

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2009-SC-000412-WC

DATE 4/8/10 Kelly Klaber D.C.
APPELLANT

TERRY GIBSON

V.
ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-001408-WC
WORKERS' COMPENSATION BOARD NO. 02-76774

KUHN GIBSON & SON PLUMBING;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board and the Court of Appeals affirmed an Administrative Law Judge's (ALJ's) refusal to award temporary total disability (TTD) benefits for periods before the date that the claimant filed his motion to reopen. Appealing, the claimant asks the court to reconsider the precedent set forth in *Bartee v. University Medical Center*¹ upon which the Board and the Court of Appeals relied.

We affirm. KRS 342.125(4) expressly prohibits "any change in the amount of compensation" from being ordered before the date that the motion to

¹ 244 S.W.3d 91 (Ky. 2008).

reopen is filed. A post-award order requiring an employer to pay additional TTD benefits changes the amount of compensation awarded.

The claimant, Terry Gibson, operates Kuhn Gibson and Son Plumbing, his family's business. He sustained work-related injuries to his right foot in 2001 and 2002, after which an ALJ awarded past-due TTD benefits and reasonable and necessary medical treatment for so long as he remained disabled. The ALJ awarded interlocutory TTD benefits until such time as Gibson reached maximum medical improvement (MMI) and deferred a decision concerning permanent disability until that time.

On June 21, 2004, the ALJ awarded enhanced income benefits based on findings that Gibson retained a 3% permanent impairment rating at MMI and that he lacked the physical capacity to return to the type of work performed on the date of injury. In rejecting Gibson's claim of permanent total disability, the ALJ noted that his permanent restrictions were not very confining and that he was a successful entrepreneur who had operated his business for some time. Gibson appealed, but the Board affirmed the award.

Gibson worked on a limited basis for several months after receiving the award. His treating physician, Dr. Shea, restricted him from performing any type of work from October 22, 2004, through December 7, 2004, however, due to swelling and other problems with his feet. Gibson resumed working limited hours from December 8, 2004, until March 7, 2005, when Dr. Shea again restricted him from performing any work.

On August 1, 2005, Gibson filed a motion to reopen in which he contested Kuhn Gibson's refusal to pay his post-award medical expenses and sought TTD benefits for the periods that Dr. Shea restricted him from working. He supported the motion with his own affidavit, Dr. Shea's office notes, and copies of numerous "off work" and "return to work" slips from Dr. Shea. The motion was granted and the parties took further proof. Subsequent evidence showed that Dr. Shea lifted the restriction and released Gibson to perform limited work on September 26, 2005.

The parties reached an agreement with respect to the disputed medical expenses but submitted the TTD claim for a decision. The ALJ determined that KRS 342.125(4) prohibited a change in compensation before the date that Gibson filed his motion to reopen. Noting that the definition of compensation includes income benefits, the ALJ awarded TTD from August 1, 2005, through September 26, 2005.

KRS 342.125(4) states, in pertinent part, as follows:

Upon reopening, the administrative law judge may end, diminish, or increase compensation previously awarded, within the maximum and minimum provided in this chapter, or change or revoke a previous order. The administrative law judge shall immediately send all parties a copy of the subsequent order or award. Reopening shall not affect the previous order or award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen. No employer shall suspend benefits during pendency of any reopening procedures except upon order of the administrative law judge. (emphasis added).

Bartee concerned a claim in which the worker underwent an elective surgery despite her employer's refusal to authorize the procedure based on a utilization review report. As a consequence, the employer filed a motion to reopen to contest its liability for the expense. Ms. Bartee filed a subsequent motion to reopen seeking TTD. She did so during the pendency of her employer's reopening but after she returned to work.

The *Bartee* court determined that KRS 342.125(4) prohibited the ALJ from awarding TTD for a period that occurred before the date that the motion to reopen was filed and that the employer's reopening did not raise an implicit question concerning Ms. Bartee's entitlement to TTD. Addressing her public policy arguments, the court noted that the surgery was not an emergency and that nothing would have prevented her from filing a prospective motion, supported with a treating physician's report, in which she sought to compel the employer to authorize the surgery and pay related TTD.

Represented by the same attorney as Ms. Bartee, Gibson argues that *Bartee* is based on the erroneous premise that awarding additional TTD at reopening changes the amount of compensation previously awarded. He reasons that TTD does not extend the 425-week period of permanent partial disability benefits but merely suspends the award during the period of TTD. What he fails to acknowledge is that the definition of compensation found in KRS 342.0011(14) includes income benefits and that TTD is an income benefit.

Thus, additional TTD awarded at reopening is a "change in the amount of compensation" that the previous award ordered.

A motion to reopen seeking TTD need only be supported with a reasonable *prima facie* showing that the worker will be able after further proof-taking to prove a change of disability as shown by objective medical evidence.² Thus, a motion supported with a well-crafted affidavit and a copy of a treating physician's off-work slip or office note will generally suffice. Gibson complains that *Bartee* fails to consider the "real world" difficulties of obtaining medical reports, but nothing indicates that he encountered any delay or difficulty obtaining off work slips from Dr. Shea. Although he complains that filing prospective motions to reopen would produce needless litigation in situations where an employer approves surgery, this case does not involve a post-award surgery or hospitalization.

Finally, Gibson argues that a worker who undergoes post-award medical treatment for the effects of an injury should not have to file a motion to reopen to receive benefits for the duration of TTD when a treatment's compensability is undisputed. He urges the court to view such a situation as a request for interlocutory relief rather than as a motion to reopen. We decline to do so.

A worker's entitlement to medical treatment and TTD are separate issues, decided under different standards. Compensable medical treatment

² KRS 342.125(1)(d); *Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 397 (Ky. 1972).

may or may not produce a period of TTD. The term "interlocutory" refers to a temporary decision, before the final decision on the merits.³ Gibson filed a claim, during the pendency of which he received an interlocutory TTD award. When he reached MMI, he received an award that concluded the parties' litigation and became final. The period of TTD at issue arose subsequently, when no litigation between the parties was pending.

As the court noted in *Bartee*, workers' compensation is a statutory creation. Although a final workers' compensation award may be enforced in circuit court as a judgment,⁴ KRS 342.125 permits a final award to be reopened and modified under limited circumstances. KRS 342.125(1) designates a motion to reopen as the procedural device for invoking an ALJ's authority to do so and sets forth permissible grounds for reopening, one of which is a change of disability. KRS 342.125(3) exempts a motion seeking TTD from the 4-year period for reopening and permits such a motion to be filed during the period of an award, which includes the period of future medical benefits.⁵ We view KRS 342.125(3) as an indication that the legislature considered and decided the extent to which post-award TTD would be exempt from the general reopening requirements. A decision to exempt TTD from the limitation imposed by KRS 342.125(4) is a matter for the legislature rather than this court.

³ *Black's Law Dictionary* 819 (7th ed. 1999).

⁴ KRS 342.305.

⁵ *Radco Asbestos Specialists, Inc. v. Lyons*, 295 S.W.3d 75 (Ky. 2009).

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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