Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 11, 2016

CLAIM NO. 201201406

RIVERWAY, INC. PETITIONER

VS. **APPEAL FROM HON. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

JAMES PRICE
HON. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENT

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Riverway, Inc. ("Riverway") appeals from the August 12, 2015 Opinion, Award and Order and the November 6, 2015 Order on Petition for Reconsideration rendered by Hon. Roland Case, Administrative Law Judge ("ALJ"). The sole question on appeal is whether the ALJ erred in finding Riverway is not entitled to a credit for a prior retraining incentive benefit ("RIB") award against

the disability award in James Price's ("Price") new claim for coal workers' pneumoconiosis ("CWP"). For the reasons set forth herein, we affirm.

The following facts, as determined by the ALJ, are not contested on appeal. Price received a RIB award by Opinion and Award dated June 30, 1992 in Claim Number 91-32420 against Riverway. Thereafter, he continued to work for Riverway and experienced additional exposure to coal dust until July 13, 2012. Price filed a new Form 102 Application for Resolution of Coal Workers' Pneumoconiosis Claim on October 16, 2012. In the new claim, the ALJ concluded Price is entitled to an award based on 75% disability.

In response to Riverway's request for a credit in the amount of the prior RIB award, the ALJ determined the statutory provisions for obtaining a credit apply solely to a reopening under KRS 342.125(5). He noted Price's claim was a new claim based upon additional exposure after the RIB award, and there is no overlap in the periods of the awards. Accordingly, the ALJ applied no credit.

Riverway filed a petition for reconsideration arguing the ALJ erred in interpreting KRS 342.125, and failed to apply the statute correctly per its intent with regard to successive claims for benefits under KRS 342.732.

Riverway contended the provisions of KRS 342.125(5) apply to any claim for additional benefits under KRS 342.732.

In his Order on Petition for Reconsideration, the ALJ again noted there was no overlap with the RIB award that had been fully paid. Additionally, he cited this Board's reasoning in Sidney Coal Co. v. Mullins, Claim Number 2006-01038 (DCW February 29, 2008), in finding the provisions of KRS 342.125 apply only to re-openings. Accordingly, the ALJ overruled the petition for reconsideration.

On appeal, Riverway argues the ALJ erred in failing to grant a credit for the prior RIB award. Because the facts in this case are not in dispute, and Riverway has raised a purely legal question involving the interpretation of a statute, our review is *de novo*. *See* Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). We also note our analysis must begin with the plain language of the statutes, with the goal to give effect to the intent of the General Assembly. Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 551 (Ky. 2011).

We believe this appeal centers on the question of whether Price has filed a motion to reopen his prior claim. If Price's claim is to be considered a reopening, Riverway is entitled to a credit for the prior RIB award as set

forth in KRS 342.125(5)(b). If Price has, in fact, filed a new claim resulting from his exposure since his prior claim, Riverway is not entitled to the credit found in KRS 342.125(5)(b).

Except for certain delineated circumstances not applicable to this case, reopening and review of a prior award or order is permitted only within four years following the date of the original award or order granting or denying benefits. KRS 342.125(3). Price's award of RIB was dated June 30, 1992. He filed the present claim in 2012, well after the four year limitation set forth in KRS 342.125(3). Therefore, per the plain language of the statute, Price was not statutorily permitted to reopen his prior claim.

Riverway nonetheless contends Price's claim is, for all intents and purposes, a reopening. It bases this argument on the terminology used in KRS 342.125(1) and (5):

> (1) Upon **motion** by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:
>
> …
>
> (5)(a) Upon the **application** of the affected employee, and a showing of progression of his previously-diagnosed occupational pneumoconiosis resulting from exposure to coal dust and

> development of respiratory impairment due to that pneumoconiosis and two (2) additional years of employment in the Commonwealth wherein the employee was continuously exposed to the hazards of the disease, the administrative law judge may review an award or order for benefits attributable to coal-related pneumoconiosis under KRS 342.732. An application for review under this subsection shall be made within one (1) year of the date the employee knew or reasonably should have known that a progression of his disease and development or progression of respiratory impairment have occurred. Review under this subsection shall include a review of all evidence admitted in all prior proceedings.
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> (b) Benefits awarded as a result of a review under this subsection shall be reduced by the amount of retraining incentive benefits or income benefits previously awarded under KRS 342.732. The amount to be deducted shall be subtracted from the total amount awarded, and the remaining amount shall be divided by the number of weeks, for which the award was made, to arrive at the weekly benefit amount which shall be apportioned in accordance with the provisions of KRS 342.316.
> (Emphasis added).

We acknowledge the ambiguity in KRS 342.125. While KRS 342.125(1), dealing with injury claims, refers to reopening "upon *motion* by any party", KRS 342.125(5), dealing specifically with CWP claims, states an ALJ may review an award or order "[u]pon *application* of the affected employee". (Emphasis added). Through the use of

this differing language, we presume the legislature drew a distinction between a "motion to reopen" and an "application" of an employee affected by CWP. However, the significance of this distinction is unclear.

Prior to 1996, KRS 342.125(2) dealt with CWP claims and set forth the evidentiary requirements to establish a worsening of CWP. The provision began with the same language in today's version of KRS 342.125(5)(a): "[u]pon *application* of the affected employee, and a showing of progression of his previously diagnosed occupational pneumoconiosis…" However, in language that was removed in 1996, the provision went on to explain, "[s]uch a *reopening* may also occur upon a showing of progression of respiratory impairment." Therefore, at least prior to 1996, the "application" and the "reopening" were synonymous. Because the reference to a CWP-related "reopening" was removed, one might fairly deduce the legislature intended to draw a distinction between a motion to "reopen" and an "application" pursuant to KRS 342.125(5).

Though we acknowledge these ambiguities, we are nonetheless left with the inescapable fact that the four-year time limitation specified in KRS 342.125(3) applies to the entire statute. There is nothing in KRS 342.125 excepting an application made pursuant to subsection (5)

from this time limitation. Importantly, though the General Assembly revised KRS 342.125 in 1996, removing the reference to a "reopening" related to CWP claims, it did not remove subsection (5) entirely from KRS 342.125. The provision permitting a credit for a previously paid RIB award has not been relocated to KRS 342.732; rather, it remains within the statute generally governing the reopening of claims.

For these reason, we are compelled to conclude KRS 342.125(5) applies only to the reopening of CWP claims made within four years of the original award or order. The reduction in benefits found in KRS 342.125(5)(b) therefore does not apply to Price's claim. There is no provision in KRS 342.732 permitting a credit for a previously paid RIB award. We are not at liberty to establish a credit through judicial fiat.

We are likewise not convinced by Riverway's citation to McCoy Elkhorn Coal Corporation v. Sullivan, 862 S.W.2d 891 (Ky. 1993), in which the Supreme Court characterized a RIB award as one part of the increasing benefit levels set out in KRS 342.732, but not a separate, distinct benefit. The Court explained:

> . . . [I]t is clear that despite the difference in its name, the retraining incentive benefit is not an entirely

> separate benefit but is part of an ascending scheme of benefits for workers with varying degrees of proved respiratory impairment or disease category and, hence, occupational disability, from none [KRS 342.732(1)(a)], to partial [KRS 342.732(1)(b)], to total [KRS 342.732(1)(c) and (d)]. Under this scheme, a worker's occupational disability is presumed to increase with either his respiratory impairment or disease category, and his compensation, in the form of a retraining incentive benefit [KRS 342.732(1)(a)] or an income benefit [KRS 342.732(1)(b), (c), (d), increases accordingly.

The Court further observed, "In other words, a worker may not receive both a RIB benefit and the full income benefit for which he would otherwise be entitled by virtue of his occupational disability." Id. at 893.

Riverway also cites Helton v. Canada Mountain Coal Auguring, Inc., 892 S.W.2d 588 (Ky. 1995). In Helton, the Supreme Court held the expiration of an award of permanent partial disability benefits before the claimant's last employment does not entitle him to additional benefits without an increase in occupational disability. Riverway asserts KRS 342.125(5) is to be considered in deciding any subsequent claim for CWP where the worker was previously compensated for the disease. In support of this view, Riverway cites the following statement from Helton:

> Where a worker has been awarded a RIB and subsequently is entitled to receive a higher level of benefits pursuant to a different section of KRS 342.732, the subsequent award of income benefits is reduced by the amount of the RIB which has been received. KRS 342.125(2)(b). In other words, a worker may not receive both a RIB benefit and the full income benefit for which he would otherwise be entitled by virtue of his occupational disability.
> Id. at 590.

Both Sullivan and Helton were decided prior to the revision of KRS 342.125 in 1996. Prior to 1996, there was no four-year time limitation to file a motion to reopen. In fact, there was no time limitation whatsoever. Thus, it was clear that a credit for a prior RIB award was granted in any reopening of a CWP claim, and the Supreme Court articulated as much in Sullivan and Helton. Since that time, the General Assembly has added the four-year limitation to the reopening of a claim. We are therefore bound to conclude Price's claim is a new claim, not a reopening.

Accordingly, the August 12, 2015 Opinion, Award and Order and the November 6, 2015 Order on Petition for Reconsideration rendered by Hon. Roland Case, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS IN PART, AND FILES A SEPARATE OPINION.

ALVEY, Chairman. While I concur with the result reached by the majority in the case, I believe it is imperative we make a distinction. If this new filing were solely for a retraining incentive benefit, I believe it would be precluded pursuant to KRS 342.732 since that is a one time only benefit. The case *sub judice* is not a RIB claim but rather a true occupational disease claim, and therefore I do not believe any portion of it should be precluded.

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