

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002611-WC

RUMPKE OF KENTUCKY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-86998

DONALD LEON GRIBBIN;
HON. J. KEVIN KING,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.
JOHNSON, JUDGE: Rumpke of Kentucky, Inc. has petitioned for
review of an opinion and order of the Workers' Compensation
Board entered on November 27, 2002, which reversed the
Administrative Law Judge's determination that Donald Leon
Gribbin had failed to establish a prima facie case for the

reopening of his claim pursuant to KRS¹ 342.125. The Board remanded the case to the ALJ for a "reopening on the merits." Having concluded that the Board has not overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice, we affirm.

Gribbin began working for Rumpke in September 1998, as a heavy equipment operator and tractor-trailer driver. On April 7, 1999, Gribbin was injured during the course of his employment when his foot slipped off of a ladder located at the rear of a tanker trailer.² Gribbin sustained injuries to his lower back and hip. As a result of these injuries, Gribbin subsequently underwent surgery for a subluxation of his left hip.

On July 2, 1999, Gribbin filed an application for resolution of injury claim with the Department of Workers' Claims. On November 3, 2000, the ALJ approved a settlement agreement between Gribbin and Rumpke. The diagnosis on the settlement agreement stated "[c]hronic progressive low back pain, subluxation of the left hip." Under the terms of the settlement agreement, Gribbin was entitled to a lump-sum payment of \$2,479.57, which was based on a 3.75% permanent disability rating. This amount was in addition to payments of \$25,544.30

¹ Kentucky Revised Statutes.

² Gribbin's injury occurred while he was working for Rumpke at a landfill located in Hardin County, Kentucky.

in medical expenses and \$4,777.00 in temporary total disability (TTD) benefits that Gribbin had already received.

On June 14, 2002, Gribbin filed a motion to reopen pursuant to KRS 342.125. In support of his motion to reopen, Gribbin attached an affidavit wherein he stated that he had experienced "a sharp increase in the level of symptoms in my low back[.]" Gribbin further stated that he had undergone surgery to repair a ruptured disk in his back, based upon the recommendation of Dr. Rolando Cheng. Finally, Gribbin stated that he had not sustained any new injuries to his back since the settlement of his claim, and that he believed his additional complications were "directly related" to the work-related injury he suffered on April 7, 1999.

In addition to his affidavit, Gribbin attached several medical records related to his diagnosis and treatment following the exacerbation of his symptoms. Gribbin sought payment for his additional medical expenses, an award of TTD benefits, and an increased permanent partial disability award.

On July 18, 2002, Rumpke filed a response objecting to Gribbin's motion to reopen. Rumpke argued that "there [was] no medical evidence that [Gribbin] [had any] increase in occupational disability due to the work injury in question nor [was] there evidence that the alleged total disability was caused by a 'worsening of [Gribbin's] condition' which is a

necessary criteria pursuant to [KRS] 342.125(1)(d)." The ALJ agreed with Rumpke and denied Gribbin's motion to reopen on July 18, 2002. On August 21, 2002, the ALJ denied Gribbin's petition for reconsideration.

Gribbin appealed to the Board, which reversed the ALJ's denial of Gribbin's motion to reopen in an opinion and order entered on November 27, 2002. The Board ruled that "the ALJ erred as a matter of law in finding Gribbin did not present a prima facie showing of work-relatedness." Consequently, the Board remanded the matter "for a reopening on the merits." This appeal followed.

Rumpke's sole claim of error on appeal is that the Board improperly substituted its evaluation of the evidence for that of the fact-finder, i.e., the ALJ. In particular, Rumpke argues that Gribbin "failed to put forth a prima facie case [before the ALJ] which would permit a reopening based upon the medical evidence submitted and the Board unilaterally substituted its judgment in place of the ALJ." We disagree with Rumpke and hold that the Board did not err by ordering a reopening of Gribbin's claim.

This Court will correct a decision of the Board only when we perceive that "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in

assessing the evidence so flagrant as to cause gross injustice."³

In Stambaugh v. Cedar Creek Mining Co.,⁴ the former Court of Appeals explained the burden of a party seeking to reopen his claim pursuant to KRS 342.125:

[O]n an application to reopen[,] [the movant] 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 [original] decision before his adversary is put to the additional expense of relitigation.

In construing this language from Stambaugh, the Board in the case sub judice stated the question as follows:

Generally speaking, if the information submitted by the moving party is taken as true, would it justify reopening upon one of the grounds in KRS 342.125? . . .
Fundamentally, the question is, could a reasonable ALJ justify a reopening pursuant to KRS 342.125 if the moving party's supporting documentation is believed totally[?]

We agree with the Board's framing of the question on a motion to reopen and hold that, based upon the evidence submitted by Gribbin, the Board did not assess "the evidence so flagrant as to cause gross injustice."

As we mentioned previously, Gribbin attached several medical records in support of his motion to reopen. A report

³ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

⁴ Ky., 488 S.W.2d 681, 682 (1972).

from Dr. Amjad M. Faheem dated April 18, 2002, noted that Gribbin had a history of problems dating back to his injury in April 1999, at the L4-5 level in his back. Dr. Faheem's report also noted that Gribbin had "moderate muscle spasms and tenderness" in that same L4-5 level when Gribbin reported to the emergency room on April 18, 2002. A radiology report conducted that same day indicated that Gribbin had a "moderate-sized disc extrusion noted centrally at L4-5." Further, a report from Dr. Rolando Cheng dated April 22, 2002, diagnosed Gribbin as having a "mild central disc herniation at L4-L5 level." Finally, Dr. Cheng reported that he performed a "lumbar laminectomy of L4-L5" on Gribbin's back in an attempt to alleviate his symptoms.

Therefore, based upon the evidence that was submitted to the ALJ, we conclude that the Board was correct in determining that Gribbin had presented a prima facie case for reopening under KRS 342.125. Gribbin proffered sufficient "objective medical evidence of worsening"⁵ of his condition to warrant a finding that there was a "substantial possibility" that Gribbin would be entitled to additional benefits under KRS 342.125. Accordingly, the Board did not err by reversing the ALJ and ordering a reopening on the merits.

⁵ Under KRS 342.125, an injury claim may be reopened if, inter alia, there has been 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."

Rumpke places a great deal of emphasis on the fact that when Gribbin went to the emergency room on April 17, 2002, he told hospital personnel that his back pain began "since getting off of his lawn mower" the previous day. Rumpke contends that based on Gribbin's statement, his symptoms were the result of a new injury and the ALJ therefore correctly denied his motion to reopen. We first note that there is nothing in this statement alone indicating that Gribbin's getting off of his lawnmower caused the exacerbation of his symptoms. Moreover, as Stambaugh makes clear, when deciding initially whether the movant is entitled to a reopening, the determination does not involve weighing the conflicting evidence. Rather, the ALJ merely looks to whether the movant has shown to a "substantial possibility" that he will be entitled to additional benefits under KRS 342.125. In the case at bar, Gribbin satisfied this threshold inquiry. Therefore, the Board correctly determined that Gribbin was entitled to a reopening on the merits.

Based on the foregoing, the opinion and order of the Board reversing the ALJ and ordering a reopening of Gribbin's claim on the merits is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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