

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002044-WC

PEPSI COLA GENERAL BOTTLERS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-01479

JOHN MURRELL;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

DIXON, JUDGE: Pepsi Cola General Bottlers, Inc., seeks review of a decision of the Workers' Compensation Board, which reversed and remanded an ALJ's decision on reopening. We affirm.

John Murrell worked for Pepsi as a route salesperson from July 2000, until his termination in July 2002. While working for Pepsi, Murrell injured his back and his knee in December 2000, and March 2001. Murrell sought workers' compensation benefits, and the parties ultimately agreed to settle Murrell's claims.

On November 4, 2003, an ALJ approved the parties' Form 110 settlement agreement, which established benefits based on Murrell's 21% permanent disability. Due to his disability, Murrell could not return to his former employment; consequently, Pepsi agreed to pay Murrell a triple income benefit pursuant to KRS 342.730(1)(c)1, for a period of 425 weeks. The agreement also contained the following statement:

Defendant reserves the right to reopen this claim pursuant to the provisions of KRS 342.125 and KRS 342.730 should Plaintiff return to work at the same or greater wages.

Nearly five years later, in August 2008, Pepsi moved to reopen the settlement to reduce Murrell's benefits. Pepsi asserted that Murrell was no longer entitled to a triple income benefit because he had a new job earning a greater wage than at the time of his injury. Murrell objected to reopening and contended Pepsi's motion was untimely. Following a hearing, the ALJ rendered an opinion reducing Murrell's award to a basic weekly benefit, with no income multiplier, pursuant to

KRS 342.730(1)(c)2. Despite Murrell's argument to the contrary, the ALJ found that KRS 342.730(1)(c)4 allowed an award to be reopened for adjusting income benefits depending on a claimant's employment status. The ALJ further noted the parties had considered a future benefit adjustment by including a reopening provision in the settlement agreement.

On appeal, the Board disagreed with the ALJ's reasoning and concluded Pepsi's motion was untimely filed beyond the four-year limitation period of KRS 342.125(3). The Board reversed and remanded the ALJ's opinion, and Pepsi filed this petition for review.

When this Court reviews a decision of the Board, our function is to correct the Board only where we believe it "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Furthermore, "[s]tatutory interpretation is a matter of law reserved for the courts and this Court is not bound by the Board's interpretation of the statute." *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 330 (Ky. App. 2000).

At the outset, we review the statutes relevant to reopening a workers' compensation award. KRS 342.125 addresses reopening a final award, including an award made pursuant to an approved settlement agreement. *Whittaker v. Pollard*, 25 S.W.3d 466, 469 (Ky. 2000). KRS 342.125(1) provides that a party may move to reopen an award on grounds of fraud, newly discovered evidence,

mistake, or change in impairment. The statute also creates a limitation period for reopening:

Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2, . . . no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits[]

KRS 342.125(3).

Next, we look to KRS 342.730, which addresses the calculation of income benefits. Under KRS 342.730(1)(c)1, an injured worker may have his basic income benefit tripled if he “does not retain the physical capacity to return to the type of work . . . performed at the time of injury[.]” Alternatively, KRS 342.730(1)(c)2 provides a basic income benefit if an injured worker returns to work making an equal or greater weekly wage than at the time of the injury, and it also allows the worker to receive a double income benefit “[d]uring any period of cessation of that employment[.]” Finally, KRS 342.730(1)(c)4 states:

Notwithstanding the provisions of KRS 342.125, a claim may be reopened at any time during the period of permanent partial disability in order to conform the award payments with the requirements of subparagraph 2. of this paragraph.

In the case at bar, Pepsi contends the Board erred by concluding that reopening was time-barred. Pepsi asserts that KRS 342.125(3) allows reopening to conform an award to KRS 342.730(1)(c)2; alternatively, Pepsi argues that,

pursuant to the settlement agreement, it reserved the right to reopen the award if Murrell's wages increased. After careful review, we disagree.

A. Reopening pursuant to KRS 342.125

Pepsi concedes that Murrell's settled award correctly provided a triple income benefit because he could not return to the type of work he performed at the time of his injury. *See* KRS 342.730(1)(c)1. Neither KRS 342.125(3), nor KRS 342.730 address a specific procedure for reopening an award calculated under KRS 342.730(1)(c)1. Pepsi urges a broad reading of the statutes and contends KRS 342.125(3) and KRS 342.730(1)(c)4, authorize reopening any award if the worker's post-award employment circumstances warrant a reduction in benefits pursuant to KRS 342.730(1)(c)2.

Murrell disagrees with Pepsi's interpretation of the statute and points out a factually-similar, though unpublished, decision of the Kentucky Supreme Court, *Phillips Tree Experts, Inc. v. Travis*, 2007 WL 1159761 (Ky. 2007), where the Court examined the propriety of reopening a KRS 342.730(1)(c)1 triple-benefit award for the purpose of conforming it to KRS 342.730(1)(c)2. In *Travis*, the Court succinctly explained :

KRS 342.730(1)(c)1 permits injured workers who lack the physical capacity to return to the work performed at the time of injury to receive a triple benefit. KRS 342.730(1)(c)2 encourages those who retain the physical capacity to return to the work performed at the time of an injury to do so and to earn the same or a greater wage. It accomplishes that purpose by authorizing a basic income benefit during employment at the same or a greater wage but a double income benefit during any period that the

employment ceases. KRS 342.730(1)(c)4 permits reopening at any time during the period of an award to conform it with the requirements of subparagraph 2.

Although KRS 342.730(1)(c)4 provides an additional ground for reopening, it mentions only subparagraph 2. It evinces a legislative intent to permit an award made under subparagraph 2 to be reopened and amended to reflect the cessation or resumption of employment at the same or a greater wage, regardless of whether KRS 342.125 would permit reopening. Nothing in subparagraph 4 evinces the intent to affect awards made under subparagraph 1. Contrary to the employer's assertion, KRS 342.125(3) does no more than create an exception to the usual time limits when reopening is sought under KRS 342.730(1)(c) 4.

Travis, slip op. at 3.

In the case at bar, Pepsi cannot rely on the exception created for reopening an award made under KRS 342.730(1)(c)2 to reopen Murrell's KRS 342.730(1)(c)1 award and essentially convert it to a (1)(c)2 award. Murrell properly received the triple benefit pursuant to KRS 342.730(1)(c)1; accordingly, the general reopening provisions and four-year limitation period of KRS 342.125 applied to his award. As Pepsi moved to reopen nearly five years after the award, the motion was untimely, and the Board properly reversed the ALJ on this issue.

B. Settlement Agreement

Pepsi alternatively argues it retained the right to reopen pursuant to the parties' agreement, which stated, "Defendant reserves the right to reopen this claim pursuant to the provisions of KRS 342.125 and KRS 342.730 should Plaintiff return to work at the same or greater wages."

After careful review, we conclude that, while the agreement may have provided Pepsi a right to reopen if Murrell's wages increased, that right expired four years after the award in accordance with the applicable statute of limitation.² To reach a different result would be contrary to the language of KRS 342.125(3) and the beneficial policies advanced by the Workers' Compensation Act.

For the reasons stated herein, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Laurie Goetz Kemp
Louisville, Kentucky

BRIEF FOR APPELLEE JOHN
MURRELL:

Don Meade
Louisville, Kentucky

² Although we recognize the parties' freedom to negotiate a settlement, Pepsi's interpretation of the reopening provision would suspend the otherwise applicable four-year limitation period. Kentucky's highest Court has stated, "Statutes of limitation are statutes of repose, and it is the rule in this state that contracts undertaking to fix a longer period of limitation than that established by the statute are against public policy and are void." *Kentucky River Coal & Feed Co. v. McConkey*, 271 Ky. 261, 111 S.W.2d 418, 419 (1937).