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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

2005-SC-0321-WC

DONNIE MORRIS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-1707-WC
WORKERS' COMPENSATION BOARD NOS. 01-97088 & 01-0854

W.A. KENDALL & COMPANY, INC.; HON. W. BRUCE COWDEN, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal concerns an Administrative Law Judge's (ALJ's) authority under KRS 342.125 to withdraw and later revise an award on the ground that it was rendered before the ALJ ruled on an outstanding motion to extend the time for submitting evidence. Affirming a decision of the Workers' Compensation Board (Board), the Court of Appeals determined that although the ALJ erred by revising the initial opinion pursuant to a petition for reconsideration, KRS 342.125 permitted the ALJ to correct an admitted oversight in failing to rule on the motion before considering the claim. Wheatley v. Bryant Auto Service, 860 S.W.2d 767 (Ky. 1993). We affirm.

This case involves an unusual procedural history. The claimant alleged work-related back injuries of March 31, 2000, and February 14, 2001. A different insurance carrier covered the employer's liability on each date; therefore, the degree to which each incident caused the claimant's disability became an issue. Within the scheduled

time for proof-taking, the parties submitted evidence from numerous physicians. On March 27, 2003, the carrier responsible for the first injury (first carrier) deposed Dr. Gregory Gleis, and the other carrier cross-examined him. The first carrier subsequently included Dr. Gleis on its witness list and summarized his testimony as indicating that the claimant sustained two injuries, that the first injury caused a 5% impairment, and that the second necessitated surgery and caused a 7% impairment.

A memorandum of the June 12, 2003, benefit review conference (BRC) listed the extent of pre-existing active disability regarding the second injury and whether the second incident was an "injury" as being contested issues. Having reached a tentative settlement with the claimant after the BRC, the first carrier did not appear at the June 26, 2003, hearing, and neither the hearing order nor the transcript of the proceeding made any reference to Dr. Gleis's deposition. In July, 2003, the first carrier and the claimant submitted their agreement to the ALJ for approval. It provided for a lump sum payment of $15,000.00, of which $1,000.00 was for a waiver of the right to reopen and $1,000.00 was for a waiver of future psychological care.

On August 18, 2003, the ALJ held a status conference at which the employer was represented by counsel for both carriers. An order entered on that date noted the discrepancy between the evidence that had been filed and that which was listed on the hearing order. It stated that Dr. Gleis's deposition would be included as evidence and ordered that the contested issues would include the propriety of including Dr. Gleis's deposition as evidence. The order also gave the second carrier 30 days to take further proof, after which the case would stand submitted. The claimant failed to object.

On September 2, 2003, the employer (as represented by the second carrier) filed a motion for an extension of time until December 1, 2003. The motion explained that an

evaluation by Dr. Wood was scheduled on August 19, 2003, but would not be performed until November 20, 2003. Again, the claimant failed to object.

On September 4, 2003, the ALJ entered a sua sponte order noting that the status of the case had been reviewed and approval of the settlement deferred. The order gave the parties until September 17, 2003, to attempt to reach a global settlement and stated that the case would stand submitted on that date if they did not. The employer was directed to fax any evidence to the ALJ on or before September 17, 2003.

On September 30, 2003, while the unopposed motion for an extension of time remained pending, the ALJ approved the claimant's settlement regarding the first injury and rendered an opinion on the merits of the claim for the second injury. Noting that Dr. Gleis's deposition was taken during normal proof time, that both carriers participated, but that the deposition was inadvertently left off the hearing order, the ALJ determined that it could properly be considered. After considering the conflicting medical evidence submitted by the parties, the ALJ relied on Dr. Gleis's testimony and concluded that there were objective medical findings of a second injury, that it caused both a 7% physical impairment and a 6% psychiatric impairment, and that the claimant lacked the physical capacity to return to the type of work that he performed when he was injured.

On October 13, 2003, the employer filed a petition for reconsideration, pointing out that its motion for an extension of time was pending on September 17, 2003, and remained pending when the merits were decided. It requested that the opinion be set aside, that the still-pending motion be granted, and that it be given an opportunity to obtain and submit Dr. Wood's evaluation.

Objecting, the claimant asserted that the petition did not allege a patent error in the opinion and award but was an attempt to re-litigate the merits. The claimant pointed

out that the employer had an ample opportunity during proof time to cross-examine Dr. Gleis and to submit rebuttal medical evidence. He requested, therefore, that both the motion for an extension of time and the petition for reconsideration be denied.

After a status conference with the parties, the ALJ entered an order on November 14, 2003. The ALJ took exception to the employer's assertion that there was a decision at the hearing not to admit Dr. Gleis's deposition as evidence but noted that the outstanding motion for an extension of time had been overlooked and that the settlement and the merits of the claim for the second injury were considered before deciding it. On that basis, the ALJ ordered the opinion and award to be withdrawn and granted the motion for an extension of time. The employer was given through December 1, 2003, to introduce additional proof. The claimant was given 30 days thereafter for rebuttal, after which the parties were given ten days in which to file supplemental briefs.

The employer introduced a medical report from Dr. Wood, which indicated that there was no causal relationship between any permanent harmful change in the human organism and the February 14, 2001, injury. However, the claimant submitted no additional evidence. In a revised opinion rendered on January 30, 2004, the ALJ relied on Dr. Wood and found that any permanent physical or psychiatric impairment was due to the injury that occurred in March, 2000. Convinced, however, that the February, 2001, injury caused a temporary flare-up in the pre-existing condition that required surgery, the ALJ determined that the second carrier was liable for the surgery and temporary total disability benefits from the date of injury until the claimant reached maximum medical improvement following surgery. Liability for any medical expenses thereafter was the responsibility of the first carrier.

Asserting that counsel for the second carrier cross-examined Dr. Gleis and had ample opportunity in the original proofing schedule to present rebuttal evidence, the claimant maintains that it had no legal right to introduce additional proof. Although the August 18, 2003, order offered the carrier an extra opportunity to do so, it was merely gratuitous. Therefore, the ALJ's failure to decide the motion for an extension of time before considering the merits of the claim was not reversible error. Nor was it the sort of error that would permit a reopening under Wheatley v. Bryant, supra. The claimant argues that the evidence presented within the proofing schedule was conflicting and that the initial findings were reasonable; therefore, there was no basis to reverse them on appeal. Yet, by withdrawing the initial opinion, considering additional evidence, and later revising the opinion, the ALJ effectively short-circuited the appellate process and changed the result, which KRS 342.281 does not permit. Wells v. Ford, 714 S.W.2d 481 (Ky. 1986); Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329 (Ky. 1971); see also, Francis v. Glenmore Distilleries, 718 S.W.2d 953 (Ky. App. 1986). The claimant notes that reopening is not permitted in order to submit evidence that could have been discovered with the exercise of due diligence in the course of the original litigation but that the Board and the Court of Appeals have effectively endorsed the use of the "mistake" provision to permit just such evidence to be introduced.

KRS 342.281 limits an ALJ to correcting errors patently appearing on the face of an award. Although it permits an ALJ to make additional findings and to resolve unresolved issues, it does not permit the merits of issues that were decided to be reconsidered. Wells v. Ford, supra; Eaton Axle Corp. v. Nally, supra; Beth-Elkhorn Corp. v. Nash, supra; Wells v. Beth-Elkhorn, 708 S.W.2d 104, 106 (Ky. App. 1985); see

also, Francis v. Glenmore Distilleries, supra. It is apparent that the ALJ withdrew the initial opinion in this claim for the purpose of reconsidering the merits, which clearly was prohibited. Furthermore, the decision was not rendered within the 10-day period that KRS 342.281 permits. At issue, therefore, is whether the result was properly affirmed on the ground that KRS 342.125 would have permitted a reopening to amend the award to correct a mistake, such as occurred in Wheatley v. Bryant, supra.

In Wheatley v. Bryant, supra, the court acknowledged an apparent vacillation in previous decisions regarding the authority to correct an admitted error in applying the law in a workers' compensation proceeding but noted that CR 60.02 permitted a judge to correct such a mistake in a civil proceeding. Concluding that the more recent decisions more nearly comported with the General Assembly's intent, the court determined that KRS 342.125 permitted an ALJ to reopen a final award that had not been appealed to a court in order to correct an admitted mistake in applying the law as it existed at the time of the worker's injury. Therefore, it affirmed an ALJ's decision to correct the duration of Wheatley's award sua sponte from 425 weeks to life.

In a subsequent case, counsel for the employer was not served with an order denying its petition for reconsideration, so the ALJ set aside the order and reissued it to enable the employer to file a timely notice of appeal. Fluor Construction International, Inc. v. Kirtley, 103 S.W.3d 88 (Ky. 2003). The court relied on the analysis set forth in Kurtsinger v. Board of Trustees of Kentucky Retirement Systems, 90 S.W.3d 454, 456 (Ky. 2002), in which the court noted that CR 60.02 is a mistake-correcting rule that gives a trial court broad discretion to vacate an order on the basis of mistake, inadvertence, or excusable neglect. In Kirtley, the court determined that although the ALJ did not cite the

mistake provision of KRS 342.125, the statute offered the same relief under the circumstances as CR 60.02.

Wishing to consider all of the medical evidence before resolving the contested issues in the second claim and considering the propriety of the settlement agreement, the ALJ determined in the present claim that Dr. Gleis's deposition would be considered as evidence although neither the claimant nor the second carrier had listed it in the hearing order. The second carrier had both reason and opportunity to rebut Dr. Gleis's testimony during the normal proofing schedule, and the regulations do not provide for additional proof to be taken after a hearing. Nonetheless, the ALJ gave the carrier an opportunity to submit additional evidence to rebut Dr. Gleis's testimony, and the claimant failed to object. Under the circumstances, he waived any error regarding the August 18, 2003, order.

The November 14, 2003, order did not cite KRS 342.125, but it explained that the basis for withdrawing the initial decision was that the ALJ would have granted the pending motion for an extension of time before considering the merits had he not overlooked it. When viewed as being a statutory equivalent to CR 60.02, KRS 342.125(1)(c) would have permitted the ALJ to vacate the opinion on the ground that it was a mistake to have rendered a decision on the merits before deciding a pending motion to extend the time for taking proof. By failing to object to the order permitting post-hearing proof and to the subsequent motion for an extension of time, the claimant waived any error in granting them. Mindful that a correct result may be affirmed although it was reached through erroneous reasoning, we conclude that the revised decision rendered on January 30, 2004, was properly affirmed on appeal. Vega v. Kosair Charities Committee, Inc., 832 S.W.2d 895, 897 (Ky. App. 1992).

The decision of the Court of Appeals is affirmed.

All concur.

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