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TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000401-WC
AND
NO. 2006-CA-000513-WC

SONIA BARTEE

APPELLANT/CROSS-APPELLEE

PETITION AND CROSS-PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-09414
ACTION NO. WC-96-68717

UNIVERSITY MEDICAL CENTER; DR.
CRAIG ROBERTS; DR. RANIER
LENHART; HON. JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES/CROSS-APPELLANTS

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY,¹ SENIOR
JUDGE.

PAISLEY, SENIOR JUDGE: This case concerns an award of temporary
total disability benefits following a motion to reopen filed by
the employer, University Medical Center, disputing medical

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

expenses. Bartee alleges that the TTD award should be made from the date of her surgery and University Medical Center cross-appeals objecting to any award of TTD benefits. We find that under the facts the reopening statute, KRS 342.125, does not permit an award of temporary total disability benefits.

Bartee suffered a work-related injury to her left knee on May 9, 1996. A settlement agreement was approved awarding a 16.4% impairment and Bartee was also entitled to receive reasonable medical expenses. In March 2004, Bartee had an MRI performed and in April 2004, underwent arthroscopic surgery on the same knee. On June 8, 2004, University Medical Center filed a motion to reopen to dispute the medical bills received for that surgery on the basis that they were not related to the original 1996 knee injury. Bartee responded by acknowledging that there were issues to be determined relating to the medical expenses and joined in the reopening request; she did not, however, request or address the issue of increased permanent disability or temporary total disability benefits.

University Medical Center's motion was sustained on July 15, 2004, and the medical fee dispute was assigned to an ALJ for further adjudication. It was not until September 2004, that Bartee filed a separate motion to reopen based on a worsening of her condition and requesting TTD and permanent disability benefits.

The ALJ found that University Medical Center was responsible for the medical expenses incurred and dismissed Bartee's claim for benefits based on a worsening of her condition. The ALJ did not address the issue of TTD benefits. Bartee then filed a petition for reconsideration requesting an award of TTD benefits from the date of her surgery, April 21, 2004, through June 21, 2004, the date she returned to work. An amended order was issued awarding TTD benefits for the entire period requested. University Medical Center filed a petition for reconsideration arguing that the award of TTD benefits was improper for any period before the date Bartee filed her motion to reopen. University Medical Center's petition was denied on the basis that the issue arose from the compensability of the surgery; it was, therefore, University Medical Center's motion filed on June 8, 2004, which put the matter in issue. The principles of waiver and estoppel, the ALJ found, precluded University Medical Center from contesting the award of TTD benefits.

The Workers' Compensation Board found that pursuant to the plain language of KRS 342.125, TTD benefits could not be awarded prior to the time that either University Medical Center or Bartee filed a motion to reopen; it further found, however, that University Medical Center's motion to reopen to contest the medical expenses and Bartee's request for TTD benefits prior to

the final resolution of the reopening proceeding permitted an award from June 8, 2004, through June 21, 2004. We disagree with the Board to the extent that it found that University Medical Center's motion permitted an award. We hold that Bartee, who returned to work prior to the date she filed her motion to reopen, is not entitled to TTD benefits.

University Medical Center filed its motion disputing the medical bills pursuant to the reopening statute, KRS 342.125. That statute is a "remedy for addressing certain changes that occur or situations that come to light after benefits are awarded" and is a procedural device for invoking the jurisdiction of the Department of Workers' Claims to reopen a final award. *Dingo Coal Co., Inc. v. Tolliver*, 129 S.W.3d 367, 370 (Ky. 2004). In *Westvaco Corporation v. Fondaw*, 698 S.W.2d 837 (Ky. 1985), the court held that although KRS 342.125 does not directly provide a procedure for the employer to contest medical bills, it nevertheless is the proper avenue to pursue.

We are of the opinion that KRS 342.125 can be construed to permit a proceeding for the employer to challenge a medical claim. This section provides a mechanism to reopen an award on the ground of change of condition, fraud, or mistake, and if there is a procedure to cover the present case, it is in this section of the statutes. KRS 342.035 provides that medical fees are to be reasonable and subject to regulation by the Board. Thus, we infer the legislature

intended a procedure whereby disputes as to reasonableness, etc., could be resolved. *Id.* at 839.

Although the statute permits the reopening of a final award, it states that a reopening "shall not effect the previous order or award as to 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." The unambiguous language of KRS 342.125 prohibits a retroactive award of compensation; any award on reopening, therefore, is effective on the date on which the motion was filed. *Newberg v. Cash*, 854 S.W.2d 791 (Ky.App. 1993); *Reynolds v. Justice Coal Company*, 425 S.W.2d 750(Ky. 1968).

TTD benefits, like permanent and partial disability benefits, replace lost wages and are, therefore, payments made replacing income. KRS 342.0011(14). Since an award of TTD benefits on reopening is an award of compensation as defined under the Workers' Compensation Act, it can only be effective from the date of the filing of a motion to reopen. The unique facts of this case present the question of whether TTD benefits can begin from the date of an employer's motion disputing medical expenses or whether the claimant is required to file a separate motion alleging one of the grounds specified in KRS 342.125.

Although recognizing that KRS 342.125 precludes a retroactive award of benefits, the Board found that University Medical Center's motion to reopen for the limited purpose of disputing medical bills was sufficient to permit an award of benefits from that date through the date Bartee returned to employment. Following the Board's reasoning, once a claim is brought before the ALJ for adjudication on reopening, all issues are raised for consideration. We disagree.

The employer is responsible for payment of only reasonable and necessary medical expenses. KRS 342.020(1). The procedure for resolving disputes regarding the employer's responsibility is resolved by the filing of a motion to reopen and a Form 112. 803 KAR 25:012. The burden is on the employer to file the motion and to offer proof that it is not responsible for the disputed bills. See *Peabody Coal Company v. Goforth*, 857 S.W.2d 167 (Ky. 1993). A claim for increased benefits based on the grounds listed in KRS 342.125 is an entirely different proceeding and requires that the motion be filed with supporting medical reports and affidavits. A hearing is not automatic and is required only if the claimant proves a prima facie case. KRS 342.125; 803 KAR 25:010; *Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 681, 682 (Ky. 1972). Thus, a medical fee dispute and a motion to reopen for a change in disability are two distinct and separate procedures. Because of the distinctions between

the two procedures and the requirements necessary to invoke the jurisdiction of the Department of Workers' Claims, University Medical Center's filing of its motion to dispute the medical bills did not invoke jurisdiction for the consideration of Bartee's claim for TTD benefits.

The Board did not address the ALJ's finding that University Medical Center was precluded from challenging the award of TTD benefits based on waiver or estoppel. We note only that those equitable doctrines have no application to this fact situation. The essence of waiver is the relinquishment of a known right. *National Sur. Marine Ins. Corp. v. Wheeler*, 257 S.W.2d 573 (Ky. 1953). The filing of the motion by University Medical Center was not a relinquishment of a right but simply a use of the proper procedure to dispute medical bills. Moreover, there is no suggestion that University Medical Center acted in a manner that would have induced Bartee to believe she would be paid TTD benefits. See *Carroll County Memorial Hospital v. Yocum*, 489 S.W.2d 246 (Ky. 1972).

We hold that a claimant is entitled to TTD benefits only from the date a motion to reopen is filed in compliance with KRS 342.125 requesting those benefits. To avoid the consequences suffered by Bartee, the claimant facing elective surgery can file a prospective motion to reopen so that the

procedure will be compensable and income benefits permitted from the date of temporary total disability.

The decision of the Workers' Compensation Board is reversed and the case remanded to the ALJ for a decision consistent with this opinion.

HENRY, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I respectfully dissent from the majority opinion. It is both illogical and inconsistent to allow a reopening under KRS 342.125 to contest medical expenses of the surgery after the fact and yet to bar TTD flowing from that same surgery. The majority opinion would impose an additional requirement that a candidate for surgery prospectively file a motion for TTD prior to the surgery. The implications as to an emergency surgery are ominous indeed.

The reasoning of the Board on this issue was a correct and equitable interpretation of KRS 342.125. It restricted the award of TTD to Bartee for only that period running from the date of the University Medical Center's filing to reopen (June 8, 2004) through the date of her return to work (June 21, 2004). If the statute permits one party to seek redress for changes occurring subsequent to an award, it must be even-handed in its application to permit all the ramifications of such changes to

be addressed as to the other party. The payment of TTD for this period had nothing to do with Bartee's previous award. As soon as the University Medical Center "opened the door" on this issue, Bartee had a legitimate right to pursue a remedy as well before the ALJ.

The Board was correct in its analysis, and we have no basis to disturb its opinion. Therefore, I would affirm in all respects.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Wayne C. Daub
Louisville, Kentucky

BRIEF FOR APPELLEES/CROSS-
APPELLANTS:

Lyn A. Douglas
Fulton & Devlin
Louisville, Kentucky