RENDERED: DECEMBER 20, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000925-WC

CHARLES GUTTMAN — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-78794

GENERAL ELECTRIC COMPANY;
HON. RONALD MAY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. Charles Guttman ("Guttman") appeals from an opinion of the Workers' Compensation Board ("the Board") affirming an opinion and order of the Administrative Law Judge ("ALJ") holding that Guttman could not maintain an action for an alleged back injury after settling a claim with his employer, General Electric ("GE"). We affirm.

On June 5, 1998, Guttman injured his knee and shoulder when he fell from a platform during the course of his employment with GE. Guttman received medical treatment, and was referred to Dr. Ed Tillett ("Tillett"), an orthopedic physician. About three

weeks after the accident, Guttman apparently complained to Tillett of back pain.

Guttman filed a claim for benefits and received temporary total disability. Thereafter, a dispute arose between Guttman and GE as to whether Guttman's back pain was caused by the fall from the platform. Negotiations on the dispute were undertaken, and a settlement was agreed to under which Guttman would receive a lump sum payment based on a 2% whole body impairment.

To memorialize the settlement, a GE claim representative prepared an "Agreement as to Compensation" form. The form addressed Guttman's knee and shoulder injuries, but did not recognize the alleged back injury. Guttman signed the form, but added a notation by hand that the release did not include the back injury.

GE rejected the form based on the handwritten notation, and produced a second copy for Guttman's signature. Guttman signed the second form and did not add the handwritten notation. A GE claim representative then signed the form and it was forwarded to the Department of Workers' Claims where it was approved.

On January 4, 2000, Guttman filed an "Application for Resolution of Injury Claim" seeking compensation for treatment of the back injury. The application included information that Guttman underwent a surgical discectomy and fusion on June 23, 1999.

GE answered and offered the signed settlement agreement as a complete bar to Guttman's claim. The matter went before the ALJ, who found that Guttman waived his right to assert a back injury claim when he executed the settlement agreement. The ALJ also concluded that the claim was barred by operation of KRS 342.270(1), which provides that a claimant shall join all causes of action which are known or should be reasonably known to him at the time of the filing. The matter then went before the Board, which reversed and remanded for consideration of whether a prima facie showing of fraud or mistake was made and, if so, directing the ALJ to consider further evidence on the claim.

On remand, the ALJ, concluded that the case was not appropriate for reopening because the facts did not show fraud or mistake. The ALJ noted that Guttman underwent back surgery almost two months prior to execution of the settlement agreement, and found that this was not a situation in which Guttman was being starved into a settlement because of lack of income or deprivation of medical treatment. The ALJ also concluded that he did not find credible Guttman's assertion that he (Guttman) complained of back pain on every visit to Tillet.

The matter again went before the Board, which rendered an opinion affirming on April 3, 2002. This appeal followed.

Guttman now argues that the evidence of record compels a finding of mistake sufficient to reopen his claim. He notes that the claims adjuster, Debbie Whitlow ("Whitlow") mistakenly believed that he did not complain of back pain until five months after the injury. He argues that this mistake, when viewed in

the context of the entire record, formed the basis for GE's denial of compensability, and accordingly he maintains that he should be allowed to reopen the matter to assert the back injury as a compensable claim.

We have closely examined Guttman's argument on this issue and find no error in the Board's affirmation of the ALJ's order. As the Board properly found, the "mistake" provision in KRS 342.125 which permits reopening is not applicable where the alleged mistake is merely a failure to produce available evidence. In the matter at bar, it is uncontroverted not only that Guttman was aware of his back pain prior to executing the settlement, but in fact had undergone surgery on his back prior to its execution. KRS 342.270(1) requires a claimant to join all causes of action which are known or should be reasonably known to him at the time of the filing. Guttman chose to proceed without the benefit of counsel and to execute the second settlement agreement even after his handwritten exclusionary language was found unacceptable by GE. In sum, we cannot conclude that the Board erred in affirming the ALJ's conclusion that Guttman is not entitled to reopen his claim for benefits.

Guttman also briefly argues that GE is estopped from asserting that he waived the low back claim because he relied on GE's assurance that the back injury was not included in the settlement agreement. We do not find this argument persuasive. The Board properly noted that the ALJ was unconvinced that the insurance adjuster made any misrepresentations to Guttman concerning his ability to retain counsel or that the back injury

claim could be raised at a later date. These findings were supported by substantial evidence, and the Board properly so found. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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