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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2002-CA-001538-WC

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF TRANSPORTATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-42764

TODD A. WARD; WORKERS' COMPENSATION
FUND, FORMERLY SPECIAL FUND;
RONALD W. MAY, ADMINISTRATIVE LAW
JUDGE; AND THE WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND MILLER[1], JUDGES.

KNOPF, JUDGE: This is a workers' compensation case in which an administrative law judge (ALJ) granted the employee's motion to reopen a previously entered award.[2] At the conclusion of the reopened proceedings, a different ALJ increased the award from fifty-five percent permanent partial disability to total and permanent disability. The employer appealed to the Workers'

[1]Judge Miller concurred in this opinion prior to his retirement effective January 1, 2003.

[2]KRS 342.125.

Compensation Board and complained that both ALJs had applied a superseded version of the reopening statute. It also maintained that the employee had failed to meet his burden of proof and that the second ALJ had abused his discretion when he denied the employer's post-hearing motion to introduce additional testimony. By order entered June 19, 2002, the Board upheld the ALJ's ruling. The employer then repeated his appeal in this Court. We affirm.

Todd Ward was injured in October 1994 while working as a heavy-equipment operator for the Commonwealth's Department of Transportation (DOT). His end-loader struck a section of rail-road track, and the violent lurch wrenched Ward's back. At the time of his injury, Ward was only twenty-nine years old and had been working for DOT since 1989. Claiming that he had been rendered totally disabled, Ward filed his original claim for benefits in July 1995. He complained of severe pain in both the cervical and lumbar regions of his back and claimed that the lower-back pain radiated to his left leg and foot. He also complained of depression. He had tried to return to work, but after two or three days the pain had forced him to quit. He has not worked since.

The medical evidence showed some degenerative changes in Ward's cervical and lumbar spine, but the neurological tests did not indicate any nerve damage. Ward's experts testified that the work incident had chronically strained Ward's back and had exacerbated his otherwise non-disabling spinal changes. If he was to return to work, they opined, it could only be to light

work with little or no bending, stooping, or twisting. DOT's experts emphasized the lack of evidence of nerve damage and opined that Ward's pain (if indeed his complaints were legitimate) should eventually resolve.

Ward was awarded forty-percent partial disability benefits by order entered April 2, 1996. Then on May 17, 1996, the award was amended to fifty-five percent disability with the benefits apportioned equally between DOT and the Special Fund.[3]

In December 2000, Ward moved the Board to reopen the 1996 award on the ground of change of condition. He alleged that rather than resolving, his pain had grown worse. Merely getting around was difficult, he claimed; he had twice fallen while descending the steps of his home. And his life, which had been an active one, was reduced to little more than watching television and taking medications. Furthermore, he had recently stopped sensing the need to urinate and so had become obliged to remember to do so every so often. An ALJ ruled that Ward had stated a prima facie claim for reopening and assigned the case for a hearing.

Before the ALJ assigned to consider the merits of Ward's claim, Ward's physician testified that, since the initial award, Ward had been treated at a pain-management clinic, but he had not obtained any lasting relief. The relief Ward obtained from pain medications, furthermore, had diminished. The physician believed that Ward could no longer be considered a

[3]The successor to the Special Fund, the Workers' Compensation Funds, has seconded DOT's arguments on appeal.

candidate for any type of employment. Other evidence showed that Ward's spine may have undergone some slight additional aging, but as in 1996, the standard neurological tests did not suggest any nerve damage.

Two urologists also examined Ward. Ward's expert diagnosed some sensory loss and some reflex loss on Ward's left side and a progressive voiding dysfunction. He attributed none of those findings to Ward's injury, however. DOT's urologist, on the other hand, testified that Ward lacked a bulbocavernosus reflex, a spinal-cord reflex of the anal sphincter, and that loss of the reflex was often the result of neurologic injury. Understandably, Ward's counsel seized upon this testimony as evidence that Ward's neurologic condition had indeed worsened. And understandably DOT's counsel hastily moved to introduce additional proof from its neurologist to the effect that the urologist's testimony showed no such thing.

The ALJ rejected both positions. He did, however, cite Ward's missing reflex as evidence that lent credence to Ward's and his physician's description of Ward's condition. On the basis of that description, he amended Ward's award to permanent total disability.

DOT's main argument on appeal, both to the Workers' Compensation Board and to this Court, is that both ALJs applied the wrong version of the reopening statute. At the time of Ward's injury in October 1994, KRS 342.125(1) provided in pertinent part that

> upon its own motion or upon the application of any party and a showing of change of

> medical condition, mistake, or fraud, or newly discovered evidence, the administrative law judge may at any time reopen and review any award or order . . . ending, diminishing, or increasing the compensation previously awarded.

In December 1996, however, shortly after Ward's original award and presumably before his condition changed, the General Assembly amended KRS 342.125(1) to provide that

> [u]pon motion by any party or upon an arbitrator's or administrative law judge's own motion, an arbitrator or administrative law judge may reopen and review any award or order on any of the following grounds: (a) Fraud; (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence; (c) Mistake; and (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

DOT argues that this later version of the statute applies and that Ward neither adequately alleged nor adequately produced Aobjective medical evidence@ of worsened impairment.

Notwithstanding the fact that Ward's alleged change of condition occurred after the effective date of the newer statute, DOT concedes that application of that statute would be retroactive. This concession is probably sensible, inasmuch as our Supreme Court has adhered to the rule that A[i]n compensation cases, the statutes creating substantive rights in effect at the time of injury are controlling.@[4] The newer statute was not yet in effect in October 1994 when Ward was injured. DOT also concedes that generally statutes are not to be applied

[4]McGregor v. Pip Johnson Construction Company, Ky., 721 S.W.2d 708, 710 (1986); Maggard v. International Harvester Co., Ky., 508 S.W.2d 777 (1974).

retroactively unless the legislature expressly indicates otherwise.[5] Nevertheless, DOT notes that there have been exceptions to this general rule, and it contends that the 1996 amendment to KRS 342.125 should be included among them.

New statutes affecting only procedures, for example, are frequently applied to all cases pending when the new statute takes effect regardless of when the case arose.[6] So called remedial statutes, statutes clearly intended to correct inconsistences in the law,[7] have also been given retroactive effect on the ground that the legislature could not have intended the inconsistency to remain controlling even of cases arising thereunder.[8]

Peabody Coal Company v. Gossett[9] was such a case. In Peabody, our Supreme Court applied the 1987 amendment to KRS 342.125 retroactively because the amendment was deemed to correct an inconsistency between the statute providing for original compensation awards and the reopening statute. Although DOT relies upon Peabody in urging the retroactive application of the 1996 amendment, it has not suggested any similar remedial purpose

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[5]Landgraf v. USI Film Products, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994); Federal Materials Company v. Baker, Ky., 885 S.W.2d 704 (1994).

[6]Magic Coal Company v. Fox, Ky., 19 S.W.3d 88 (2000); *cf.* Landgraf v. USI Film Products, *supra* (discussing the exceptions).

[7]We are aware that remedial statutes in another sense, statutes "relating to remedies," have sometimes been applied retroactively. Kentucky Insurance Guaranty Association v. Jeffers, Ky., 13 S.W.3d 606 (2000). This is not, however, the sense of "remedial" with which we are here concerned.

[8]Newberg v. Davis, Ky., 867 S.W.2d 193 (1993).

[9]Ky., 819 S.W.2d 33 (1991).

behind that amendment and we perceive none. On the contrary, the 1996 amendment was part of a sweeping substantive change of the Workers' Compensation Act, the sort of change ordinarily applied prospectively only. We agree with the Board, therefore, that the older reopening statute applies and that Ward was not obliged to allege or to produce Aobjective medical evidence@ in support of his motion to reopen.

We also agree with the Board that the ALJ's decision was supported by substantial evidence. Ward's testimony and that of his physician, if believed, provided substantial evidence that, since the injury, Ward's pain has increased and his ability either to concentrate on or to perform the movements of even a light or sedentary job has diminished.[10] As the Board noted, it is for the ALJ, not reviewing bodies, to assess the witnesses' credibility.[11]

For essentially the same reason, finally, we agree with the Board that the ALJ did not abuse his discretion when he denied DOT's untimely proffer of additional evidence concerning the possible meaning of Ward's missing bulbocavernosus reflex. The ALJ has broad discretion to reopen the proof.[12] The decision to deny reopening here in no way suggests that the ALJ was biased or that he gave unreasonable significance to the urologist's testimony about the reflex. He merely noted that the likely fact

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[10]*Cf.* Ratliff v. Harris Brothers Construction Company, Ky., 441 S.W.2d 127 (1969) (employee's and treating physician's testimonies deemed sufficient); Deby Coal Company v. Roark, Ky., 360 S.W.2d 511 (1962) (employee's testimony deemed sufficient).

[11]Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

[12]Past Coal Company v. Bishop, Ky., 871 S.W.2d 432 (1994).

of the missing reflex, a fact DOT's additional evidence would not have refuted, bore on his assessment of Ward's credibility. That assessment was peculiarly the ALJ's. It was not rendered improper merely because DOT failed to anticipate its own witness's testimony.

In sum, we agree with the Board that the ALJs applied the proper version of the reopening statute, afforded the parties a fundamentally fair process, and rendered decisions duly supported by substantial evidence. Accordingly, we affirm the June 19, 2002, order of the Workers' Compensation Board.

ALL CONCUR.

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