

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002449-WC

EQUITABLE BAG COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-92-21461

SHIRLEY HOLLON;
ROBERT WHITTAKER, DIRECTOR
OF SPECIAL FUND;
HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COM

APPELLEES

AND: NO. 2001-CA-002548-WC

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SHIRLEY HOLLON;
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CROSS-APPELLEES

OPINION
REVERSING

** ** * * * **

BEFORE: BUCKINGHAM, GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. Equitable Bag Company, Inc., and Roger Whittaker, Director of Special Fund (collectively Equitable), each appeal from an order of the Workers' Compensation Board (the Board) entered October 17, 2001, which reversed an order entered by Administrative Law Judge James L. Kerr (the ALJ) which dismissed Shirley Hollon's (Hollon) motion to reopen pursuant to KRS 342.125. The appeals have been joined by previous order of this Court since each appeal raises similar issues. We reverse on both appeals.

Hollon sustained a work-related back injury as a result of two separate incidents which occurred in April 1992, while she was employed as a bag catcher by Equitable. On October 19, 1992, Hollon filed a Form 101 in which she alleged that she sustained an injury to her lower back. On December 10, 1993, Hollon filed a motion to amend her Form 101 to include, among other things, a claim for psychiatric disability stemming from her back injury.

Hollon was deposed on October 20, 1993. She testified that her chief complaint was back pain radiating into her right leg. She participated in a work hardening program in December 1992, but was unable to complete the program because of headaches and pain in her back, shoulders and legs. This was the only mention of shoulder pain in Hollon's deposition.

Dr. Lowell Ford (Dr. Ford) treated Hollon for her back injury. On several occasions Hollon told Dr. Ford that she was experiencing pain in her neck and right shoulder and arm which

she felt was related to her work-related accident. Specifically, on July 1, 1992, Dr. Ford noted in his records:

She also reminds me that two days after the original injury she felt neck pain and that was associated with right shoulder and arm pain into the hand. She had some tingling in the digits also which she still has occasionally. Her motor function is normal in the upper extremity with no limitation of agility though when she turns her head and neck to the right she gets neck discomfort.

At his deposition, Dr. Ford testified that he believed Hollon's neck complaints of July 1, 1992, were "secondary to complaints in the lower back area," and was "not of significant neurological concern." Although Hollon made occasional complaints of neck pain to Dr. Ford, his deposition makes it clear that he primarily treated her for her back problems.

Dr. Kenneth Graulich (Dr. Graulich) examined Hollon on November 2, 1993. His physical examination covered Hollon's neck and back. Hollon told Dr. Graulich that her neck pain started around the time that her back pain began. After examining her neck and concluding that it was essentially normal, Dr. Graulich assigned Hollon an impairment rating of 0% in regard to her neck complaints.

Despite telling her doctors that she began experiencing neck pain around the time of her work-related accident, Hollon never moved to amend her Form 101 to include a claim for benefits stemming from her neck complaints. On March 24, 1994, Hollon and Equitable entered into a settlement agreement which resolved her claim. The settlement agreement listed the nature of the injury as "low back and psychiatric."

On December 12, 2000, Hollon filed a motion to reopen her claim, stating that she had undergone consistent treatment for her neck and back injuries since the date of her injury and that she had cervical disc surgery in August 1994. Hollon alleged that she had an MRI performed on December 5, 2000, and that "when the results of the new MRI is compared with the results of the earlier MRI done in 1992, it shows a substantial change in her medical condition." Hollon contended that the new MRI and the fact that she had cervical surgery satisfied her burden of showing a substantial change in her medical condition.

Attached to Hollon's motion to reopen were medical records from Dr. Ghahreman Khodadad (Dr. Khodadad) and a statement from Dr. Todd Perkins. Dr. Khodadad's records show that when he first saw Hollon on April 20, 1994, she complained of neck and right arm pain, numbness and tingling. Hollon did tell Dr. Khodadad that she had a prior low back injury in April 1992. Dr. Khodadad performed a foraminotomy and partial hemilaminectomy at C6-7 on August 19, 1994. Dr. Khodadad offered no opinion as to whether Hollon's neck complaints were causally connected to her work-related accident.

The record from Dr. Perkins consisted of a statement drafted by Hollon's attorney and signed by Dr. Perkins on December 8, 2000. The statement read:

That I have examined Shirley Hollon on the 8th day of December, 2000 and have compared the results of her MRI taken in 1992 with the results of her MRI taken on December 5, 2000 and believe that there is a substantial change in her medical condition.

There was no indication as to whether these MRIs were of Hollon's neck or lower back.

Hollon's motion to reopen was granted by Chief Administrative Law Judge Shelia Lowther on March 26, 2001, and the matter was assigned to ALJ Kerr for resolution. On April 5, 2001, Equitable filed a motion to reconsider the reopening order, arguing that Hollon's attempt to reopen her claim to obtain benefits for a neck injury amounted to piecemeal litigation and was soundly prohibited by Slone v. Jason Coal Company, Ky., 902 S.W.2d 820 (1995). The ALJ granted Equitable's motion by order entered May 18, 2001, stating:

As the defendant-employer points out, plaintiff's original claim involved low back and psychiatric conditions. Review of her application, motion to amend, and settlement indicates the plaintiff's original claim did not include an injury to her neck. It further appears that plaintiff's neck condition was in existence as of 1992 when the plaintiff had a cervical MRI (see Dr. Perkins [sic] note for evidence of this information). As plaintiff's original claim failed to include a cervical condition, even though it was known to her at the time, and as plaintiff has presented no evidence that her low back and/or psychiatric condition have resulted in an increase of occupational disability, CALJ Lowther's March 26, 2001 order must be set aside[.]

Hollon appealed the ALJ's order to the Board, which reversed in an opinion entered October 17, 2001, stating:

Slone does not mandate there be a recovery for a condition before it may be considered upon reopening but rather that if it is known and not brought forth in any manner, then it may not be addressed upon reopening. Here, Hollon did present evidence concerning the condition prior to the settlement through the deposition of Dr. Ford. Additionally, it is clear Equitable was well aware of the

condition since its physician, Dr. Graulich, examined Hollon, paying particular attention to her neck and back. It is a longstanding principle that issues may be tried by consent. It is also clear from reviewing the medical evidence at the time of the settlement that the evidence would not have supported an award of income benefits for the cervical condition. Dr. Graulich assigned a 0% impairment rating and stated Hollon had a normal examination. Hollon's treating physician did not seem concerned with the cervical condition. Evidence from Dr. Ford would seem to indicate the neck problem at the time of settlement was a result of the back problem. He stated the cervical condition was probably not of significant neurological concern. Evidence submitted with the motion to reopen indicates a history that the condition became much more severe after the settlement was entered. In our opinion, Hollon did "raise" her cervical condition in the claim prior to settlement even though she had not amended her Form 101 to include the cervical condition. In our opinion, the intent of the court in Slone was to prohibit piecemeal litigation and to prohibit claimants from reopening for conditions that were compensable and known prior to settlement or final adjudication that were not presented in any way at the time of the settlement or adjudication.

Unfortunately, it appears quite likely the file the ALJ had before him was significantly deficient at the time of his ruling. The original claim file was microfilmed. Much of the evidence would not have been available to the ALJ through the Department of Workers' Claims computer imaging system nor had it been reproduced on paper in the claim file for the reopening. This no doubt contributed to the ALJ's apparent erroneous belief that Dr. Perkins' note comparing MRIs related to a cervical MRI in 1992 and was evidence that Hollon had a neck condition prior to the settlement. In reviewing the medical evidence, the only evidence of record concerning MRIs performed in 1992 relate to Hollon's low back condition. The only logical inference that may be drawn from the evidence of record is that Dr. Perkins was comparing a 1992 low back MRI with another MRI taken in December 2000. Equitable did

state in its initial response to the motion to reopen that Dr. Perkins was referring to cervical MRIs, however, Equitable had abandoned that statement and argued to the ALJ that it was not clear to what body part Dr. Perkins was referring. In our opinion, the claimant has submitted evidence sufficient to make a prima facie showing of grounds for reopening.

These appeals followed.

We note that Hollon has failed to file an appellate brief in this matter and her failure to do so is to be treated as a confession of error pursuant to CR 76.12(8)(c)(iii). Ausum v. Pierce, Ky., 894 S.W.2d 631, 633 (1995).

Even if we were to address the merits of the appeals, the result would be the same. Each appeal maintains that the Board erred in holding that Slone does not preclude Hollon's motion to reopen. After reviewing the record on appeal and Slone, we find that we must agree.

In Slone, the plaintiff filed a workers' compensation action and an action for SSI in July 1987. While the plaintiff's SSI claim sought benefits for a work-related back injury as well as benefits for a psychiatric disability, the plaintiff's workers' compensation claim only sought benefits for the back injury. The plaintiff ultimately received both social security and workers' compensation benefits.

Approximately two years later, the plaintiff sought to reopen his workers' compensation claim in which he claimed that "a change of occupational disability in that a mental condition which was dormant and non-disabling at the time of his injury was then manifesting itself." Slone, 902 S.W.2d at 821. In holding

that the plaintiff could not reopen his claim, the Kentucky Supreme Court held:

The testimony in the record from the physician expert used by the claimant indicates that the mental condition was sufficiently known to be the subject of a proceeding for [SSI]. For some unknown reason, the claimant did not choose to pursue a similar complaint in the State workers' compensation proceeding. Accordingly, the present appeal which attempts to raise those issues by means of the reopening procedure cannot really be distinguished from the prohibition against piecemeal litigation stated in Wagner Coal & Coke Co. v. Gray, 208 Ky. 152, 270 S.W. 721 (1925). The failure of the claimant to present any evidence regarding his mental condition in the original workers' compensation claim cannot be cured by a motion to reopen more than two years later.

KRS 342.125 provides that an award may be reopened upon a showing of "change of occupational disability, mistake, fraud or newly discovered evidence." 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.

Slone, 902 S.W.2d at 821-822.

Like the plaintiff in Slone, Hollon was aware that her neck was hurting several days after the accident. She told Dr. Ford on July 1, 1992, that her neck started hurting "two days after the original injury." She obviously complained of neck pain to Dr. Graulich as well. However, despite complaining of neck pain which manifested itself several days after the work-related accident, we are left with the fact that Hollon never amended her Form 101 to include a claim for benefits for a cervical injury. Thus, like the plaintiff in Slone, she is barred from attempting to recover benefits for a neck injury on

reopening. She was aware of the existence of a neck injury at the time her original action was pending before the ALJ but, for whatever reason, never sought to recover benefits for her neck injury at that time.

We are not persuaded that the fact that Equitable may have known that Hollon was complaining of neck pain makes any difference. Hollon never put Equitable on notice that she was seeking benefits for a neck condition and, absent any amendment of the Form 101 to include a benefit for a cervical condition, Hollon cannot now seek benefits for a cervical condition on reopening.

We have also considered whether Dr. Perkins' signed statement could be evidence upon which a prima facie case for reopening under KRS 342.125 could be based. The only thing Dr. Perkins statement provides is that a comparison of a 1992 MRI to a 2000 MRI shows a worsening in Hollon's condition. While testimony from Dr. Ford's deposition in the original action shows that Hollon had a lumbar MRI on July 7, 1992, there is no information in the record as to whether the 2000 MRI was of Hollon's lumbar spine, and to speculate that the 2000 MRI was of Hollon's lumbar spine would be pure conjecture.

Having considered the arguments presented in both appeals, the opinion of the Workers' Compensation Board is reversed and the order of the ALJ is reinstated.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael R. Sanner
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NO BRIEF FOR APPELLEE, SHIRLEY
HOLLON

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