

RENDERED: JULY 30, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2004-CA-000109-WC

LEONARD GOMILLIA

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. 97-01459

BAESEL & ASHER ENTERPRISES;  
UNINSURED EMPLOYERS' FUND; SPECIAL FUND;  
J. LANDON OVERFIELD, ADMINISTRATIVE LAW  
JUDGE; AND THE WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Leonard Gomillia appeals from an order of the Workers' Compensation Board, entered December 17, 2003, affirming the denial of his motion to reopen a 1998 award. The Administrative Law Judge (ALJ) found that any change in Gomillia's medical condition was the result not of Gomilla's August 23, 1996, injury, the injury that gave rise to the 1998 award, but of prior injuries. Gomillia contends that a causative link between his 1996 injury and the worsening of his

condition is res judicata. We agree with the Board that it is not.

Gomillia is forty-three years old with a history of sporadic employment through labor services and independently arranged odd jobs. He injured his lower back in 1985 while working for the Gilliam Candy Company. He underwent surgery and settled his claim. In 1992, he aggravated the injury and had two more surgeries. Again in 1994 he sustained a back injury and underwent a fourth surgery. In 1995, he reopened his claim and settled for approximately \$60,000.00. In August 1996, while working as a roofer for Baesel & Archer Enterprises, he injured his low back again, which necessitated a fifth surgery in November 1996.

Gomilla's claim for benefits following this 1996 injury resulted in a finding that he had a seventy-percent occupational disability, sixty percent pre-existing and active and ten percent related to the 1996 injury. In October 1998, he was awarded benefits for 520 weeks. It is this award that Gomilla seeks to reopen.

In support of his claim he presented the deposition of Dr. Dan M. Spengler, an orthopedic surgeon and chairman of the department of orthopedics at the Vanderbilt University School of Medicine. Dr. Spengler, who operated on Gomilla's back in January 2001, February 2001, and March 2002, testified that

Gomilla suffers from transition syndrome and that his medical condition and occupational disability have indeed worsened since his surgery in November 1996. Dr. Spengler explained "transition syndrome," as follows:

[T]ransition just means that you fix a segment [of the spine], and then the segment above breaks down and you fix that, and then the one above that. That's sort of unusual, but that's what Mr. Gomillia had.

When asked if it was possible to tell what part of Gomillia's worsened condition was attributable to the 1996 injury as opposed to the original injury in 1985, Dr. Spengler said,

That's very difficult. My philosophy is that most of this built on his original problem. So I would say if you're looking at it, it's whatever would cause the original problem. All the rest of it, to me, has been related.

On the basis of this testimony, the ALJ found that Gomillia's worsened condition was not the result of the 1996 injury and so concluded that the award for that injury could not be increased.<sup>1</sup> The Board affirmed, and it is from that affirmance that Gomillia has appealed.

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<sup>1</sup> Whittaker v. Ivy, Ky., 68 S.W.3d 386, 388 (2002) ("It is axiomatic that a worker who seeks an increased award at reopening must demonstrate that the increased disability for which compensation is sought is the direct and proximate result of the injury that is the subject of the award.")

He contends that the 1998 finding that ten percent of his disability was the result of the 1996 injury is res judicata and that the same percentage should therefore have been applied to the increase in his disability since that finding.

Gomillia's conclusion, however, does not follow from his premise. Although the 1998 apportionment is res judicata with respect to the disability that then existed,<sup>2</sup> that finding has nothing to do with the additional disability that subsequently developed. The additional disability could have been the result of a new injury or any combination of the prior injuries. The only medical evidence—Dr. Spengler's opinion—was that the additional disability probably resulted from Gomillia's original injury, not the injury in 1996. The ALJ's finding in accordance with that testimony was not flagrantly erroneous.<sup>3</sup>

Finally, Gomillia contends that he is entitled to life-time benefits solely by virtue of the facts that he is now totally occupationally disabled and that his disability is the result of work-related injuries. We disagree. KRS 342.125

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<sup>2</sup> Garrett Mining Company v. Nye, Ky., 122 S.W.3d 513 (2003).

<sup>3</sup> Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992) ("The function of further review of the WCB [Board] in the Court of Appeals is to correct the Board only where the Court perceives 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.")

allows for awards to be increased only in the course of a reopening. Gomillia's 1998 award cannot be increased, however, because, as we have seen, the injury underlying that award did not cause Gomillia's increased disability. Gomillia's earlier award can no longer be reopened because of the reopening statute's limitations provisions.<sup>4</sup> Thus, notwithstanding Gomillia's total disability, the Board did not err by affirming the denial of his claim. Accordingly, we affirm the Board's December 17, 2003, order.

ALL CONCUR.

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<sup>4</sup> KRS 342.125(8).