RENDERED: April 19, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001908-WC

MARSHA TOLER — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-91-48000

JACKSON COUNTY BOARD OF EDUCATION,
HONORABLE LANDON J. OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, EMBERTON, AND TACKETT, JUDGES.

TACKETT, JUDGE: Marsha Toler appeals from an order of the Workers' Compensation Board (Board) denying her motion to reopen her claim. We affirm.

Toler, an employee for the Rockcastle County Board of Education, was injured in 1991 when a handicapped bus on which she was a passenger overturned. After receiving temporary total disability benefits for a substantial period, she filed a claim which was assigned to an Administrative Law Judge (ALJ). The ALJ made a finding that Toler had sustained a twenty-percent

occupational disability due to her injuries. She appealed the ALJ's decision asserting that she was suffering ongoing physical and psychological problems which made her totally disabled. In 1995 and 1996 respectively, the Board and this Court affirmed the ALJ's decision.

In October 1999, Toler filed a motion to reopen alleging a worsening of her disability. The ALJ considered the evidence she presented and concluded, in an opinion dated October 28, 2000, that Toler had failed to establish a worsening of her occupational disability. Toler then filed a notice of appeal to the Board. While her appeal was pending, Toler filed an additional motion to reopen her claim on the grounds of newly discovered evidence. The Board affirmed the ALJ's decision denying Toler's first motion to reopen her claim, and Toler did not take any further appeal to our Court regarding that motion.

Toler's newly discovered evidence, which was presented in support of her second motion to reopen, consists of an MRI report written on October 16, 2000, just two days before the ALJ's decision denying her first motion to reopen. Consequently, the ALJ denied her second motion to reopen her claim stating that the MRI did not constitute newly discovered evidence which could not have not have been discovered by due diligence. Rather, the MRI was characterized as evidence of Toler's physical condition as it existed prior to the ALJ's decision denying her first motion to reopen in which the ALJ found that Toler had not met her burden of proving a worsening in her disability. The Board affirmed the ALJ's decision denying Toler's second motion to

reopen and this appeal followed. We believe that it would be difficult to improve on the Board's well-reasoned opinion and, therefore, adopt the following portion:

> Newly discovered evidence, according to KRS 342.125(1)(b), is "evidence which could not have been discovered with the exercise of due diligence." This statutory definition is similar to case law discussions concerning what is newly discovered evidence. See, for example, Durham vs. Copely, Ky., 919 S.W.2d 610 (1991).
>
> Toler, on appeal, argues there is no way she could have known about this evidence since the MRI was done only two days prior to the ALJ's October 18, 2000 opinion. She further states she was unaware an MRI had been ordered. First, presumably since Toler herself underwent the MRI, we find it difficult to understand how she could be unaware it had been ordered. Additionally, Dr. Muckenhausen, who had the MRI performed, stated in her report of June 1, 1999 that an MRI of the cervical and lumbosacral spine should be conducted. We believe the ALJ aptly and correctly interpreted the circumstances surrounding this MRI. First, it is difficult to understand how Toler believes the MRI could alter the ALJ's ultimate conclusions since Dr. Muckenhausen, even without the benefit of this MRI, assigned a 53% impairment to the body as a whole. This took into consideration significant impairment to the cervical spine. The MRI itself establishes the existence of bulges in the cervical spine and the possibility of some neurological compression in that area.
>
> Although frequently argued as such, simply because there is "new" evidence does not equate to the statutory terminology of "newly discovered evidence". In virtually every reopening upon an allegation of a change of occupational disability there is and should be "new" evidence. It occasionally is in the form of an MRI, x-ray or other specialized testing that lends support to either a physician's testimony or to an individual's subjective symptomatology. It is offered for the purpose of credibility enhancement. New evidence is not newly discovered evidence. Newly discovered

> evidence is evidence that is in existence and which could not have been accessed even through the exercise of due diligence. It is evidence that tends to establish that the original decision was made based upon faulty information, erroneous diagnoses and would without the consideration of this information constitute an egregious error and manifest injustice. See, for example, Durham vs. Copely, supra.
>
> In reviewing Dr. Muckenhusen's June 1999 report, she assessed significant functional impairment to the cervical spine and offered this based upon her clinical examination. While she then recommends an MRI, there is no explanation in the record of what it might establish nor why it was not conducted for some 16 months after this recommendation. The MRI itself offers some support for the rejected testimony of Dr. Muckenhausen, but does not offer an implication that there has ever been a misdiagnosis or a mistaken impression of what Toler and Dr. Muckenhausen believed her condition to be. In essence, what Toler presents as newly discovered evidence is cumulative medical testing that is offered in an effort to bolster the testimony of a physician upon whom the ALJ chose to not rely. Such cumulative evidence does not constitute newly discovered evidence as that is contemplated by KRS 342.125(1)(b).

For the forgoing reasons, the order of the Worker's Compensation Board denying Toler's motion to reopen her claim based on newly discovered evidence is affirmed.

EMBERTON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I dissent because I agree with the appellant that the MRI performed on October 16, 2000, was new material evidence that should have been evaluated and considered by the fact-finder. Instead, it was summarily rejected based on essentially semantic exercises as to the nuances distinguishing "new evidence" from "newly discovered

evidence." The Board's reasoning is interesting and perhaps even persuasive on paper:

> New evidence is not newly discovered evidence. Newly discovered evidence is evidence that is in existence and which could not have been accessed even through the exercise of due diligence.

However, this academic analysis is meaningless as a matter of fact and reality to the injured appellant. Perhaps the four herniated discs could have been discovered sooner had the medical test been ordered in a more timely fashion. Whether the delay in ordering the test was attributable to the vagaries of insurance or merely the vicissitudes underlying medical diagnostics, the fact remains that appellant had a devastating injury all the while. The extent of that injury was not revealed to her counsel until after the MRI results came back — after the Opinion of October 18, 2000, had been rendered.

The Board's opinion cites the statutory definition of newly discovered evidence as "evidence which could not have been discovered with the exercise of due diligence." KRS 342.125(1)(b). Whose diligence? That of the patient? Surely Ms. Toler had no means of dictating her treatment. That of the physician? Surely we must accord discretion to a physician to practice a medical case and to order whatever additional tests may become manifestly necessary to render a complete diagnosis — regardless of the sequence and timing of legal paperwork inevitably involved in such a claim for injury.

The Board's opinion belabors the fact that Toler was unaware that an MRI had been ordered by observing: ". . .

presumably since Toler herself underwent the MRI, we find it difficult to understand how she could be unaware it had been ordered." The legally significant fact is that her counsel was unaware of the test (performed on October 16, 2000) until after the Opinion was issued (a mere two days later on October 18, 2000).

I would submit that this case is the very kind of newly discovered evidence that the spirit underlying Durham, supra, intended be allowed as the basis for a re-opening in order to prevent manifest injustice. It was actually both new and newly discovered. Semantics should not pre-empt common sense and fair play.

I would also note before concluding that a disturbingly abrasive tone characterizes the appellee's brief, one that amounts to an *ad hominem* attack upon the appellant. Such negativity — indeed hostility — is both unnecessary and inappropriate. Regrettably, it seems to be part and parcel of the "manifest injustice" suffered throughout these proceedings by Ms. Toler, adding insult to her injury.

BRIEF FOR APPELLANT:

Edmond Collett
John Hunt Morgan
Monica Jo Rice Smith
Hyden, Kentucky

BRIEF FOR APPELLEE:

Douglas W. Gott
Bell, Orr, Ayers and Moore
Bowling Green, Kentucky