



## Adkins v. Elkhorn City Area Ambulance

2006 | Cited 0 times | Kentucky Supreme Court | March 23, 2006

### IMPORTANT NOTICE

### NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

### MEMORANDUM OPINION OF THE COURT

#### AFFIRMING

The Chief Administrative Law Judge (CALJ) overruled the claimant's motion to reopen on the ground that he filed it more than four years after rendition of his initial award; therefore, KRS 342.125(3) barred reopening. The Workers' Compensation Board and the Court of Appeals affirmed, rejecting arguments that the four-year period for reopening runs from the date an award becomes final and that the motion implicitly requested temporary total disability (TTD) benefits, which KRS 342.125(3) permits to be sought during the period of an award. We affirm.

In an opinion and award rendered on April 13, 2000, an ALJ awarded a 65% occupational disability for the claimant's work-related back injury of November, 1996, and ordered a vocational rehabilitation evaluation. Although testing indicated that the claimant had the potential for success at the college or technical college level, he thought that his medical condition precluded retraining. On April 23, 2004, the claimant filed a motion to reopen in which he stated, in pertinent part, as follows:

1. That the Plaintiff moves to reopen claim number 97-02284 pursuant to KRS 342.125 based on a worsening of his condition, wherein he was initially awarded the sum of \$131.81 per week beginning September 1, 1999, and continuing for a period not to exceed 520 weeks.
2. That since the entry of the [award] the Plaintiffs physical condition has also grown progressively worse, pursuant to the medical report of Dr. Harry Lockstadt. That the Plaintiff had not returned to work after the Opinion and Award.



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3. That due to the aforementioned facts, the Plaintiff is entitled to have his claim reopened pursuant to KRS 342.125 and 803 KAR 25:010 Section 4.
4. That this should be reopened, and scheduled for a hearing so that an [ALJ] may hear evidence to determine Plaintiffs present occupational disability.
5. That no previous motion to reopen this claim has been made on behalf of the Plaintiff.

WHEREUPON, the Plaintiff respectfully demands that an Order be entered reopening the above styled action pursuant to KRS 342.125, and... set this matter for a hearing to determine the Plaintiffs present occupational disability, and for any and all other relief for which Plaintiff may be entitled under law or equity.

Accompanying the motion was a March 25, 2004, letter from Dr. Lockstadt, indicating that the claimant's pain and underlying back condition had worsened over the years. It stated that he had developed "a more degenerative condition" and also a recurrent disc that caused "a lot of leg pain." The letter concluded:

We have offered surgical intervention for him and he is going to consider that. He will let us know when he wants to proceed. If he doesn't have the surgery it is unlikely he will suffer any long term damage but it will just continue to be uncomfortable for him. He understands this and has no further questions.

The employer objected to the motion on two grounds. First, it was untimely under KRS 342.125(3). Second, the claimant failed to offer prima facie evidence of a change of disability, which under KRS 342.125(1)(d) must consist of objective medical evidence of a post-award worsening of impairment due to the injury.

The claimant argued in response that KRS 342.125(3) permitted reopening within three years after his award became final. He also argued that Dr. Lockstadt recommended additional surgery at the level of his back affected by the work-related injury and that Dr. Lockstadt's letter showed a worsening of his condition and change of occupational disability. The CALJ overruled the motion as being untimely, and the claimant appealed. He asserted that the four-year period for reopening runs from the date an award becomes final and that his motion implicitly requested TTD benefits.

KRS 342.125(3) states 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



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original award or order granting or denying benefits, or within two (2) years of such award or order, 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).

KRS 342.125(3) is neither vague nor ambiguous regarding the four-year period for reopening. It clearly expresses a legislative intent for the period to commence on "the date of the original award or order granting or denying benefits." Therefore, it is not open to interpretation. *Griffin v. City of Bowling Green*, 458 S.W.2d 456 (Ky. 1970); *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25 (Ky. 1955). The CALJ did not err in following its plain language.

Dr. Lockstadt's March 25, 2004, letter states that he "offered" surgery and that although no long term damage was likely without it, the claimant would continue to be uncomfortable. According to the letter, the claimant indicated that he would "consider" surgery. His motion to reopen alleged a worsening of condition but referred only to the claimant's "present occupational disability." It neither stated nor implied that he wished to undergo the proposed surgery. Nor did it allude to TTD benefits. Under the circumstances, the CALJ did not err in failing to grant the motion in order to consider the claimant's entitlement to TTD.

The decision of the Court of Appeals is affirmed.

All concur.

