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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000525-WC

BILES AND VETTER — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NOS. WC-87-08713 & WC-91-06845

KEVIN P. SKAGGS; CHARLES HARPRING ROOFING COMPANY; IRENE STEEN, Administrative Law Judge; ROBERT L. WHITTAKER, Director of WORKERS' COMPENSATION FUNDS (Successor to SPECIAL FUND) and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; GUIDUGLI and McANULTY, JUDGES.

EMBERTON, CHIEF JUDGE. Biles and Vetter petitions for review of an opinion of the Workers' Compensation Board that affirmed in part, reversed in part, and remanded an opinion of the Administrative Law Judge. Biles and Vetter challenges that portion of the Workers' Compensation Board's opinion that

reversed and remanded the ALJ's apportionment of liability. We affirm.

On September 26, 1985, while working for Charles Harpring Roofing Company Skaggs fell from a roof fracturing his vertebra at the T12 and L1 levels and both heels. In April 1987, he settled with Charles Harpring Roofing for a lump sum payment of $25,000 representing a 32.38% permanent partial occupational disability. The Special Fund was not joined in the claim and was not a party to the settlement.

Skaggs returned to work for Biles and Vetter and was injured on January 17, 1991, when he fell from a ladder and fractured his left leg and aggravated his back. In October 1993, he settled with Biles and Vetter and the Special Fund for a lump sum payment of $28,162.10 plus $2,500 for vocational rehabilitation representing a 32.38% permanent partial occupational disability. Biles and Vetter paid two-thirds and the Special Fund paid one-third of the settlement amount.

On December 11, 2000, Skaggs filed a motion to reopen both claims against Charles Harpring Roofing and Biles and Vetter alleging increased occupational disability.

Following a hearing held on June 28, 2001, the ALJ entered a hearing order indicating that the parties had stipulated that Biles and Vetter would be responsible for

payment of two-thirds and the Workers' Compensation Fund one-third "on [the] second injury."

The ALJ found that Skaggs had a worsening of his condition and is now 100% occupationally disabled. With respect to apportionment, the ALJ held that the prior two settlements of Skaggs's workers' compensation claims were reasonable and supported a finding of equal causation for his current total disability. Based on Campbell v. Sextet Mining Co.,[1] the ALJ concluded that because Charles Harpring Roofing was no longer liable on the 1985 injury and, but for the first injury Skaggs would not be entitled to total disability, the Workers' Compensation Fund was responsible for the amount attributable to Skaggs's total disability (which she had found to be 50%) for the first injury as "excess disability."[2] The Workers' Compensation Fund was liable for the entire 50% of the 1985 injury and 33.33% attributable to the 1991 injury, resulting in a total liability of two-thirds to the Workers' Compensation Fund and one-third to Biles and Vetter.[3] Both employers and the

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[1] Ky., 912 S.W.2d 25 (1995).

[2] See KRS 342.120(6) and (7).

[3] The ALJ then awarded benefit payments from the date the motion to reopen was filed as long as Skaggs remains disabled for total permanent disability based on Skaggs's average weekly wage for the 1991 injury payable two-thirds by the Workers' Compensation Fund and (FOOTNOTE CONTINUED)

Workers' Compensation Fund filed motions to reconsider. The ALJ denied the motions except that it allowed Biles and Vetter a credit for any payment under the 1991 award that overlapped the total disability award.

On appeal, The Workers' Compensation Board affirmed the amount of total disability benefits but reversed as to apportionment holding that the stipulation apportioning liability two-thirds to Biles and Vetter and one-third to the Workers' Compensation Fund covered any "excess disability" included in the award. Additionally, the Board held that under Whittaker v. Fleming,[4] and KRS[5] 342.1202 the Workers' Compensation Fund cannot be liable for more than 50% of the benefits attributable in whole or in part to the arousal of a pre-existing active back condition.

The sole issue on appeal concerns the apportionment of liability. The standard of review is whether the Board overlooked or misconstrued controlling statutes or precedent, or

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one-third by Biles and Vetter. See Campbell v. Sextet Mining Co., supra.

[4] Ky., 25 S.W.3d 460 (2000)(Fleming II).

[5] Kentucky Revised Statutes.

committed an error in assessing the evidence so flagrant as to cause gross injustice.[6]

Biles and Vetter asserts that the ALJ's assignment of 50% of the liability to the Workers' Compensation Fund was correct based on the finding that neither the 1985 nor the 1991 injury alone was sufficient to render Skaggs totally disabled and each contributed equally (50%) to his disability. Biles and Vetter also claim that the apportionment stipulation between it and the Workers' Compensation Fund applied only to disability attributable to the 1991 injury. Finally, Biles and Vetter maintains that the Board erroneously relied on KRS 342.1202 and the case of Whittaker v. Fleming, supra, in determining apportionment.[7]

In 1995, the Kentucky Supreme Court rendered its decision in Campbell, supra, where it held that the claimant was

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[6] See Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999).

[7] KRS 342.1202 (repealed in 1996) provides:

> An award for income benefits for permanent total or permanent partial disability under this chapter based, in whole or in part, on a pre-existing disease or pre-existing condition of the back, or of the heart shall be apportioned, by the administrative law judge, fifty percent (50%) to the employer and fifty percent (50%) to the special fund. Apportionment required by this section shall not be a cause of appeal.

entitled to total disability benefits on each of the combined injuries occurring in different years even though none of the injuries alone were totally disabling. The court characterized the case as an "excess disability" situation but did not designate any specific apportionment.

In Fleming v. Windchy,[8] the Supreme Court elaborated on its decision in Campbell. Fleming injured his back on two separate occasions involving two different employers: in 1990, while employed by Sun Glo Coal Company, and in 1991, while employed by Trojan Mining, Inc. He had also received workers' compensation for two previous injuries to his back and knee based on a 6% and 10% occupational disability, respectively. As to the 1990 and 1991 injuries, the ALJ found the combined effect of all his injuries rendered Fleming totally disabled, but 16% of the disability related to the 1977 and 1988 injuries was prior, active, and noncompensable. The remaining 84% was attributable equally (42%) to the 1990 and 1991 injuries. The ALJ ordered lifetime total disability benefits from the date of each injury and apportioned liability for the 1990 injury equally between Sun Glo and the Special Fund. Liability for the 1991 injury was equally apportioned between Trojan Mining and the Special Fund. The Board reversed the ALJ in part stating

[8] Ky., 953 S.W.2d 604 (1997) (Fleming I).

Fleming could receive benefits for the 1990 injury only for 425 weeks based on a partial permanent disability under KRS 342.730(1)(b). This court affirmed the Board.

The Supreme Court retreated from that aspect of its decision in Campbell allowing recovery of total disability benefits from the date of the earlier compensable injury, but held a claimant was entitled to such benefits from the date of the last injury that rendered a claimant totally disabled. It noted that the occupational effect of the last injury transformed the award for Fleming's 1991 injury from a partial disability situation to a total disability situation. Although Sun Glo could not be held responsible for payments exceeding those for a partial disability, the disability attributable to the prior injury is not excluded from the total disability award.[9] Fleming was entitled to total disability benefits payable by Trojan Mining and the Special Fund as of the date of the 1991 injury with an offset for the partial disability benefits he received for the period that overlapped. Pertinent to the present case, in a footnote, the Supreme Court noted that it was undisputed that liability would be apportioned equally

[9] Id. at 608.

between Trojan Mining and the Special Fund pursuant to KRS 342.1202(1).[10]

On remand, the Special Fund sought enforcement of the stipulation between itself and Trojan Mining calling for equal apportionment of liability. Trojan Mining asserted that the stipulation concerned only the 42% disability attributable to the 1991 injury and the ALJ agreed. Ultimately, in Fleming II, the Supreme Court rejected the ALJ's approach and upheld the Board's equal apportionment of liability for the entire total disability award:

> In an attempt to clarify our decision in Fleming [I], we again emphasize that claimant became totally disabled as a result of the 1991 injury. He is entitled to an award of total disability as of the date of the 1991 injury. A 16% prior, active disability must be excluded for the pre-1990 injuries, leaving 84% of an award for permanent, total disability as a result of the 1991 injury. Apportionment of the 1991 award is controlled by KRS 342.1202; therefore, liability for the 84% award must be borne equally by Trojan and the Special Fund. Trojan and the Special Fund are entitled to a credit against the 1991 award to the extent that benefits payable pursuant to the 1990 partial disability award against Sun Glo and the Special Fund overlap the period of total disability.[11]

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[10] See Id. at 608, n.2.

[11] Fleming, supra, at 463 (Fleming II).

In Phoenix Manufacturing Company v. Johnson,[12] the court reaffirmed its holding that in cases controlled by KRS 342.1202, the Workers' Compensation Fund could be liable for no more than 50% of the total liability.

Biles and Vetter's contention that the statute is not applicable to the 1985 injury is without merit. KRS 342.1202(1), which is controlling in this case, was enacted in 1987. Although enacted subsequent to Skaggs' 1985 injury, the holding in Fleming precludes the division of disability attributable to each individual injury. Skaggs did not become totally disabled until the occurrence of his 1991 injury and Harpring is no longer liable. The Board accurately and concisely stated the law as follows:

> KRS 342.1202 has been part of our statutory provisions since 1987. That extraordinary session led to many major modifications to the Kentucky Workers' Compensation Act and was due in large part to the "unfunded liability" of the SF. In an effort to address unfunded liability, our Legislature saw fit to limit the payment by the SF in back and heart cases to no more than 50%. Since then, the courts have consistently held, including the decision in Fleming II, that when, as here, the disability is attributable in whole or part to the arousal of a pre-existing condition in the back, the SF can have liability no greater than 50%. This includes excess liability.

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[12] Ky., 69 S.W.3d 64 (2002).

We also agree with the Board that Biles and Vetter is bound by the stipulation to a greater apportionment than 50%. Biles and Vetter was aware when entering into the stipulation that the injury in question was the 1991 injury and would necessarily cover any "excess disability." Litigation of the 1991 injury encompassed the 1985 injury. As noted by the Board, Biles and Vetter did not seek relief from the stipulation under 803 KAR 25:010E §14(2).

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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