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**NOT TO BE PUBLISHED OPINION**

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  
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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,  
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OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE  
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION  
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ACTION.

# Supreme Court of Kentucky

2012-SC-000337-WC

JEAN HAYNES

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2011-CA-002064-WC  
WORKERS' COMPENSATION NO. 07-97216

SINGH PETRO, II, INC.;  
HONORABLE HOWARD E. FRASIER,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Appellant, Jean Haynes, appeals from an opinion of the Court of Appeals which affirmed the dismissal of her motion to reopen her workers' compensation claim. The sole issue presented in this appeal is whether the Administrative Law Judge ("ALJ") erred in determining that her motion to reopen, based on an alleged cervical spine condition, was barred as a matter of law based on *Slone v. Jason Coal Co.*, 902 S.W.2d 820 (Ky. 1995) or alternatively by the doctrine of *res judicata*. The Workers' Compensation Board and Court of Appeals both affirmed the dismissal of Haynes's motion. For the reasons set forth below, we affirm.

Due to the quality of the fact pattern presented in Judge VanMeter's Court of Appeals opinion, we adopt it as part of our opinion.

While employed with Singh, Haynes suffered a work-related injury on January 20, 2007. Based on the medical report of Dr. Barefoot, who diagnosed Haynes with a traumatic right shoulder injury, and Haynes's own reports of pain in her neck, shoulder, arm and elbow, as well as reports of altered sensation, headaches and submaximal effort, the ALJ awarded Haynes permanent partial disability benefits for a right shoulder injury. Thereafter, Haynes filed a motion to reopen the workers' compensation claim, alleging that Singh refused to authorize certain medical treatment. Haynes also sought compensation for an MRI of her cervical spine. In support of her motion, Haynes attached the April 18, 2008, medical report of Dr. Sanjiv Mehta, who noted that Haynes complained of constant headaches with pain radiating into the scapular region with some spasm in the erector spinae muscle down the cervical spine. Haynes also provided the May 13, 2008, medical report of Dr. Mehta, in which he noted Haynes demonstrated radiculopathy which started in the base of her cervical spine, and recommended a cervical MRI scan, as well as a new MRI of Haynes's shoulder because the first was inconclusive. Dr. Mehta stated he believed some of Ms. Haynes's problems were related to her cervical spine and recommended referral to a neurosurgeon for chronic neck pain and radiculopathy.

In an order dated July 22, 2008, the ALJ granted Haynes's motion to reopen the claim, but denied compensability of the cervical spine MRI given that the injury was to Haynes's right shoulder and not to her spine. Haynes appealed to the Board, which affirmed the ALJ's opinion. The Board opinion was not further appealed.

In 2009, Haynes filed a second motion to reopen, again alleging the need for a cervical spine MRI, as well as physical therapy, and potential surgery if the therapy is not successful. Dr. Mehta stated the cervical spine MRI was necessary before proceeding to a surgery on Haynes' right shoulder in order to rule out the possibility of a cervical spine injury. The ALJ granted the motion to reopen and found the cervical spine MRI to be compensable in an order entered October 23, 2009.

On October 15, 2010, Haynes filed a third motion to reopen, contending that Singh still refused to authorize additional medical treatment for her work injury to her shoulder and cervical spine condition. In support of her motion, Haynes attached a cervical MRI report which revealed multilevel degenerative changes of the cervical spine. In further support, Haynes attached medical

reports from Dr. Mehta, dated February 23, 2010, March 5, 2010, and August 20, 2010, in which he discussed Haynes's cervical spine condition and the distress it caused her. Singh responded to the motion, alleging Haynes unjustly continued to have it pay for the unrelated cervical spine condition. Singh then filed a motion to dismiss, arguing that Haynes was barred from bringing a claim regarding the cervical spine condition because she failed to raise the issue during the pendency of the original action. *See Slone v. Jason Coal Co.*, 902 S.W.2d 820, 822 (Ky. 1995) . . . . Singh maintained that Haynes's motion was barred under the doctrine of *res judicata* since the compensability of a cervical spine MRI was previously litigated.

In an order dated May 18, 2011, the ALJ dismissed Haynes's motion to reopen as it related to the cervical spine condition on the basis that the claim was barred under the principle laid out in *Slone*, as well as the doctrine of *res judicata*. In that order, the ALJ set forth the findings regarding the history of Haynes's cervical spine injury, stating:

(18) Without question, additional medical proof has been taken; however, the first time that the Plaintiff filed a medical opinion that the original injury might have caused the cervical spine injury was when the report of Dr. Roberts was filed on April 12, 2011, four years after the date of injury; however, his report does not identify any evidence of any structural change, but simply relies upon the fact that the new cervical MRI provides evidence of degenerative changes and the 2007 injury may have 'aroused' such condition into disabling reality;

(19) The undersigned finds the crucial question now is whether the cervical spine symptoms of Ms. Haynes were manifest within two years of her date of injury of January 20, 2007, or if not then, did such work-related symptoms become manifest no later than two years prior to the date of her latest motion to reopen on October 15, 2010;

(20) The undersigned finds that despite having headaches and neck symptoms from the date of her injury, Ms. Haynes accepted a 'final' order of ALJ Terry that her only injury was to her right shoulder and again accepted without appeal the affirmance by the [Board] that she did not have a cervical spine injury;

(21) The undersigned finds that during this time period the Plaintiff was under the active treatment of Dr. Mehta, she never at any point in time provided an opinion that the cervical spine symptoms were related to her 2007 injury, including even at the time that Dr. Mehta opined that surgery might be necessary in the future in regard to the cervical spine;

(22) The undersigned finds that unlike a psychiatric condition that might not manifest itself until after physical symptoms of a work-related injury worsen, the Plaintiff here has simply not pointed to any reason why Dr. Mehta, or Dr. Barefoot at the time of her original IME, would not have been in a position to provide an opinion similar to the more recent opinion of Dr. Roberts before the previous decisions of ALJ Terry and ALJ Steen;

(23) The undersigned finds that the fact that a recent MRI in a 62 year old individual shows the existence of degenerative changes in the cervical spine should not be surprising to any physician; but, to use this as a basis for the first manifestation of a cervical spine injury in the presence of active cervical spine symptoms from the date of injury would mean that the administrative efforts to limit compensation to work-related injuries would NEVER have any closure and could simply be continued at any time when a future medical opinion is obtained that a degenerative condition has been aroused by a work injury, even for an injury that occurred more than four years previously and after three ALJ opinions and one [Board] affirmance finding only a right shoulder injury[.]

The Board and Court of Appeals affirmed the dismissal of Haynes's motion to reopen.

We review the ALJ's denial of the motion to reopen to see if it "was an abuse of the ALJ's discretion because it was 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Turner v. Bluegrass Tire Co., Inc.*, 331 S.W.3d 605, 609 (Ky. 2010) (citation omitted). Haynes argues that the ALJ

abused his discretion by dismissing her motion on the basis that her cervical spine claim is barred by *res judicata* and the doctrine expressed in *Slone*.

*Slone* held that “[a] motion to reopen cannot be based on a condition known to the claimant during the pendency of his original action, but which for some reason, he did not choose to litigate.” 902 S.W.2d at 822. In other words, if a claimant fails to present all of her potential work-related injuries at the time she first presents her claim, she waives her right to reopen the claim based on those known injuries.

Haynes argues that her cervical spine injury was not a pre-existing condition, but was a new condition which arose after her original award, justifying a reopening of her claim. But, Haynes never presented evidence of any new manifestation of a cervical spine injury which was not present before the original award was rendered. As stated in the Board’s opinion which found Haynes was barred from reopening her claim:

. . . Haynes referenced complaints to her neck, shoulder, arm and elbow at the time the original claim had been litigated, but [the ALJ] only found a right shoulder injury. Commensurate with these findings, [the ALJ] awarded future medical expenses to only Haynes’s shoulder condition.

ALJ Frasier also referenced ALJ Hays’s synopsis of the independent medical evaluation from Dr. Barefoot dated June 18, 2007 introduced on the initial claim and relied on by [the ALJ] in her findings. Dr. Barefoot noted in addition to symptoms and pain in the right shoulder, Haynes referenced pain into the lower neck region in the posterior aspect of her neck. . . . Dr. Moskal’s medical report . . . introduced as evidence on the original claim . . . recorded Haynes describ[ing] ‘a burning feeling like a rash from the base of her neck to her ear, down her arm to the lateral arm both to the anteroposterior and lateral aspects, and down the elbow.’ . . . Finally, in a medical report dated March 28, 2011 and introduced by Haynes during proof taking in her third motion to reopen . . .

Dr. Roberts's recorded Haynes did not complain of any prior right arm or neck problems until the work injury of January 27, 2007.

Yet, notwithstanding the fact that these potential injuries to her cervical spine were elicited during the initial litigation of her claim, Haynes accepted the ALJ's original decision that only her right shoulder suffered a work-related injury. Further, Haynes never amended her application to allege a new injury within two years of her accident date. Again, we note that Haynes has not presented evidence to indicate that there has been a new manifestation of a cervical spine condition which was not previously known to her. Therefore, we must find that the ALJ's decision to deny Haynes's motion to reopen was not an abuse of discretion.

For the reasons set forth above, the opinion of the Court of Appeals is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT,  
JEAN HAYNES:

Wayne C. Daub

COUNSEL FOR APPELLEE,  
SINGH PETRO, II, INC.:

Derek Patrick O'Bryan