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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000423-WC

J. L. FRENCH AUTOMOTIVE — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-05-01524

WILLIAM JAMES DANIEL;
HON. HOWARD E. FRASIER, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON[1] AND DIXON, JUDGES; ROSENBLUM,[2] SENIOR JUDGE.

ABRAMSON, JUDGE: In about April or May 2004, William Daniel suffered a low back injury in the course of his employment as a die cast machine operator for Nelson Metal

[1] Judge Lisabeth H. Abramson completed this opinion prior to her appointment to the Supreme Court effective September 10, 2007. Release of this opinion was delayed by administrative handling.

[2] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Products, d/b/a J.L. French Automotive (J.L. French), an auto parts manufacturer doing business in Glasgow, Kentucky. Daniel's injury, a disk herniation, eventually required surgery. He was left, according to his surgeon, with some residual pain and with a 13% impairment rating under the *AMA Guides*. In about July 2005, the surgeon determined that Daniel had reached maximum medical improvement and released him for employment with the following permanent restrictions: "no lifting of more than 10 pounds on a repetitive basis . . . [and] no repetitive bending, stooping and twisting or prolonged work posture such as prolonged sitting." Apparently pursuant to a company policy against retaining workers with permanent medical restrictions, J.L. French terminated Daniel's employment in August 2005. In October of that year, Daniel filed a workers' compensation claim. At the final hearing on the claim, the parties agreed to settle, and on March 3, 2006, the Administrative Law Judge (ALJ) entered an order approving the settlement. The settlement provides, among other things, for permanent partial disability benefits based on an impairment rating of 13% and Daniel's inability to return to the continual lifting and manipulating of forty-pound Jaguar crankcases which his pre-injury employment required. In July 2006, J.L. French moved to reopen Daniel's claim, and it is from the denial of that motion, as affirmed in a January 26, 2007 Opinion by the Workers' Compensation Board, that J.L. French now appeals. J.L. French contends that an April 2006 office note by Daniel's surgeon removing Daniel's work restrictions is suggestive enough of fraud, mistake, or a change in Daniel's disability to compel the resumption of litigation. Agreeing with the Board that the ALJ did not abuse

his discretion when he denied J.L. French's motion, we affirm.

As the parties correctly note, and as our Supreme Court has several times explained:

> A final workers' compensation award is the equivalent of a judgment and is enforceable as such in circuit court. KRS 342.305. Nonetheless, KRS 342.125(1) permits the reopening of an otherwise final award upon a showing of one of several specified grounds for reopening. A motion to reopen, accompanied by prima facie evidence of one of the specified grounds, is the procedural device by which a party may invoke the Department's jurisdiction to do so.

Whittaker v. Hall, 132 S.W.3d 816, 818 (Ky. 2004). Among the statutory grounds for reopening are fraud, mistake, and "[c]hange of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order." KRS 342.125 (1). Under the "mistake" provision, our Supreme Court has noted, "reopening is permitted to address a mutual mistake of fact or a misconception of the cause, nature, or extent of disability at the time an award is rendered." *Whittaker v. Hall,* 132 S.W.3d at 819. Before an adversary may be put to the expense of relitigation, however, a party seeking reopening must make "a reasonable prima facie preliminary showing of the existence of *a substantial possibility of the presence of one or more of the prescribed conditions* from KRS 342.125." *Hodges v. Sager Corporation,* 182 S.W.3d 497, 500 (Ky. 2005) (quoting from *Stambaugh v. Cedar Creek Mining Company,* 488 S.W.2d 681 (Ky. 1972)). These rules apply no less to approved settlements than they do to fully litigated awards. KRS 342.305; *Kendrick v. Bailey Vault Company, Inc.,* 944 S.W.2d 147 (Ky.App. 1997). "The applicable standard

for review is whether a decision to grant or deny a motion to reopen was an abuse of the ALJ's discretion." *Hodges v. Sager Corporation,* 182 S.W.3d at 500.

The ALJ abused his discretion in this case, J.L. French contends, because no reasonable ALJ could deny that J.L. French's preliminary showing raised a substantial possibility either that the settlement was tainted by fraud or mistake or that Daniel's impairment had improved. As noted, this contention is based on an April 2006 office note by Daniel's surgeon. After remarking on Daniel's post-surgery history of pain and his use of pain medicines, the note continues as follows:

> There has been a conclusion to his worker's compensation case, being that the place of business went bankrupt and moved out of town. No further claims are being pursued by Mr. Daniel. He states that now that his back feels fine he has minimal discomfort and does not require pain medicine anymore he would like to be released to full duty work with no restrictions so he can find employment. I certainly released him today for full duty with no restrictions. No prescriptions were written today. I will see him back here on a prn basis only.

According to J.L. French, this note implies one of the following: either (a) that the permanent restrictions imposed in July 2005 and incorporated in the March 2006 settlement were mistaken or falsely overstated, in which case Daniel was not entitled to benefits based on an inability to return to his pre-injury employment; (b) that the April 2006 note falsely understates Daniel's restrictions; or (c) that between July 2005 when the restrictions were imposed and April 2006 when they were removed, Daniel's impairment improved. Since (a) or (c) could justify a reduction of Daniel's award, J.L. French maintains that the award should be reopened for consideration of the possibilities.

The ALJ essentially determined, however, that neither (a) nor (c) was substantially possible and so declined to reopen the award. In making that determination, the ALJ relied on the medical evidence of record and on Daniel's response to J.L. French's motion. The objective medical evidence clearly shows that Daniel suffered a *bona fide* back injury, which, prior to surgery, involved nerve compression and its resulting pain. After surgery, Daniel's pain lessened, but he was left, in the surgeon's estimation, at risk of reinjury if he resumed the heavy manual labor—the continual heavy lifting, bending, twisting, and stooping—that led to his injury. In light of this record, the ALJ could reasonably conclude that there was virtually no possibility, much less a substantial one, that the work restrictions the surgeon imposed in July 2005 were the result of fraud or mistake.

The ALJ also relied on Daniel's response to J.L. French's motion, in which Daniel explained the circumstances that led to the surgeon's April 2006 note. Those circumstances include the facts that Daniel's wife was ill with cancer and in need of expensive treatment; that J.L. French dismissed Daniel, cutting off his income, notwithstanding the fact that it had light-duty positions within his work restrictions; that from August 2005, when he was dismissed, until April 2006, Daniel unsuccessfully applied for more than twenty jobs and was told several times that the employer would not hire someone with work restrictions; that by March 2006 Daniel faced the possibility of mortgage foreclosure on his home; and that at about that time he applied for a relatively light-duty position--one that involved no bending, twisting, or stooping and only the

intermittent lifting of copper pipes weighing from one to twenty pounds—but was again told that his restrictions precluded his employment, although if he had his restrictions removed he would be hired. It was at that point that Daniel approached his surgeon and requested to be released from his restrictions. The surgeon acquiesced, but not because Daniel's work restrictions were no longer medically appropriate. Indeed, the surgeon does not report having examined Daniel and makes no reference to objective evidence that Daniel's medical condition had changed. Daniel's pain had apparently resolved enough to permit him to dispense with prescription pain medicine, but that is not objective evidence that he was no longer at increased risk of reinjury. Presented with these circumstances, the ALJ could reasonably infer that the surgeon removed Daniel's restrictions because Daniel's desperate financial circumstances necessitated compliance with the prospective employer's demand. He could also reasonably conclude that the removal of the restrictions did not indicate a substantial possibility that Daniel's impairment had improved or that he was actually capable of resuming heavy manual labor.

J.L. French also attached to its motion to reopen the report of an occupational medicine physician who, on the basis of the surgeon's April 2006 note, opined that a pain-free, restriction-free conclusion to Daniel's surgery suggested a 10% impairment under the *AMA Guides* and the ability to resume pre-injury employment. This report, however, is not based on objective medical evidence any more than the April 2006 note itself is. It assumes, furthermore, that the removal of Daniel's work

restrictions necessarily implies a reassessment of Daniel's physical condition, but, as just discussed, that assumption is unwarranted. As this case shows, the removal of restrictions does not necessarily imply that restrictions are not medically indicated. The ALJ could reasonably discount this report as adding little to J.L. French's claim and could conclude that it did not suffice to show a substantial possibility that Daniel's impairment had improved.

Finally, J. L. French argues that if alternatives (a) and (c) of its three part construction of the April 2006 note are rejected, then alternative (b), the possibility that the April note falsely understates Daniel's restrictions, must be true. Again, however, this argument ignores the possibility that restrictions may be removed for non-medical reasons. The surgeon did not represent, falsely or otherwise, that Daniel's condition had changed. He stated, rather, that Daniel asked to have the restrictions removed "so he can find employment." The surgeon did not understate the medical advisability of those restrictions. He removed the restrictions simply so that Daniel could obtain an appropriate job with an employer, who otherwise would have rejected his application. Daniel and his surgeon faced an obvious dilemma, between economic hardship on the one hand and increased medical risk on the other. Neither Daniel nor his surgeon responded inappropriately to that dilemma, and the ALJ did not abuse his discretion by looking behind the surgeon's April 2006 note at the circumstances that gave rise to it.

In sum, KRS 342.125 permits the reopening of a final workers' compensation award only upon a *prima facie* showing that one of the statutory grounds is

a "substantial possibility." The doctor's removal of work restrictions in this case, in response to economic rather than medical considerations, did not compel a finding that either fraud, mistake, or reduced impairment was such a possibility. The ALJ did not abuse his discretion, therefore, when he rejected J.L. French's contrary claim and denied its motion to reopen Daniel's settlement. Accordingly, we affirm the January 26, 2007 Opinion of the Workers' Compensation Board.

ALL CONCUR.

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