Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 11, 2022

CLAIM NO. 199448971

DANA TRUCKING COMPANY PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, CHIEF ADMINISTRATIVE LAW JUDGE**

JEFF NORTH
and HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Dana Trucking Company ("Dana") appeals from the October 1, 2021, Order of Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ"), overruling its Motion to Reopen. The Motion to Reopen alleges "mistake" based upon the failure of Hon. Thomas Nanney, Administrative Law Judge ("ALJ Nanney"), to subject the January 30, 1998, award to the tier-down provision contained in KRS 342.730(4) which was in effect at that time.

Dana asserts three arguments on appeal. It first asserts the tier-down provision is included in ALJ Nanney's award by operation of the law regardless of whether the specific language was included in the award. Next, Dana argues the Board is authorized to correct an error of law even if Dana is not authorized to formally raise mistake in a much later pleading. Finally, in an argument nearly identical to its second argument on appeal, Dana argues the Board is authorized to make a correction when the unaltered result constitutes a gross injustice to one of the parties.

BACKGROUND

Jeff North ("North") filed a Form 101 alleging he sustained injuries to his hip, ribs, lungs, pelvis, and left knee due to a work-related motor vehicle accident on October 27, 1994.

In the January 30, 1998, Opinion, ALJ Nanney set forth the following findings of fact and conclusions of law:

> 2. The evidence establishes that the plaintiff sustained severe injuries as a result of the incident of October 27, 1994, including broken ribs, a punctured lung, a collapsed lung, a broke hip, a fractured pelvis, a puncture injury to his leg a significant left knee injury as well as a head injury. Although plaintiff apparently recovered from some portions of the injury, he nevertheless retained substantial impairment as a result of the broken hip and the knee injury, as well as an aggravation of his prior back condition. As previously noted, the plaintiff underwent a total hip replacement, as well as a substantial surgery on his left knee. I find his testimony in regard to his subjective complaint to be very credible. It is apparent that he continues to suffer from significant amounts of pain and is extremely limited in his activities. I further note that plaintiff has only an eighth grade education and that his work history is limited to manual labor in the coal mining industry.

> 3. Therefore, after reviewing the lay and medical testimony and taking into consideration Plaintiff's age, education and work history, I find that the Plaintiff is suffering from an occupational disability of 100% under the principles of Osborne vs. Johnson, Ky., 432 SW2d 800 (1968).
>
> In reaching this conclusion, I essentially accept the testimony of Dr. Ellingson that the plaintiff has sustained a 20% impairment to the body as a whole as a result of the hip replacement and, based upon the testimony of Dr. Kibler, an additional 8% to the body as a whole as a result of the knee injury. Plaintiff is precluded from performing work requiring any bending, stooping or crawling.

ALJ Nanney found North had a prior active non-compensable 15% occupational disability. He also found insufficient evidence of an arousal of a pre-existing dormant condition and dismissed the Special Fund as a party.

ALJ Nanney set forth the following Order and Award:

> 1. The Plaintiff, Jeff North, shall recover of the Defendant-Employer, Dana Trucking Company, and/or its insurance carrier, the sum of $261.11 per week for 85% occupational disability beginning October 27, 1994 and continuing thereafter for so long as he is so disabled together with interest at the rate of 12% per annum on all past and unpaid installments of compensation and Defendant shall take credit for any compensation heretofore paid.
>
> 2. The plaintiff's claim against the defendant, Special Fund, is DISMISSED.
>
> 3. The Plaintiff shall further recover of the Defendant-Employer and/or its insurance carrier for the cure and relief from the effects of the injury such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability.

On February 13, 1998, Dana filed a Petition for Reconsideration requesting ALJ Nanney correct his calculation of the exclusion for the prior active disability. In a March 11, 1998, Order, ALJ Nanney modified the weekly rate of income benefits. Importantly, Dana did not challenge the original Order and Award based upon ALJ Nanney's failure to include in the decision the tier-down provision as set forth in the version of KRS 342.730(4) as amended in 1994.[1] An additional Petition for Reconsideration was not filed after the March 11, 1998, Order and no appeal was taken.

On September 2, 2021, Dana filed a Motion to Reopen alleging "mistake" on the grounds that the tier-down language was not included in the January 30, 1998, Order and Award.

In the October 1, 2021, Order, the CALJ held as follows:

> Defendant/Employer Dana Trucking has filed a motion to reopen on grounds of mistake under KRS 342.125(1)(c).
>
> Plaintiff Jeff North was injured at Dana on October 27, 1994. An ALJ awarded him total disability benefits (subject to 15% prior active disability "carve-out") on January 30, 1998. He has received $261.11 per week under that award for the last 23 years.
>
> Now, Dana asks that the claim be reopened so that the benefits can be adjusted downward when he reaches age 65 on January 30, 2024. The "mistake" that forms the basis for the motion is that the ALJ who made the award in 1998 failed to make it subject to the "tier-down" statute; the version of KRS 342.730(4) applicable to injuries occurring in 1994 reduced benefits 10% per year from age 65 through age 70. (In 1996, the statute was amended and the tier-down provision removed.)

[1] As noted by the CALJ, KRS 342.730(4) was amended in 1996 removing the tier-down provision.

> Regardless of whether the tier-down statute applied to this claim when it was originally decided, the Chief ALJ finds the Defendant has not made a prima facie case for reopening sufficient to refer it to an ALJ for a ruling on the merits. The award in this claim was final long ago. Dana failed to petition the original ALJ for reconsideration of the award to correct what may have been a patent error. KRS 342.281. And it failed to appeal over the absence of the limiting language of KRS 342.730(4) that it now claims is applicable. KRS 342.285. The motion is overruled.
>
> No Petition for Reconsideration was filed.

ANALYSIS

Dana first asserts the tier-down provision is included in ALJ Nanney's award by operation of law by virtue of the iteration of KRS 342.730(4) in effect at the time North sustained his work-related injuries. Consequently, the tier-down provision applies regardless of whether it is cited in specific terms in the award. We disagree.

As an initial matter, Dana failed to file a Petition for Reconsideration contesting the CALJ's October 1, 2021, Order overruling of its Motion to Reopen alleging "mistake." While this Board is aware of the fact that the issues Dana has raised on appeal are questions of law or mixed questions of law and fact, issues that can still be reached despite the failure to file a Petition for Reconsideration, Dana's failure to file a Petition for Reconsideration makes the following findings of fact in the October 1, 2021, Order, findings detrimental to its appeal, irrefutable:

> - "Dana failed to petition the original ALJ for reconsideration of the award to correct what may have been a patent error. KRS 342.281."

- "And it failed to appeal over the absence of the limiting language of KRS 342.730(4) that it now claims is applicable. KRS 342.285."

These findings of fact, verified by our examination of the record and uncontested by Dana in a Petition for Reconsideration following the October 1, 2021, Order, makes the Motion to Reopen, *filed twenty-three years after ALJ Nanney's January 30, 1998, Order and Award*, untimely.

The CALJ correctly overruled Dana's Motion to Reopen as the motion is barred by the statute of limitations contained in KRS 342.125(3) which reads, in relevant part, as follows:

> **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., or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award**, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party. (emphasis added.)

The case of Burroughs v. Martco, 339 S.W.3d 461 (Ky. 2011) is directly on point. In Burroughs v. Martco, supra, on March 3, 2009, the claimant filed a Motion to Reopen alleging mistake arguing the award dated July 19, 2004, contained a mistake regarding the duration of his permanent total disability benefits. The motion was overruled by the ALJ. This Board and the Kentucky Court of Appeals affirmed. The Kentucky Supreme Court, in affirming the decision of the Court of Appeals, held as follows:

> The ALJ who denied the claimant's motion acknowledged that the court construed KRS 342.125(1) (presently KRS 342.125(1)(c)) in *Wheatley v. Bryant* Auto Service as permitting an ALJ to reopen a final award *sua sponte* in order to correct a mistake in applying the law as it existed at the time of the award. *Wheatley* was decided, however, at a time when KRS 342.125 placed no limitations on the time for reopening. That was not the case in February 2009, when the claimant sought to have his award reopened and corrected.
>
> As amended in 2000 and as applicable to the claimant's motion, KRS 342.125(3) provides as follows:
>
> > 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., or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.
>
> **KRS 342.125(3) barred a reopening based on "mistake" for the purpose of correcting the claimant's award because he filed his motion more than four years after the original award and more than four years after the subsequent order granting additional benefits. Thus, the ALJ did not err by denying the motion as being untimely.**

Id. at 464. (emphasis added.)

Consequently, based solely upon the statute of limitations set forth in KRS 342.125(3) and the Court's guidance in Burroughs, we affirm the CALJ's Order overruling Dana's motion. Further, Dana seemingly concedes that its Motion to

Reopen is not timely, as its second and third arguments suggest this Board can *sua sponte* "correct" the alleged error made by ALJ Nanney in the January 30, 1998, Order and Award even though it "may not be able to request correction on its own behalf over four years after the opinion is final."

Nonetheless, despite the fact that Dana's motion is barred by the four-year statute of limitations set forth in KRS 342.125(3), thereby rendering the arguments in this appeal moot, we will briefly address each issue raised in Dana's appeal.

We acknowledge the 1994 version of KRS 342.730(4) was in effect at the time of North's injury. However, the 1994 version of the statute in question was repealed before ALJ Nanney rendered his January 30, 1998, decision. Thus, whether the tier-down language was required to be imposed in the award is an inquiry which should have been addressed with ALJ Nanney in a Petition for Reconsideration. Had ALJ Nanney still omitted the tier-down language in the award and failed to offer any additional findings regarding this omission, the alleged error should have brought to the attention of this Board in 1998 in the form of an appeal and *not* in 2021, twenty-three years later, under the guise of a Motion to Reopen alleging "mistake."

The doctrine of *res judicata* is the underlying principle that bars Dana's motion. The doctrine of *res judicata* "prohibits the relitigation of matters which actually were, **or could have been**, litigated to a conclusion in an earlier action." Godbey v. University Hosp. of the Albert B. Chandler Med. Ctr., 975 S.W.2d 104, 105 (Ct. App. 1998) (emphasis added). In Turner v. Bluegrass Tire Co.,

331 S.W.3d 605, 608 (Ky. 2010), the Supreme Court explained that "final workers' compensation awards, like other judgments, are subject to the doctrine of finality." *Id.* The doctrine of *res judicata* is a central tenet within our legal system. For Dana to challenge ALJ Nanney's Order and Award in a Motion to Reopen alleging "mistake" twenty-three years afterwards and regarding an issue it failed to raise in a Petition for Reconsideration and in an appeal to this Board is an attempt to undermine the doctrine of *res judicata*.

Next, Dana asserts this Board is authorized to *sua sponte* correct mistakes of law even if Dana is unable to request the correction on its own behalf. On this issue, we affirm.

Dana correctly observes the Board is permitted to *sua sponte* reach errors of law even if unpreserved on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Dana is also correct in acknowledging it now is unable to request a correction of ALJ Nanney's alleged error of law. For the reasons set forth above, ALJ Nanney's alleged oversight may not be addressed by this Board twenty-three years after-the-fact. As noted, Dana's Motion to Reopen alleging "mistake" was clearly filed outside the four-year statute of limitations contained in KRS 342.125(3). Consequently, we do not have the jurisdiction to revisit the nuances of an Order and Award rendered twenty-three years ago, particularly in light of the fact Dana failed to bring this alleged error to the attention of ALJ Nanney in a Petition for Reconsideration or this Board in a timely appeal.

Finally, Dana asserts this Board is authorized to correct a mistake when the opposite result would result in a "gross injustice" to one of the parties. Dana merely rephrases its second argument. As previously stated, we are not authorized to alter a final award rendered twenty-three years earlier based on an alleged error not raised before the ALJ in a Petition for Reconsideration or appealed to this Board. Further, Messer v. Drees, 382 S.W.2d 209 (Ky. 1964), is wholly inapplicable, as it involved a *promptly-filed* Motion to Reopen by the claimant in order to introduce medical evidence regarding a psychiatric condition potentially induced by the work-related physical injury. As made clear by the Kentucky Supreme Court's predecessor, the Kentucky Court of Appeals, its decision to grant the claimant's Motion to Reopen was motivated by its desire to provide the *plaintiff* with the entirety of the benefits he is due. The Court of Appeals explained, "[t]he important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it." Messer v. Drees, supra, at 213. On the third issue raised on appeal, we affirm the CALJ's Order.

Accordingly, on all issues raised on appeal, the October 1, 2021, Order is **AFFIRMED**.

ALL CONCUR.

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