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Supreme Court of Kentucky

2023-SC-0028-WC

TENNCO ENERGY, INC. — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2021-CA-0211
WORKERS' COMPENSATION NOS. 2019-WC-01221,
2019-WC-01223, AND 2019-WC-01321

RICHARD LANE; HONORABLE JONATHAN ROBERT WEATHERBY, JR., ADMINISTRATIE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION OF THE COURT BY JUSTICE KELLER

AFFIRMING

An administrative law judge (ALJ) dismissed Richard Lane's 2019 coal workers' pneumoconiosis (CWP) claim against his former employer, Tennco Energy, Inc. (Tennco) after determining Lane had failed to give Tennco timely notice of the claim pursuant to Kentucky Revised Statute (KRS) 342.316(2). The Workers' Compensation Board (Board) reversed and remanded, after concluding that a prior CWP claim Lane had settled against a former employer in 2005 had no bearing on Lane's duty to notice Tennco when he asserted a subsequent claim against it. The Court of Appeals affirmed the Board and determined, under its own analysis, that Lane's notice was timely. Tennco appeals the decision of the Court of Appeals to this Court. Because we interpret

KRS 342.316(2) to have triggered Lane's statutory obligation to provide notice of his claim when he was reasonably apprised that he had sustained a harmful change in his CWP condition attributable to his employment with Tennco, we affirm and remand to the ALJ.

I. BACKGROUND

Richard Lane worked in Kentucky's coal mining industry for more than 30 years – all of them underground, where he was continuously exposed to coal dust. At the time Lane left the mining industry, and his employment with Tennco, in 2019, he operated a shuttle car in an underground coal mine from 3 a.m. to 3 p.m., six days a week.

Lane has been diagnosed with CWP, commonly referred to as "black lung disease," on multiple occasions, and was first diagnosed as early as June 2003. Two workers' compensation claims Lane filed after contracting CWP are critical to this appeal.

On December 22, 2005, Lane settled a CWP workers' compensation claim against his then-current employer, Simpson Mining, for $12,500. The settlement agreement reflected that Lane was occupationally exposed to coal dust for approximately 19 years, and that five physicians had assessed his condition using the International Labor Organization (ILO) standardized radiographic classifications of lung X-rays for diagnosing pneumoconiosis. Such classifications are used in categorizing the progress of a case of CWP, and, under Kentucky law, correspond to the amount of workers' compensation benefits to which an employee is entitled. *See generally* KRS 342.732(1)(a)-(b).

The record indicates that of the five physicians that assessed Lane's condition prior to his 2005 settlement, three diagnosed him with CWP and two did not. Lane's *highest* CWP classification among his three diagnoses was reported as being category 1/1.

ILO Classification	Date of Report	Physician
1/1	06/07/2003	Alexander
0/0	12/02/2003	Jarboe
1/0	01/14/2004	Baker
0/0	01/22/2004	Narra
1/1	01/31/2004	Vuskovich

For the next 14 years, Lane continued to work in the coal mining industry for various employers where he was continuously exposed to coal dust. Lane began working for Tennco in 2009, and remained at Tennco until his last day of employment on January 21, 2019. Lane later testified at deposition that he ceased working at Tennco because of a mine fatality.

On July 11, 2019, an attorney representing Lane sent a letter of notice to Tennco, explaining that Lane would be filing a workers' compensation claim for CWP he contracted in Tennco's underground mines. Lane filed that claim on October 29, 2019. Pursuant to KRS 342.316(1)(a), "[t]he employer liable for compensation for occupational disease shall be the employer in whose employment the employee was last exposed to the hazard of occupational disease."

Around the time Lane filed his claim against Tennco, four physicians assessed his condition using the ILO classifications for diagnosing

pneumoconiosis. Each diagnosed him with CWP – the earliest diagnosis coming on September 11, 2019, two months after Lane had noticed Tennco of his claim. Of these four diagnoses, Lane's *lowest* CWP classification was reported as being category 2/2. As such, the evidence presented to the ALJ tended to establish that Lane's CWP had gotten worse since he was last diagnosed in 2004.

ILO Classification	Date of Report	Physician
3/2	09/11/2019	DePonte
2/3	12/05/2019	Westerfield
2/2	05/12/2020	Jarboe
2/3	06/21/2020	Kendall

Despite this evidence, Tennco argued, and the ALJ agreed, that Lane failed to give proper notice of his CWP claim under KRS 342.316(2), which states in part:

> [N]otice of claim shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, or a diagnosis of the disease is first communicated to him or her, whichever shall first occur.

The ALJ concluded, as a matter of law, that Lane's prior diagnoses of CWP prior to his 2005 settlement necessarily rendered any notice Lane provided Tennco in 2019 as untimely. The Board reversed and remanded. The Court of Appeals affirmed the Board's decision.

II. ANALYSIS

This Court's review of workers' compensation cases is limited "to

address[ing] new or novel questions of statutory construction, or to reconsider[ing] precedent when such appears necessary, or to review[ing] a question of constitutional magnitude." *French v. Rev-A-Shelf*, 641 S.W.3d 172, 177 (Ky. 2022) (quoting *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 688 (Ky. 1992)). We review these questions of law de novo. *Lexington Fayette Urb. Cnty. Gov't. v. Gosper*, 671 S.W.3d 184, 199 (Ky. 2023) (citation omitted).

The issue at hand concerns *when* a workers' compensation claimant must notify his employer of his impending CWP claim under KRS 342.316(2), when that claimant has previously been diagnosed with CWP and concluded a prior CWP claim for benefits against a previous employer. But to answer this question, we must first address whether such a claimant may even initiate a subsequent CWP claim against a new employer.

CWP is "an irreversible and progressive disease." *Fouch v. Island Fork Const.*, No. 2003-SC-0052-WC, 2004 WL 316945, at *3 (Ky. Feb. 19, 2004). As such, the General Assembly has contemplated that coal miners who have already sought workers' compensation benefits after contracting CWP might, nonetheless, seek subsequent benefits – often as their condition progresses. In fact, an ALJ may only assert jurisdiction to review an existing award or order for benefits attributable to CWP where a claimant demonstrates:

> [a] *progression* of his previously-diagnosed occupational pneumoconiosis resulting from exposure to coal dust and development of respiratory impairment due to that pneumoconiosis and two (2) additional years of employment in the Commonwealth wherein the employee was continuously exposed to the hazards of the disease . . . .

KRS 342.125(5)(a) (emphasis added). However, the "reopening" of such a prior claim against a previous employer is not the correct procedure where a claimant has subsequently been exposed to coal dust in the course of his employment with a different employer. *Blackburn v. Lost Creek Mining*, 31 S.W.3d 921, 924 (Ky. 2000); *Fouch,* 2004 WL 316945, at *3. Any such "exposure in a different employment" is more properly "the subject of a new claim against the subsequent employer." *Fouch*, 2004 WL 316945, at *3 (citing *Blackburn*, 31 S.W.3d at 924). In *Blackburn*, two doctors diagnosed a miner with CWP, while two others opined he was negative for the disease. 31 S.W.3d at 922. In his claim for benefits, an ALJ adopted the diagnoses indicating the miner did not have CWP and dismissed his claim. *Id.* After several more years of working in the coal mining industry, the miner filed a new claim against a new employer, Lost Creek, and was awarded benefits because his underlying condition had "worsen[ed]." *Id.* at 923. This Court held that the ALJ erred by treating the new claim against Lost Creek as a reopening, but, nonetheless, "the claimant was entitled to have the matter considered as the new claim which it was." *Id.* at 925. This Court then upheld the ALJ's award to the miner. *Id.*

The General Assembly has expressly restricted an ALJ's jurisdiction to hear such subsequent claims except where "there has occurred in the interim between the conclusion of the first claim and the filing of the second claim at least two (2) years of employment wherein the employee was continuously exposed to the hazards of the disease in the Commonwealth." KRS 342.316(12).

We note that neither KRS 342.125(5)(a) nor KRS 342.316(12) grant a cause of action to seek workers' compensation benefits via subsequent claims, but both rather operate in the negative – limiting the class of miners who may assert claims for such benefits under the Workers' Compensation Act.

Now that it is clear that subsequent CWP claims against new employers are not totally prohibited by statute, we turn to the issue of when claimants who have previously been diagnosed with CWP, like Lane, are required to provide their new employers with notice of their impending claims. The notice statute governing CWP claims states:

> [N]otice of [the] claim shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, or a diagnosis of the disease is first communicated to him or her, whichever shall first occur.

KRS 342.316(2). Tennco argues, and the ALJ concluded as a matter of law, that Lane's prior diagnoses of CWP in 2003 and 2004 necessarily render his July 2019 notice letter untimely. This Court feels that such a strict interpretation of the notice statute would frustrate the general purpose of the Workers' Compensation Act and quash an entire category of lawful workers' compensation claims before they are even anticipated.

While this Court has never held as much, it seems likely to us that any claimant who has previously been diagnosed with CWP, concluded a prior claim for benefits, and now seeks subsequent CWP benefits against a new employer must demonstrate that he has suffered a harmful change in his condition attributable to his time with his new employer if he wishes to

succeed.[1] In fact, the legislature has defined "occupational disease[s]" like CWP to be those "follow[ing] as a natural incident to the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause." KRS 342.0011(3). A subsequent harmful change in one's occupational disease attributable to his new employer naturally extends from this definition. Today, we express no opinion as to whether that harmful change must be a "progression" in ILO category, the onset of new CWP symptoms, an increase in respiratory impairment, or any other harm we have yet to conceive. We decline to make such an exacting holding because it is not for this Court to dictate what evidence might comprise a successful claim for workers' compensation benefits. Rather, we only observe that there must be *some* evidence.

If evidence of a harmful change in condition attributable to one's new employer is a likely prerequisite to any successful subsequent CWP claim, it only seems rational to this Court that a claimant's own awareness of such change is the event that should trigger his statutory obligation to provide notice of an impending claim to his employer. In other words, awareness of such change gives the claimant "knowledge" of his own "potentially compensable condition." *Newberg v. Slone*, 846 S.W.2d 694, 695 (Ky. 1992). Such an

[1] The likely prerequisite of demonstrating new harm attributable to one's new employer is consistent with this Court's previous unpublished cases. *See generally Black v. CMT Trucking*, No. 2005-SC-0168-WC, 2005 WL 2679997 (Ky. Oct. 20, 2005); *Mann v. Rockhouse Energy Mining Co./Sidney Coal*, No. 2007-SC-000276-WC, 2008 WL 746599 (Ky. Mar. 20, 2008).

interpretation of KRS 342.316(2)'s notice requirement does not create an "exception" to the statute for those with prior CWP diagnoses as Tennco argues, but rather embraces a reading of the statute consistent with the purpose of KRS Chapter 342 – to "aid injured or deceased workers." *Ky. Uninsured Emp'rs.' Fund v. Hoskins*, 449 S.W.3d 753, 762 (Ky. 2014) (citation omitted). In fact, we are "required to interpret the workers' compensation statutes in a manner that is consistent with their beneficent purpose." *Id.* (quoting *Webster Cnty. Coal Corp. v. Lee*, 125 S.W.3d 310, 315 (Ky. App. 2003)). To hold otherwise would be to allow a stringent reading of the notice statute to quash an entire subset of workers' compensation claims before they are ever anticipated.

In holding as we do, this Court does not wish to place the average CWP claimant in the role of physician – always bound to investigate the severity of his or her inherently progressive CWP symptoms in an effort to salvage the viability of some potential workers' compensation claim. Rather, the touchstone of this analysis should be whether a claimant was *reasonably* apprised he or she had sustained a harmful change in his CWP.

This Court has already interpreted KRS 342.316(2)'s requirement to give notice "as soon as practicable" after having knowledge of a CWP diagnosis to mean "within a reasonable time under the circumstances of each particular case." *Peabody Coal Co. v. Harp*, 351 S.W.2d 170, 172 (Ky. 1961). As applied to claimants with prior diagnoses of CWP, giving notice of a subsequent claim only after having knowledge of some subsequent harmful change is the only

reasonable time to provide notice under such circumstances. Otherwise, such claimants would be forced to give notice of their prior CWP diagnosis to all future employers as soon as they received that initial diagnosis, a sheer impossibility.

In *Blackburn,* this Court's only published case to address this near-novel topic, we held that notice was timely under facts nearly analogous to those at hand. *Blackburn*, 31 S.W.3d at 925. Blackburn received two diagnoses of CWP, concluded a claim for benefits against his employer (albeit unsuccessfully), started employment with a new mining company, ceased employment with that company, was again diagnosed with CWP, gave notice to that employer of an impending claim three weeks after his diagnosis, and filed that new claim. *Id.* The ALJ adjudicating Blackburn's claim concluded that "under the circumstances, notice was timely," and this Court upheld the ALJ's determination. *Id.*

Under our interpretation of KRS 342.316(2), Lane was not required to notify Tennco of his impending claim until he himself was cognizant of the harmful change in his CWP condition he sustained as a result of his employment. Here, the record establishes that Lane left his employment with Tennco because of a fatality at the mine, not because he realized he had suffered a harmful change in his CWP as a result of his employment. In fact, when asked about his CWP symptoms at his 2020 hearing Lane testified that his CWP did not restrict his ability to work during his last two years with Tennco. It seems to this Court that the record indicates the only concrete

notice Lane received as to his changed condition was his eventual diagnosis of Category 2/2 CWP on September 11, 2019 – two months after he had already given notice to Tennco. However, "nothing prohibits a worker who thinks she has sustained a work-related gradual injury from reporting it to her employer before the law requires her to do so, and nothing prevents her from reporting an injury that she thinks is work-related before a physician confirms her suspicion." *Am. Printing House for the Blind ex rel. Mutual Ins. Corp. of Am. v. Brown*, 142 S.W.3d 145, 149 (Ky. 2004).

The record does indicate, however, that Lane was experiencing shortness of breath as a result of his CWP, and that he was using an inhaler to treat his CWP symptoms. Whether these limited facts could have reasonably apprised Lane that he had experienced a harmful change in his CWP condition is simply unclear. This Court is not a fact-finding court, thus we are constrained to remand this case to the ALJ for findings of fact sufficient to determine when Lane was, or should have been, reasonably apprised he had sustained a harmful change in his CWP, and, ultimately, whether his July 2019 notice to Tennco was given "as soon as practicable" afterward.

III. CONCLUSION

For the foregoing reasons, we affirm both the Court of Appeals' and Board's reversal of the ALJ's findings concerning notice and the dismissal of Lane's CWP claim. We remand Lane's claim for the ALJ to determine,

consistent with this Opinion, whether Lane provided timely notice to Tennco.

VanMeter, C.J.; Bisig, Conley, Lambert, and Nickell, JJ., concur.

Thompson, J., not sitting.

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