

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001320-WC

MICHAEL SCOTT COOVERT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-63505

LOGAN'S ROADHOUSE, INC.,
AND GALLAGHER BASSETT
SERVICES, INC.; HON. JOSEPH
W. JUSTICE, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Michael Scott Covert petitions for review of an opinion of the Workers' Compensation Board ("Board") affirming an order of the

Administrative Law Judge (“ALJ”) denying Coover’s motion to reopen. For the following reasons, we reverse and remand.

On October 28, 2004, the ALJ approved the settlement agreement between Coover and Logan’s Roadhouse, which provided for a lump sum payment of \$20,000 for work-related injuries Coover sustained during the course of his employment at Logan’s Roadhouse. The agreement did not provide for a waiver or buyout for past or future medical expenses.

Post-settlement, Coover underwent back surgery on December 5, 2007. Over a year later, Logan’s Roadhouse filed a motion to reopen the case to resolve a medical fee dispute, contesting the reasonableness, necessity and causation of Coover’s ongoing medical treatment. The benefit review conference (“BRC”) order listed the contested issues as: (1) entitlement to temporary total disability (“TTD”) benefits related to the December 5, 2007, surgery and (2) reasonableness, necessity, and causation of narcotic medications, injections, and spinal cord stimulator.

A formal hearing before the ALJ was held; thereafter, the parties submitted briefs for the ALJ’s consideration. In his brief, Coover alleged for the first time that the insurance adjuster for Logan’s Roadhouse had lied to him about his entitlement to TTD benefits while he was recuperating from the 2007 surgery, which amounted to fraud. The brief filed on behalf of Logan’s Roadhouse did not address the issue of fraud.

In an opinion and order dated September 15, 2009, the ALJ found that Coover's 2007 surgery was causally related to his work-related injuries, but denied Coover's request for payment of TTD benefits following the 2007 surgery, finding:

[Coover] has testified to certain TTD benefits that he was entitled to following his 2007 surgery. He has also made an argument in his brief for TTD benefits. The ALJ has searched the record and does not find any pleadings raising this as a matter to be decided by him other than an issue in the BRC order.

Coover filed a petition for reconsideration, noting that the parties listed as a contested issue at the BRC entitlement to TTD benefits related to the December 5, 2007, surgery. By order dated November 3, 2009, the ALJ denied Coover's petition for reconsideration, noting:

Plaintiff has filed a Petition for Reconsideration of the Opinion and Order entered September 15, 2009, and complains that the ALJ did not take up the issue of TTD benefits following Plaintiff's 2007 surgery. The issues raised by the pleadings were medical dispute filed by the Defendant/Employer questioning the reasonableness and necessity of certain medical treatment and proposed treatment. The only time that the TTD issue was raised was at the BRC, when the Plaintiff asserted that as an issue. Defendant/Employer did not brief the issues.

It was the opinion of the ALJ that this matter should have been raised by a motion to reopen and request payment of TTD rather than being raised at the BRC when proof is closed. The ALJ does not remember everything that was discussed at the BRC, but it is the ALJ's recollection that Plaintiff placed the issue in the order rather than the parties listing it as an issue. It is unfortunate if Plaintiff was due TTD benefits following the [2007] surgery, but this should have been raised by pleadings.

Covert did not appeal from this order. Rather, Covert filed a motion to reopen pursuant to KRS¹ 342.125(1)(a), which provides for the reopening of a claim due to fraud. In his motion to reopen, Covert stated that the Workers' Compensation carrier had paid for his surgery in 2007, and he had received TTD benefits from Logan's Roadhouse following the surgery. Covert alleged that the insurance adjuster for Logan's Roadhouse falsely told him he was not entitled to TTD benefits related to the 2007 surgery and instructed him to return the TTD check, which he claims he did. Covert argued that he was entitled to receive TTD benefits while recuperating from the 2007 surgery and that Logan's Roadhouse's misrepresentation that he was not so entitled amounted to fraud.

In response, Logan's Roadhouse asserted a number of defenses, including that Covert's motion to reopen was barred by the doctrine of *res judicata*, claim preclusion pursuant to KRS 342.270(1), and the statute of limitations pursuant to KRS 342.125 and KRS 342.185. By order dated February 19, 2010, the ALJ summarily denied Covert's motion to reopen. Covert appealed to the Board, which affirmed. This appeal followed.

Our review of a Board decision "is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009) (citing *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). We review

¹ Kentucky Revised Statutes.

the ALJ's decision to grant or deny a motion to reopen for an abuse of discretion. *Hodges v. Sager Corp.*, 182 S.W.3d 497, 500 (Ky. 2005). The movant on a motion to reopen bears the burden of making "a reasonable prima facie preliminary showing of the existence of a substantial possibility of the presence of one or more of the prescribed conditions" set forth in KRS 342.125 so as to justify reopening the claim. *Hall v. Hospitality Res., Inc.*, 276 S.W.3d 775, 779-80 (Ky. 2008) (citation omitted).

In this case, the ALJ summarily denied Covert's motion to reopen without making any findings of fact or conclusions of law regarding his claim of fraud. Such findings are essential to meaningful appellate review. *White v. Great Clips*, 259 S.W.3d 501, 504 (Ky.App. 2008) (citing *Shields v. Pittsburgh and Midway Coal Min. Co.*, 634 S.W.2d 440, 444 (Ky.App. 1982)). Further, "[a]s a reviewing body, neither we nor the Board should attempt to supplant such a finding of fact." *Great Clips*, 259 S.W.3d at 504 (quoting *Finley v. DBM Technologies*, 217 S.W.3d 261, 266 (Ky.App. 2007)). Because the ALJ failed to make essential findings of fact in this case as to the merits of Covert's claim of fraud, we are compelled to reverse and remand for additional findings of fact.

The opinion of the Workers' Compensation Board is reversed with directions that the claim be remanded by the Board to the ALJ for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rodger W. Lofton
Paducah, Kentucky

BRIEF FOR APPELLEE LOGAN'S
ROADHOUSE, INC. AND
GALLAGHER BASSETT SERVICES
INC.:

James G. Fogle
Bowling Green, Kentucky