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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: NOVEMBER 23, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0232-WC

DATE 12-14-05 ELA Grav. ++ D.C.

JAMES LANKFORD — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-1937-WC
WORKERS' COMPENSATION BOARD NO. 01-1655

ADDINGTON ENTERPRISES; SPECIAL FUND;
HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

KRS 342.316(4)(a) provides that "the right to compensation for any occupational disease shall be forever barred, unless a claim is filed . . . within five (5) years from the last injurious exposure to the occupational hazard." In a decision that has been affirmed by the Workers' Compensation Board and the Court of Appeals, an Administrative Law Judge (ALJ) dismissed the claimant's application for benefits on the ground that he did not file it within five years after he last worked for the defendant-employer. We affirm.

It is undisputed that the claimant was born in 1940 and has an eleventh-grade education with vocational training in carpentry. He testified that he worked about 25 years in the coal mining industry, during which time he was exposed to coal dust. He began working for the defendant-employer on October 16, 1996.

On December 18, 2001, the claimant filed an application for occupational disease benefits, alleging that he suffered from coal workers' pneumoconiosis and was last

exposed to occupational coal dust on December 20, 1996. The employer filed a notice that it was denying the claim and a special answer in which it listed the statute of limitations as an affirmative defense.

When deposed in September, 2003, the claimant testified that he began to work for the defendant-employer late in 1996, loading rock trucks at night. He worked about 60 hours per week. He stated that he left the employment sometime in December, 1996. When cross-examined, he acknowledged that his application listed December 20, 1996, as his last day of work and that Willard Thompson was his boss. Confronted with Thompson's statement that he had terminated the employment on December 2, 1996, the claimant stated:

> A. That's right, sir.
>
> Q72. Okay. So, would December 2nd, '96 have been the last time you worked for Addingtons?
>
> A. Yes, it is.
>
> Q73. Is that the last time you were exposed to coal dust?
>
> A. Yes, sir.

Yet, on re-direct, he testified:

> Q1. Now, are your answers here today just the best you can remember?
>
> A. The best I can remember, yes.
>
> Q2. You were asked the question about the last day you worked and he referred to somebody saying it was the 2nd of December. Do you know for sure the last day you worked?
>
> A. No. Seems to me like it was up in December.
>
> Q3. Okay. Because you – the records you gave us was the 20th, and that's the reason we put it on there.

A. It was close to – it was fairly close to Christmas because I asked the boss could I work till Christmas.

Q4. Alright. So – but you don't know for sure the exact date.

A. No.

On February 6, 2004, the claimant submitted wage records from DNL Services, Inc., reflecting his earnings from Addington. They showed that Addington paid him $4,010.00 in 1996 and $588.57 in 1997. At a subsequent deposition, the claimant was questioned about his prior testimony that his last day of work was December 2, 1996, and testified as follows:

Q5. And in that testimony the Counsel for Addington Mining asked whether you had, the last day you'd worked was December the 2nd. Is that correct?

A. Yes.

Q6. And you agreed initially in the deposition. Is that correct?

A. Yes, I did.

Q7. Now, did you understand that question when he asked you?

A. No, I didn't. I don't think I did.

Q8. Okay. Mr. Turner later on asked you whether or not you had stated to us that you'd worked up till the 20th of December and that's what you submitted to us when we filed your claim? Is that correct?

A. Yes, it was.

The claimant also testified that he had obtained unemployment office records which indicated that Addington last paid him in 1997 and indicated that it held back "either a week or two weeks" of wages. He stated that upon reviewing the wage records he recalled that he had worked for Addington until December 20, 1996. Furthermore, he was certain of the date because he remembered asking if he could work until Christmas

and was told that he could not. When cross-examined, he acknowledged that Addington paid a monthly production bonus in the month after it was earned; however, he denied that the payment he received in 1997 was such a bonus rather than back wages.

The employer deposed Willard Thompson. He testified that he had worked for the company since 1976 and was the claimant's shift supervisor. He stated that he hired the claimant on October 16, 1996, and that the claimant "left the company" on December 2, 1996, because his work was unsatisfactory. Thompson supported his testimony with a copy of the company's change of status form for each event. The latter form indicates that the claimant did not adequately perform the job for which he was hired. A handwritten note in the right lower margin, dated December 6, 1996, states: "laid off per W. Thompson (not discharged) sf." Questioned about the note, Thompson testified that the claimant was laid off because couldn't operate the equipment properly and that he was a danger to himself and others. Asked how he knew that the claimant didn't work for the company after December 2, at a different location, Thompson replied that he would have been notified if the claimant was sent to another location.

Addressing the date of last exposure, the ALJ noted that the matter came down to a question of the claimant's and Thompson's credibility. The claimant had changed his testimony; whereas, Thompson's testimony was supported by documentary evidence that supported December 2, 1996, as the date of last exposure. Noting that the burden was on the claimant to prove every element of his claim, the ALJ concluded that he had been unable to meet that burden regarding the crucial date.

The claimant's basis for appealing the decision has been that, faced with his own testimony and the evidence that Addington paid him in 1997, the burden shifted to

Addington to prove that the payment was for something other than hourly wages. He criticizes the ALJ's reliance on Thompson on the ground that his status as a long-time employee would tend to cloud his judgment. Although he acknowledges that the ALJ is the designated finder of fact, he asserts that workers' compensation is fundamentally for the benefit of the injured worker and that "a just claim must not fall victim to rules of order unless it is clearly necessary in order to prevent chaos." Messer v. Drees, 382 S.W.2d 209 (Ky. 1964).

KRS 342.316(4)(a) contains both a three-year statute of limitations and a five-year statute of repose. Dupree v. Kentucky Department of Mines and Minerals, 835 S.W.2d 887 (Ky. 1992). Such statutes are strictly enforced. See Commonwealth, Cabinet for Human Resources v. Riley, 921 S.W. 2d 616 (Ky. 1996); McIntosh v. John P. Gorman Coal Co., 253 Ky. 160, 69 S.W.2d 7 (Ky. 1934); and Wilburn v. Auto Exchange, 198 Ky. 29, 247 S.W. 1109 (1923). In contrast, Messer v. Drees, supra, concerned whether, when subsequent events indicated that the initial award was based on a misconception regarding the nature of the worker's disability, the "mistake" provision in KRS 342.125 permitted a reopening.

As the party pleading an affirmative defense, the employer had the burden of proof on that issue. Whittaker v. Hardin, 32 S.W.3d 497 (Ky. 2000); Glogower v. Crawford, 2 S.W.3d 784 (Ky. 1999); and Teague v. South Central Bell, 585 S.W.2d 425 (Ky. App. 1979). KRS 342.285 designates the ALJ as the finder of fact; therefore, Thompson's credibility and that of claimant were matters for the ALJ to decide. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Thompson's status as a long-time employee was relevant in that regard, but so was the claimant's status as an interested party. See Grider Hill Dock v. Slone, 448 S.W.2d 373 (Ky. 1969). Although the ALJ

erred in stating that the burden of proof was on the claimant, the ALJ clearly stated that Thompson's testimony was more persuasive on the issue and found in the employer's favor. Therefore, because the employer prevailed before the ALJ, the claimant's burden on appeal is to show that the decision was not supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). The finding that December 2, 1996, was the date of last employment was adequately supported by Mr. Thompson's testimony and the documentary evidence he presented; therefore, the claimant has failed to meet that burden.

The decision of the Court of Appeals is affirmed.

All concur.

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