

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: August 26, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0617-WC

DATE 9-16-04 E.H.A. Grawitt, D.C.

BARBARA EDWARDS

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2003-CA-0368-WC
WORKERS' COMPENSATION BOARD NO. 96-2795

HARLAN ARH; SPECIAL FUND; HON. SHEILA
C. LOWTHER, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Court of Appeals and the Workers' Compensation Board (Board) have affirmed an Administrative Law Judge's (ALJ's) decision to dismiss the claimant's motion to reopen on the ground that it was filed more than four years after the initial award. KRS 342.125(8). Appealing, the claimant asserts that she had a vested right to reopen and that it was denied by the ALJ's application of a subsequently-amended version of KRS 342.125 to her claim. She also asserts that the amended provision denied her constitutional rights to due process and equal protection. We affirm.

The claimant sustained two work-related injuries in 1995. On August 19, 1996, an ALJ approved a settlement agreement. The parties agreed that the claimant had not been physically capable of returning to work since November 27, 1995. They also agreed that the work-related incidents affected only the L3-4 level of her back and did not re-injure or aggravate a previous injury at L4-5. Under the terms of the agreement,

the claimant received previously-paid temporary total disability (TTD) benefits and a lump sum that represented a 25% occupational disability, payable for 425 weeks from October 13, 1995. The agreement also provided that the employer remained liable for reasonable medical treatment with respect to the L3-4 region of her back but that it was not liable for treatment of the L4-5 level. At that time, KRS 342.125(1) permitted a reopening "at any time" upon evidence of a change of occupational disability.

Effective December 12, 1996, KRS 342.125 was amended to provide, 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 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.

...

(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.

...

(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.

Effective July 14, 2000, KRS 342.125(3) was amended to delete the two-year restraint on reopening and to permit reopening at any time where a worker is seeking TTD benefits during the period of an award. 2000 Ky. Acts ch. 514, § 7.

On August 2, 2002, the claimant filed a motion to reopen. It alleged that she had undergone back surgery on July 5, 2002; that her condition had worsened; and that she had become totally occupationally disabled. The motion also sought medical benefits and additional TTD benefits due to the surgery. Attached to the motion were the claimant's affidavit and various medical reports. The reports indicated that she underwent surgery on July 5, 2002, for a herniated disc at L3-4.

Responding to the motion, the employer asserted that the claimant's actual disability at settlement was total and could be no greater at reopening. Newberg v. Davis, Ky., 841 S.W.2d 164 (1992). It maintained that she failed to make a prima facie case for reopening and that the four-year period of KRS 342.125(8) barred reopening. Like the employer, the Special Fund asserted that the motion was untimely. Although the 2000 version of KRS 342.125(3) permitted reopening at any time for medical or post-award TTD benefits, the ALJ applied the 1996 version of KRS 342.125 and dismissed the motion as barred by limitations, explaining that it did not fall within KRS 342.125(3) and that more than four years had passed since the date of the initial award.

The decision did not address the claimant's assertion that KRS 342.125(3) permitted reopening at any time for post-award TTD and medical benefits. Yet, she failed to petition for reconsideration to bring the matter to the ALJ's attention; therefore, the Board rejected her attempt to raise the matter on appeal. It affirmed the decision insofar as a motion to reopen that was based upon an allegation of a change of

disability and filed more than four years after the underlying award was barred by limitations.

The claimant continues to maintain that she had a vested right to reopen at any time under the law on the date of her injury. In McCool v. Martin Nursery and Landscaping, Inc., Ky., 43 S.W.3d 256, 258 (2001), we explained, however, that the right to reopen is inchoate until such time as a post-award change of disability occurs. Furthermore, regardless of when the change occurs, the right to increased benefits does not vest until a motion to reopen is filed. Johnson v. Gans Furniture Industries, Inc., Ky., 114 S.W.3d 850, 855 (2003); Rex Coal Co. v. Campbell, 213 Ky. 636, 281 S.W.2d 1039 (1926). For that reason, any right the claimant had to reopen due to a change of disability became vested on August 2, 2002, long after the period of limitations took effect. Therefore, although the provision cut off the claimant's right to reopen on that ground, it did not impair a vested right.

Workers' compensation is a statutory creation. Although KRS 342.305 permits the enforcement of a final workers' compensation award as a judgment, KRS 342.125 authorizes the reopening of a final award in specified instances. KRS 342.125(1) provides that a motion to reopen is the procedural device for doing so. In Garrett Mining Co. v. Nye, Ky., 122 S.W.3d 513, 521 (2003), we explained that a motion to reopen is governed by the procedural law that is effective at the time it is considered; whereas, the merits of a reopened claim are governed by the substantive law in effect on the date of injury. Maggard v. International Harvester Co., Ky., 508 S.W.2d 777, 783 (1974).

KRS 342.125(8) provides that the four-year limitation on reopening is mandatory and applies to all claims. By limiting the duration of the period for reopening, it operates as both a statute of limitations and repose and may extinguish a cause of action before

it arises. Although a statute of repose may not abolish or diminish the legal remedies for common-law causes of action for personal injuries or death that existed prior to the adoption of the 1891 Kentucky Constitution, no such constraint exists with respect to a statutory cause of action such as workers' compensation. Therefore, applying a statute of repose to extinguish a worker's right to reopen before it vests does not violate Section 14, 54, or 241 of the Kentucky Constitution. Johnson v. Gans, *supra* at 854-55. Even in instances where the right to reopen did vest before December 12, 1996, KRS 342.125(8) permits a reasonable time for reopening and, therefore, does not impair a vested right. Id.

The claimant asserts that KRS 342.125(8) violates her rights to due process and equal protection. Her argument is that the recipients of workers' compensation awards are entitled to notice of statutory changes that may affect their rights. Relying on KRS 342.040(1), she argues that, like the recipient of voluntary TTD benefits, she was lulled into a false sense of security by receiving benefits and was not informed that "her vested right to file a Motion to Reopen" was limited by the 1996 and 2000 amendments. This argument lacks merit, however, because she had no vested right to reopen until one of the conditions for reopening existed and she filed a motion. She did so in July, 2002, well after the amendments became effective. Although the principles of equal protection apply to all those who are similarly situated, the position of a worker who has received an award differs significantly from that of a worker who receives voluntary TTD benefits and has yet to file a claim. Weiland v. Board of Trustees of Kentucky Retirement Systems, Ky., 25 S.W.3d 88, 92 (2000). Therefore, it was not unreasonable for the legislature to treat the two groups differently. We are persuaded that the principles of equal protection do not require the recipients of workers' compensation

awards to be notified of statutory amendments that may affect their potential right to reopen.

Procedural due process requires notice and an opportunity to be heard in a quasi-judicial or adjudicatory setting but does not apply to the enactment of legislation. 16B Am. Jur. 2d Constitutional Law § 907 (1998). In Johnson v. Gans, *supra* at 857, we determined that the purpose for limiting the period for reopening workers' compensation awards was to reduce the cost of workers' compensation insurance and, thereby, to improve the competitive status of Kentucky employers. The purpose is legitimate, and provision is a reasonable method for accomplishing it. Unlike the provision that was at issue in City of Louisville v. Slack, Ky., 39 S.W.3d 809 (2001), it is not unconstitutionally arbitrary.

The decision of the Court of Appeals is affirmed.

All concur.

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