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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-0513-WC

GARY SKINNER — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-1677-WC
WORKERS' COMPENSATION NO. 01-82485

HALE CONTRACTING, INC.; HON. MARCEL SMITH, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the portion of the claimant's application for benefits that concerned an alleged eye injury, based on the medical evidence, but also determined that any claim for an eye injury was barred by the notice and limitations requirements. The Workers' Compensation Board (Board) and the Court of Appeals determined that the ALJ did not err by considering a medical report that the employer submitted pursuant to an order to which the claimant failed to object and affirmed on that ground. We affirm.

The claimant has a tenth-grade education and no vocational or specialized training. He has worked as an equipment manager, doing farm work, and in the retread department of a tire company. In 1977, he was injured when a tire exploded and hit him in the face. He later testified that the accident injured his nose, skull, cheek bones,

right eye socket, and right eye and "basically cut the right eyelid off." He underwent various reconstructive surgeries on the eye socket until 1980 or 1981 and then returned to work for a different employer.

In April, 2001, the claimant began working for the defendant-employer, performing equipment maintenance. On July 16, 2001, a tire exploded and hit him in the hip and back part of his right leg. The emergency room physician's report from St. Luke Hospital indicated that the claimant complained of severe pain in the lower back and right leg. He denied a head or neck injury, and there was no scalp or facial trauma.

St. Luke Hospital records from a subsequent admission on July 23, 2001, noted recent facial trauma and a suspected facial fracture. A CT scan revealed no indication of an acute facial or nasal fracture but did reveal what "is likely a chronic process and may represent a mucocele" obstructing the airway. On July 24, 2001, Dr. Kratz noted, "Films show old fracture." (emphasis original). His July 27, 2001, operative note described the mass he removed as being a mucocele (mucous cyst or tumor) that extended from the right frontal sinus onto the muscles of the eye and the optic nerve. Stedman's Medical Dictionary 1136 (27th ed. 2000). A subsequent report from Dr. Bacevich noted that although Dr. Katz's operative note described the mass as a mucocele, an October 3, 2001, letter by Dr. Kratz described it as being an abscess due to the July, 2001, accident. Noting the absence of an acute facial or nasal fracture and also noting that a mucocele is not traumatically induced, Dr. Bacevich characterized it as being a chronic, residual problem from the severe facial injury in 1977.

The claimant filed an application for benefits on January 14, 2002, alleging injuries to his back and right leg. On April 19, 2002, he moved to amend the claim "to include all injuries and treatment." He explained that he wanted to make it clear that he

was seeking compensation for injuries to his right lower leg, back, and right shoulder. The motion did not mention an eye injury or a head, sinus, or facial injury. On May 14, 2002, one day before a scheduled benefit review conference (BRC), the claimant filed a motion to hold the claim in abeyance until he reached maximum medical improvement regarding his leg injury. The motion was granted and the conference postponed.

When deposed on May 15, 2002, the claimant testified that the force of the explosion threw him about 20 feet over an embankment where he landed on his back. He was taken by ambulance to St. Luke Hospital and subsequently transferred to the University of Cincinnati Hospital where he was observed for signs of compartment syndrome due to a torn hamstring muscle and severe swelling in his leg. He stated that on the second day, after the morphine wore off, he began to experience headaches and facial pain. Although he thought that he complained of the symptoms, they were not treated and he was released after three or four days. He followed up with Dr. Melton (his family physician) after his release and was re-hospitalized at St. Luke several days later. He testified that the doctors found he also had a broken nose, a cracked eye orbit, and a mucocele that had ruptured, causing sinus pain. Dr. Kratz performed surgery to remove it, and the condition was no longer symptomatic. His present complaints involved the right shoulder, leg, and low back and had been treated since his hospitalizations by Drs. Melton, Larkin, and Kelly.

On December 5, 2002, the claimant filed a motion to remove the claim from abeyance and set it for a final hearing. Responding to the motion, the employer requested additional time to complete proof. On January 21, 2003, the ALJ granted the claimant's motion to amend the claim and his motion to remove the claim from abeyance. Moreover, the ALJ granted the parties 30 days to take additional proof,

followed by an additional 30 days for the employer and 15 days thereafter for the claimant. On February 10, 2003, the claimant was given until March 10, 2003, to complete proof.

In March, 2003, the claimant sought treatment for right eye symptoms and directed the bills to the employer's workers' compensation carrier. Nonetheless, he failed to object to the employer's June 11, 2003, motion to schedule a BRC, which asserted that "all proof has been taken and the parties are now ready to proceed." The motion was granted.

On July 23, 2003, the employer filed a medical fee dispute, asserting that the 2001 accident caused no right eye condition. On July 30, 2003, the claimant moved to amend his application again in order to allege a right eye injury. The employer objected to the motion and also filed a special answer raising a limitations defense. Filed shortly thereafter, the claimant's witness list included unnamed "Doctors from the University Eye Clinic." At the September 11, 2003, BRC, the ALJ gave the parties until the hearing to take proof on the eye claim. The hearing was scheduled for December 17, 2003. Although Dr. Kaufman examined the claimant on December 8, 2003, and prepared a Form 107 on his behalf, it was not filed into evidence before the hearing.

The hearing order admitted Dr. Kaufman's report prospectively, but it was not actually filed until December 22, 2003. The hearing order gave the employer until January 23, 2004, to take responsive proof. Nothing in the record indicates that the claimant requested additional time for cross-examination or rebuttal. Two days after the hearing, the employer filed notice of an examination with Dr. Eiferman.

At the hearing, the claimant testified that after the 1977 injury his right eye did not enable him to see objects directly in front of him but did retain peripheral vision.

After the 2001 injury, he was unable to keep the eye closed, and in March, 2003, he developed a corneal ulcer. His physicians sewed the eyelid shut to keep the eye moist so it would heal. At present, he could perceive only light.

Dr. Kaufman's report indicates that he received a history of right eye trauma in 1977 and again on July 16, 2001. He diagnosed exposure keratopathy from the "second trauma to [the] eyelids," causing corneal ulceration and angle closure glaucoma. He assigned a 20% impairment, indicating that a 10% impairment was due to the 1977 injury and that a 10% impairment was due to the 2001 injury, which caused a complete loss of vision.

Dr. Eiferman evaluated the claimant for the employer on January 19, 2004, and reviewed Dr. Kaufman's findings. He noted that although the claimant asserted that he had good vision before July 16, 2001, copies of prior eye exams would be necessary to determine the actual loss of vision. Dr. Eiferman also indicated that he would need to review x-rays and CT scans to fully evaluate the mucocele but that, in his opinion, it probably was related to chronic inflammation and erosion of bone related to the 1977 injury rather than to the July, 2001, trauma.

On January 26, 2004, the employer filed Dr. Eiferman's report without objection. It also moved to extend its proof time to enable Dr. Eiferman to review the requested medical records and pre-injury eye exams and then to enable the employer to depose him. The claimant's response stated that he "anticipated that the Motion will be granted." He did not object but did request another hearing on the ground that the claim had recently been assigned to a different ALJ. He also requested that the claim be heard "as soon as possible." In an order entered on February 6, 2004, the ALJ gave the employer until February 12, 2004, in which to complete proof and directed counsel

to fax any evidence in addition to filing it. Again, the claimant did not object or request additional time for rebuttal.

Dr. Eiferman's supplemental report, dated February 11, 2004, noted that he had been supplied with additional records and x-rays, including those from Dr. Kratz. A pre-op note from Dr. Kratz, dated July 24, 2001, noted "sight gone from rt eye since '77." In another note, dated July 25, 2001, Dr. Kratz stated:

> He knows his eye sight is not going to improve since it has been bad now for many years and one of his fields is out entirely and he only perceives light and does not have much useful sight to the eye. He does not expect this to improve.

Dr. Eiferman also noted that x-rays and a CT scan from July, 2001, revealed severe deformity of the right eye socket compatible with a remote injury. He concluded that neither the acute condition requiring treatment in 2003 nor any additional loss of vision was related to the July 16, 2001, injury.

On February 12, 2004, the ALJ awarded the claimant benefits under KRS 342.730(1)(b) and (c) based upon the impairments his treating physicians assigned for the back, leg, and shoulder conditions. Relying on Dr. Eiferman, the ALJ determined that any right eye impairment existed and was active before July 16, 2001. Moreover, any eye, socket, or sinus condition was unrelated to the injury and was not compensable. Although acknowledging that the finding rendered questions regarding notice and limitations moot, the ALJ determined that KRS 342.185 barred the claim on both counts.

The claimant appealed. He did not assert error in the findings under KRS 342.185. He complained that the ALJ rendered a decision on the day after the employer submitted Dr. Eiferman's supplemental report and that he had no opportunity

to cross-examine Dr. Eiferman or to submit rebuttal evidence as provided in 803 KAR 25:010, §§ 8 and 15. On that basis, he requested the Board to reverse the finding that the eye injury was not compensable and to remand the claim with instructions to give him an opportunity to cross-examine Dr. Eiferman and submit rebuttal evidence. He now complains that the Board and the Court of Appeals affirmed.

The claimant did not appeal the ALJ's finding that any claim for an eye injury was barred by KRS 324.185; therefore, it became the law of the case. As a consequence, the finding would have precluded an award on remand because to permit an award would have deprived the employer of a vested right. See Davis v. Island Creek Coal Co., 969 S.W.2d 712 (Ky. 1998). Under the circumstances, remanding the claim to permit the claimant to cross-examine Dr. Eiferman or to introduce other evidence in rebuttal would have been futile. In any event, we are not convinced the present circumstances involve an abuse of the ALJ's discretion to control the taking of proof.

Both the time for taking proof and for extending that time expired long before the claimant's motion to amend the claim to allege a right eye injury. Therefore, the September 11, 2003, order authorizing proof regarding the eye claim was not based on 803 KAR 25:010, § 8 but on 803 KAR 25:010, § 13(15), which permits an ALJ to "order that additional discovery or proof be taken between the [BRC] and the date of the hearing." As the Board noted, 803 KAR 25:010, § 13(15) does not specify by whom, in what order, or in what timeframe additional proof shall be taken. Moreover, it does not provide response or rebuttal time for an adverse party that is subject to automatic extension under 803 KAR 25:010, § 15(5)(b).

The claimant failed to request rebuttal time at the September, 2003, BRC, when the ALJ authorized the taking of proof regarding the alleged eye injury without

specifically authorizing time for rebuttal. He also failed to do so when the December 17, 2003, hearing order was entered or when the employer requested an extension of time on January 26, 2004, to permit Dr. Eiferman to review additional information. A failure to assert a right to rebuttal may result in a loss of that right. See Maxey v. R. R. Donnelley and Sons Co., 859 S.W.2d 130, 132 (Ky. App. 1993). 803 KAR 25:010, § 18(5) requires an ALJ to render a decision on a claim no later than 60 days after the hearing. Under the present circumstances, it was not an abuse of the ALJ's discretion to consider the claim upon receipt of Dr. Eiferman's report without affording the claimant an additional opportunity to request time for cross-examination or rebuttal.

The decision of the Court of Appeals is affirmed.

All concur.

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