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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001797-WC

ST. JOSEPH HOSPITAL APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-00419

ANGELA FRYE; HON. R. SCOTT
BORDERS, ADMINISTRATIVE LAW
JUDGE; WORKERS' COMPENSATION
BOARD APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an appeal involving the dismissal of Appellee Angela Frye's workers' compensation claim and whether the failure to join an earlier claim was a valid basis for dismissal of the second claim. Based upon the

following we affirm the decision of the Workers' Compensation Board (the Board).

BACKGROUND INFORMATION

Frye filed her first claim against Appellee, St. Joseph Hospital (St. Joseph) on September 5, 2008. In the 2008 claim, she alleged a cervical injury due to a fall of five (5) feet from a dumpster platform striking her head and chin on the lip of the dumpster. This incident occurred on January 23, 2008.

In an opinion and award dated June 2, 2009, Administrative Law Judge (ALJ) Chris Davis found that Frye's cervical and lumbar conditions were work-related and permanent. Davis determined from a cervical standpoint, that Frye had sustained a 7% impairment pursuant to Diagnosis Related Estimates (DRE) category II as a result of her injury.

> However, the ALJ also found Frye's lumbar injury did not qualify for a DRE rating and therefore assigned a 0% rating, but awarded future medical benefits for the lumbar injury. The ALJ also determined pursuant to KRS [Kentucky Revised Statutes] 342.730(1)(c)1, permanent partial disability benefits awarded as to cervical claim would be enhanced by a factor of three.

Board's order entered September 2, 2011, at 8.

Frye's second injury, and the one which precipitated this appeal, occurred on April 23, 2009. Frye alleged that she suffered an injury to her lumbar spine when she fell on a wet floor while carrying baked potatoes into the cafeteria. In contesting her claim, St. Joseph contended that Frye had not presented any evidence of a permanent injury or permanent disability to support an award of

benefits and that the claim was barred by the merger provision contained in KRS 342.270(1).

A hearing was thereafter conducted before the ALJ and he found as follows:

> The first issue for determination is whether [sic] not the Plaintiff's claim resulting from the April 23, 2009, incident is barred for failure to merge the claim with her pending claim resulting from her January 23, 2008, work-related injury in violation of KRS 342.270(1).
>
> KRS 342.270(1) states in pertinent part "when the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named Employer which have accrued and which are known, or should reasonably be known, to him. Failure to join accrued causes of action will result in such claims being barred under this chapter as waived by the employee."
>
> The following facts are undisputed. The Plaintiff suffered a work-related injury on January 23, 2008, while employed by St. Joseph Hospital East. As a result of the January 23, 2008, incident the Plaintiff alleged injury to her cervical and lumbar spine. On April 9, 2009, a final hearing in regards to the January 23, 2008, injury claim was held in front of Administrative Law Judge Chris Davis. On April 23, 2009, the Plaintiff suffered her slip and fall incident on a wet floor allegedly injuring her lumbar spine. On June 2, 2009, an Opinion, Order, and Award was rendered by ALJ Davis finding the Plaintiff suffered a work-related injury to her cervical and lumbar spine, awarding income benefits for the cervical spine injury and medical benefits only for the lumbar spine injury. On April 20, 2010, the Plaintiff filed her Application for Resolution of Injury Claim regarding the April 23, 2009, work-related incident claiming injury to her lumbar spine. It is clear that Plaintiff's counsel was not aware of the April 23, 2009, work-related incident until after the Opinion, Order, and Award was received on June 2, 2009. His client never told him about it.

The Plaintiff admits she did not move to join the claim resulting from her April 23, 2009, work-related incident to the January 23, 2008, injury claim prior to the rendering of the Opinion, Order, and Award on June 2, 2009. The Plaintiff argues it was not until after the rendition of the Opinion, Order, and Award of June 2, 2009, that she realized she had a permanent injury to her lumbar spine for which she was entitled to Worker's Compensation benefits. She therefore argues that she could not have waived a claim of which she was not aware.

The Plaintiff argues she cannot be expected to have self diagnosed or comprehended the extent of the April 23, 2009, injury until her physicians advised her of that condition which did not occur until she had an MRI and was not able to respond to the limited therapy given. They argue that her cause of action had not accrued and was not known or should have been reasonably known to her. They therefore argue the merger doctrine does not apply to bar her April 23, 2009, injury claim.

The Defendant Employer argues the Plaintiff's April 23, 2009, low back injury claim is clearly barred by the merger doctrine as set forth in KRS 342.270(1). The Defendant Employer argues the statute is clear that during the pendency of the claim the Plaintiff shall join all causes of action against the named Employer which have accrued and which are known or should reasonably be known to him.

In the case of *Coslow v. General Electric Co*., 877 S.W.2d 611 (Ky. 1994), the Supreme Court held that the date of the traumatic event is the date that the claim accrues. Further, during the pendency of that claim means prior to the decision in that claim being rendered. Therefore, KRS 342.270 (1) requires that the Plaintiff join all causes of actions against the named Employer which have accrued and which are known, or should reasonably be known, to him, during the pendency of that claim.

> In the case of *Ridge v. VMW Enterprises Inc*., 114 S.W.3d 845 (Ky. 2003), the Supreme Court stated that the statute is clear, unequivocal, and mandatory, both with respect to the worker's obligation to join all causes of actions against the Employer during the pendency of a claim and with respect to the penalty for failing to do so.
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> In this instance after careful review of the evidence, the Administrative Law Judge finds that the Plaintiff clearly knew on April 23, 2009, the date she slipped and fell on the wet floor, that she had suffered an injury to her lumbar spine significant enough to require her to seek medical attention. In fact, she reported the incident to her supervisor and a first report of injury was made. Therefore, the Administrative Law Judge finds the Plaintiff's cause of action had clearly accrued as set forth in KRS 342.270 (1) prior to the rendering of the Opinion, Order, and Award on June 2, 2009.
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> Further, the Administrative Law Judge finds the Plaintiff failed to notify her attorney of the April 23, 2009, incident during the pendency of the January 23, 2008, injury claim and failed to join the April 23, 2009, accrued cause of action to the pending January 23, 2008, cause of action in violation of KRS 342.270(1) thereby waiving her April 23, 2009, cause of action.
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> While the undersigned Administrative Law Judge concedes this finding creates a harsh result for the Plaintiff, the statute and case law is clear. The Plaintiff knew that she suffered a work-related injury on April 23, 2009, that her January 23, 2008, claim was still pending, and she failed to join her April 23, 2009, cause of action with the January 23, 2008, cause of action. Therefore, pursuant to KRS 342.270(1), the Plaintiff waived any cause of action she may have as a result of the April 23, 2009, incident for failure to join the same with her January 23, 2008, pending claim. Due to the foregoing findings, the remaining issues herein are deemed moot.

Board's order entered September 2, 2011, at 8 -12.

Frye appealed the ALJ's decision to the Board. The Board reversed the ALJ's opinion based upon the following:

> We recognize 803 [Kentucky Administrative Regulations] KAR 25:010 Section 13 (15) provides upon motion with good cause shown, an ALJ may order additional discovery or proof be taken between the BRC and the date of the hearing, but no regulation anticipates proof taking after a hearing has been held. In *T. J. Maxx v. Blagg*, 274 S.W.3d 436 (Ky. 2008), the Supreme Court, in interpreting 803 KAR 25:010 Section 13 (15), determined an ALJ erred by ordering a university evaluation after taking the claim under submission. The Court noted the above cited regulation permitted an ALJ to order additional discovery or proof between the BRC and the hearing upon motion with good cause shown, but no regulation anticipates that additional proof will be taken after a claim has been heard, briefed, and taken under submission.
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> Unlike the fact situation in *Blagg*, the facts of this case *sub judice* demonstrate although the second injury occurred after proof taking and the formal hearing had occurred in the earlier claim, it occurred prior to the earlier claim's submission date and briefing. The fact remains, however, proof time had ended in the earlier claim and a formal hearing had already been held. Based on the holding in *Blagg*, therefore, we determine it would have been futile to require Frye to merge Claim No. 2010-00419 with 2008-01107 post hearing on the earlier claim after proof taking had ended.
>
> We also recognize the holding in *Westerfield* is unpublished, and as such, cannot be cited as authority. Moreover, the language contained in *Westerfield* in which the Court noted a claim is pending for the purpose of KRS 342.270(1) between the time the application is filed and decided appears to be dicta. Finally, we agree with Frye, St. Joseph's reliance on *Ridge v. VMW Enterprises, Inc*. is misplaced since the worker in *Ridge* had knowledge of the later injury when he filed benefits for the earlier injury. This is not the situation in the case

> at bar. For these reasons, we reverse the ALJ's finding that by failing to merge the April 23, 2009 injury with the earlier claim, KRS 342.270(1) mandates Frye waived her cause of action contained in File No. 2010-00419. It appears the facts presented in this case represent one of first impression in which a subsequent injury arises after proof taking had transpired and a formal hearing had been held in the earlier claim, but before a decision has been rendered in the earlier claim. Under this fact scenario, for purposes of KRS 342.270(1), based on the present wording of our regulations, which does not anticipate proof taking after a hearing, and based on the definition of "pendency" as contained in Black's Law Dictionary, we determine "pendency" of a claim refers to and include[es] the date the formal hearing is held on the earlier claim. It is this date which marks the beginning of time in which all proof has been submitted and marks the beginning of time in which the parties are "awaiting a decision." See Black's Law Dictionary, 1154, supra.
>
> Accordingly, the March 22, 2011 opinion and order and the April 20, 2011 order denying Frye's petition for reconsideration, are hereby REVERSED and this matter is REMANDED to the ALJ to address all other pending issues.

Id. at 19-21.

St. Joseph Hospital then brought this appeal arguing that the Board erred in reversing the ALJ's order.

STANDARD OF REVIEW

As a reviewing court in workers' compensation cases, our function is to correct the Board when we believe it "has 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).

"It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim," *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). With this standard in mind, we examine the merits of the appeal.

DISCUSSION

The sole issue in this case is whether Frye's failure to join her first workers' compensation claim (the 2008 claim) with her second claim (the 2009 claim) was fatal to recover under the second. The ALJ originally held that it did; however, as set forth above, the Board reversed that decision and remanded the case. The Board based its decision upon KRS 342.270(1) and found that caselaw which set forth that there must be joinder was based upon the premise that the worker knew of the second claim when she filed the first. Since Frye did not, the Board held that joinder of the claims was not necessary.

KRS 342.270(1) states, in relevant part, as follows:

> When the application is filed by the employee or during the pendency of that claim, he or she shall join all causes of action against the named employer which have

> accrued and which are known, or should reasonably be known, to him or her. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

Until the adoption of KRS 342.270(1), workers were permitted to file multiple claims and were not required to join them, even when the claims resulted from the same accident. *Woodbridge INOAC, Inc. v. Downs*, 864 S.W.2d 306 (Ky. App. 1993) (*overruled on other grounds*). In *Holbrook v. Lexmark Int'l Group, Inc.*, 65 S.W.3d 908 (Ky. 2001), the Supreme Court, discussing its holding in *Alcan Foil Prod., a Div. of Alcan Aluminum Corp. v. Huff,* 2 S.W.3d 96 (Ky. 1999), stated that "entitlement to workers' compensation benefits arises with a work-related accident that causes an injury and does not require that the injury result in a permanent functional impairment or that it be permanently disabling." *Holbrook* at 911.

St. Joseph on the other hand, contends that since the 2008 claim was still pending at the time of Frye's slip and fall injury in 2009, her failure to join the 2009 claim with the 2008 claim should result in a bar of the new claim. It argues that pursuant to *Coslow v. Gen. Elec. Co.*, 877 S.W.2d 611 (Ky. 1994), a claim "accrues" for purpose of KRS 342.270 on the date of the injury. St. Joseph also cites several Board decisions which are not published and not proper precedent.

Frye argues that since the second injury occurred after proof was concluded in the initial claim, stipulations were made and a hearing was conducted, it would be unfair to deny her an opportunity to pursue her 2009 claim.

We do not find that a case which has been heard and concluded is "pending" within the meaning of KRS 342.270. In making its determination to reverse, the Board relied on the fact that there were no regulations governing the reopening of a case after a hearing was concluded. We agree. *Blagg,* 274 S.W.3d 436, specifically held that an ALJ erred in interpreting 803 KAR 25:010 Section 13(15) to allow it to order a university evaluation be conducted after the claim had been taken under submission. Frye's fall, which was the basis for the second claim, occurred after the case had been concluded. While no decision had yet been made, Frye was diligent in her efforts to get the 2009 claim before the employer. We therefore agree with the decision of the Board.

ALL CONCUR.

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