for further consideration was correct.

It was undisputed that the claimant sustained no additional exposure to coal dust after his pneumoconiosis claim was dismissed on the merits. Therefore, he was precluded from reopening the claim unless he demonstrated that the previous decision resulted from fraud or mistake or unless he produced evidence that could not have been discovered with the exercise of due diligence in the initial proceeding. Slone v. R & S Mining, Inc., supra, at 262. The claimant's motion to reopen alleged a worsening of condition and was dismissed for failure to make the necessary prima facie showing. Under the circumstances, the decision was proper; therefore, the Court of Appeals erred by remanding the claim.

The decision of the Court of Appeals is affirmed in part and reversed in part. The motion to reopen the injury claim is remanded for further consideration, and the order dismissing the motion to reopen the pneumoconiosis claim is reinstated.

All concur.

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