

RENDERED: OCTOBER 27, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-001414-WC

KIM PIKE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-74388

FAMILY DOLLAR STORE; HON. HOWARD E.
FRASIER, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; KNOPF,¹ SENIOR JUDGE.

ACREE, JUDGE: Kim Pike (Pike) appeals from the June 2, 2006

opinion of the Workers' Compensation Board (the Board),

affirming the order of Hon. Howard E. Frasier, Jr.,

Administrative Law Judge (ALJ), denying Pike's motion to reopen

her workers' compensation claim.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Pike was working as a cashier for Family Dollar Stores (Family Dollar) on August 28, 2001, when she cut her right little finger and lacerated a nerve. She was treated by Dr. Joseph Kutz. Pike was allowed by Dr. Kutz to return to work on restricted duty with occasional use of her right hand. On May 29, 2002, Dr. Kutz performed exploratory surgery on Pike's finger and found scar tissue around the nerve, which was removed. After surgery, Dr. Kutz allowed Pike to return to work with a specific weight restriction, when lifting with the right hand, of 15 pounds. On July 8, 2002, Dr. Kutz returned Pike to regular duty, but on August 13, 2002, he further limited her right hand lifting to 5 pounds.

In November 2004, Dr. Kutz ordered a functional capacity evaluation (FCE) for Pike. From the FCE, Dr. Kutz continued Pike's 5 pound lifting restriction with her right hand.

The ALJ rendered a decision on April 21, 2005. He determined from the evidence that Pike had a 4% impairment rating and had reached maximum medical improvement (MMI) on September 8, 2002. He noted that while Pike was not fully restricted from using her right hand (and could thus operate a cash register), her duties at Family Dollar also included stocking and unloading trucks, which was beyond her work restrictions. Lacking the physical capacity to return to her

former job, the ALJ ruled Pike was entitled to the 3 multiplier pursuant to Kentucky Revised Statute (KRS) 342.731(1)(c).

The ALJ further found that while Pike could not return to Family Dollar, Dr. Kutz's restrictions did not prevent her from returning to her usual and customary work (based on her employment history as a data entry clerk) as of October 19, 2002. He found that no temporary total disability (TTD) was owed after October 19, 2002 and Pike was appropriately paid TTD from September 15, 2001 until July 14, 2002 and from August 28, 2002 until October 19, 2002. No appeal was taken from the ALJ's original decision.

Dr. Kutz performed additional surgery on Pike's finger on August 3, 2005. Family Dollar paid for the surgery. Pike filed her motion to reopen on December 14, 2005. She alleged a change of condition and alleged that she was more disabled than she was at the time of the April 2005 decision, either temporarily or permanently.

In support of her motion, Pike filed an affidavit and two return-to-work capability statements from Dr. Kutz. Pike's affidavit noted that she continued to work after the decision in her claim and continued to have problems with her right hand. She also stated that following surgery, Dr. Kutz had her on restricted work and had not released her to return to work, nor had he declared that she was at (MMI) from the surgery. Pike

acknowledged that Family Dollar had paid for her most recent surgery, but noted they would not pay TTD.

The submitted return-to-work capability statements from Dr. Kutz (dated September 14, 2005 and November 1, 2005) indicated Pike could return to work on September 14, 2005, for primarily one-handed work. The form indicated Pike could use her injured hand occasionally, but maintained her lifting restriction of no more than 5 pounds with the right hand. She was also to use a splint. The November 1, 2005 statement indicated the same restrictions.

Family Dollar filed a response arguing that Pike failed to make a *prima facie* case for a change of disability or entitlement to additional TTD. Family Dollar argued Pike failed to show any change of disability by objective medical evidence that her impairment worsened. They also noted the restrictions following surgery were the same or less than they were at the time of the award.

The ALJ denied Pike's motion to reopen. He found Pike failed to make a *prima facie* showing to support reopening her claim. She did not support her claim by evidence in the form of objective medical testimony indicating a worsening of her impairment since the previous award. She also failed to show that her current restrictions prevented her from returning to her customary work as a data entry clerk.

Pike appealed the ALJ's decision to the Board, which affirmed the denial of Pike's motion to reopen. This appeal followed.

Prior to reviewing the Board's refusal to reopen Pike's claim, we must first address Family Dollar's argument to dismiss this case as untimely filed pursuant to Kentucky Rules of Civil Procedure (CR) 76.25. CR 76.25(2) states:

Within 30 days of the date upon which the Board enters its final decision pursuant to KRS 342.285(3) any party aggrieved by that decision may file a petition for review by the Court of Appeals Failure to file the petition within the time allowed shall require dismissal of the petition.

The Workers' Compensation Board's decision was entered on June 2, 2006. CR 76.25(2) requires that the petition for review of such decisions be filed in the office of the Clerk of the Court of Appeals within thirty (30) days of the date of the Board's decision. July 2 fell on a Sunday, so by operation of CR 6.01, the petition was due on Monday, July 3, 2006.

CR 76.40(2) states that documents received via U.S. Postal Service after the specified due date will only be filed if they are transmitted by registered or express mail "within the time allowed for filing." Family Dollar contends that "there is no evidence that [Pike's petition] was sent registered or express mail." However, a simple look into the record reveals that Pike properly followed CR 76.40(2) and mailed the

petition using U.S. registered mail on July 3. Therefore, the petition was treated as timely tendered when received by the clerk's office on July 6, 2006.

Next, we turn to the real issue of this case. The findings of an ALJ will be reversed only if the evidence is so overwhelming that a different decision is compelled. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984). Our review of the Board is likewise limited and its decision will be upheld unless it has misinterpreted or disregarded controlling law. Daniel v. Armco Steel Company, L.P., 913 S.W.2d 797, 798 (Ky.App. 1995). Reopening a workers' compensation claim is governed by KRS 342.125 which requires that the movant offer *prima facie* evidence of one of the grounds listed in KRS 342.125(1). Dingo Coal Co., Inc. v. Tolliver, 129 S.W.3d 367 (Ky. 2004). One of those grounds is a "change of disability as shown by objective medical evidence of a worsening or improvement of condition caused by the injury since the date of the award or order." KRS 342.125(1)(d). "Evidence of a worsening of impairment requires that there be a comparison of impairment at two points in time." Hodges v. Sager Corp., 182 S.W. 3d 497, 501 (Ky. 2005).

We agree with the Board that Pike failed to submit proof of a change of impairment. Pike's motion to reopen alleged that she experienced a post-award change of disability.

The medical record before the ALJ on January 23, 2006, included two return-to-work capability forms completed by Dr. Kutz. Both forms indicated that as of September 14, 2005, Pike was able to return to work with limited use of her right hand and her lifting restriction remained at 5 pounds. Pike submitted no medical evidence indicating a change in functional impairment. Pike testified to her condition, but her testimony does not constitute "objective medical evidence" and is insufficient to make a *prima facie* showing for reopening. The assessment of an impairment for the purpose of assessing a workers' compensation disability claim is a medical question that must be resolved by a competent physician. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003).

Pike's testimony is insufficient to establish a *prima facie* case for reopening. Finding no abuse of discretion in the ALJ's denial of Pike's motion to reopen, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Wayne C. Daub
Louisville, Kentucky

BRIEF FOR APPELLEE FAMILY
DOLLAR STORES:

Michael P. Neal
Louisville, Kentucky