

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001887-WC

SAMUEL STEPHENS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-94270

TRANS STAR AMBULANCE;
J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: STUMBO, TAYLOR, AND VANMETER, JUDGES.

STUMBO, JUDGE: Samuel Stephens appeals from an opinion of the Workers' Compensation Board (hereinafter Board) which affirmed the opinion of Administrative Law Judge (hereinafter ALJ) J. Landon Overfield. ALJ Overfield overruled a motion to reopen Stephens' workers' compensation claim on the basis that Stephens had not made a *prima facie* case for reopening the claim. We affirm.

On February 2, 2004, Stephens was working for Trans Star Ambulance as an emergency medical technician. On this date, while exiting an ambulance, he rolled his right ankle and fell onto his left knee. He was diagnosed with a probable tear of the lateral meniscus. Stephens filed a workers' compensation claim. ALJ James Kerr presided over the claim. Stephens was found to have a 4% impairment rating, but was able to return to work with some restrictions, such as no climbing, squatting, or prolonged weight bearing.

On February 20, 2009, Stephens filed a motion to reopen his claim arguing that his condition had gotten worse. Attached to the motion was the previous workers' compensation opinion and medical records showing Stephens had undergone a left knee arthroscopic medial and lateral meniscectomy and left knee chondroplasty of the patella. These surgical records note there was a tear found at the posterior horn of the meniscus in the medial compartment and the lateral compartment. Also attached were post-operative records noting that Stephens was doing well, but still experiencing pain in his left knee.

Trans Star responded to the motion asserting that Stephens had failed to make a *prima facie* case for a change in condition, which is required to reopen the claim.

The motion to reopen was denied by ALJ Overfield. Stephens then filed a petition to reconsider, which was overruled. ALJ Overfield stated in his order denying the petition for reconsideration that the surgery Stephens underwent

did not change his 4% impairment rating and the restrictions set forth by the surgeon were similar to the previous restrictions set forth in the original claim.

Stephens then appealed to the Board. It was in this appeal that he first stated that he believed he was totally and permanently disabled and unable to continue to work. The Board affirmed the decision of ALJ Overfield. This appeal followed.

Stephens moved to reopen his case pursuant to Kentucky Revised Statute (KRS) 342.125(1)(d) which states that a workers' compensation award may be reopened upon a "[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."

Although an award of workers' compensation benefits has the same finality as a court judgment, KRS 342.125 permits an award to be reopened due to post-award changes. *Beale v. Faultless Hardware*, 837 S.W.2d 893, 896 (Ky. 1992). A party seeking to reopen a claim or award "should be required to 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 that warrant a change in the Board's decision before his adversary is put to the additional expense of relitigation." *Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 681, 682 (Ky. 1972).

Farris v. City of Louisville, 209 S.W.3d 486, 488 (Ky. App. 2006).

KRS 342.125(1)(d) requires a change of disability to be shown by "objective medical evidence of a worsening . . . of impairment." The statute does not refer to the *Guides [to the Evaluation of Permanent Impairment]*, to permanent impairment rating, or to permanent disability rating. We conclude, therefore, that although a greater

permanent impairment rating is objective medical evidence of a worsening of impairment, it is not the only evidence by which the statute permits a worsening of impairment to be shown. . . . If such findings demonstrate that an injured worker suffers a greater loss, loss of use, or derangement of a body part, organ system, or organ function due to a condition caused by the injury, they demonstrate a worsening of impairment. A worsening of impairment may or may not warrant increasing the worker's permanent impairment rating under the *Guides*.

Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 218 (Ky. 2006).

“Evidence of a worsening of impairment requires that there be a comparison of impairment at two points in time.” *Hodges v. Sager Corp.*, 182 S.W.3d 497, 501 (Ky. 2005). Further, it is left to the fact finder's reasonable discretion to determine if a *prima facie* showing has been made. *Farris* at 488. Finally, “the function of the Court of Appeals in reviewing decisions of the Workers' Compensation Board is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797, 797-798 (Ky. App. 1995). We find no error here.

Stephens put forth no evidence that compared his injury as it was back in 2004 to the time of his motion to reopen. He also did not present any evidence that the cause of his current condition related back to the work injury. While the surgery was done on the knee that was injured at work, there was evidence in the record that stated he had recently suffered a fall and injured that same knee. The only evidence he presented was that he underwent knee surgery, but he did not

show that this caused his condition to become worse. He did not present evidence that his knee was worse after the surgery than at the time of the original workers' compensation award. In fact, his 4% impairment rating did not change and the movement restrictions he was given after the surgery were similar to those initially given to him at the time of his work injury.

The ALJ and Board examined the evidence and the law, and we can find no error. We therefore affirm the opinions of the ALJ and Board and hold Stephens did not make a *prima facie* case for reopening his claim.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephanie L. Kinney
Glenn M. Hammond
Pikeville, Kentucky

BRIEF FOR APPELLEE:

James W. Herald III
Pikeville, Kentucky