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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001424-WC

KUHLMAN ELECTRIC CORP. APPELLANT

v.
PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-79685

REX CUNIGAN; HONORABLE
CHRIS DAVIS, ADMINISTRATIVE
LAW JUDGE; HONORABLE JOSEPH
W. JUSTICE, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Kuhlman Electric Corp. (Kuhlman) has petitioned this Court for review of the opinion of the Workers' Compensation Board (the Board)

reversing the opinion and order of the Administrative Law Judge (ALJ) dismissing Rex Cunigan's motion to reopen and the denial of his petition for reconsideration. Kuhlman contends that the Board erred in reversing the ALJ's decision and in holding that the grounds of newly discovered evidence and mistake supported Cunigan's motion to reopen. We affirm the Board's decision.

Cunigan, born January 28, 1967, worked for Kuhlman in preventive maintenance from October 2006 through July 2008, when he was terminated for excessive absences. This position entailed lifting, climbing, and crawling. His past work history included factory work and home improvement. On April 24, 2008, Cunigan claimed to have injured his left leg when he slipped on a concrete floor after coming off of steps at his place of employment. He reported his injury to the acting supervisor, but he did not seek medical treatment that day. Cunigan filed a *pro se* Form 101 application for resolution of injury claim on April 22, 2009, seeking benefits due to his injury. In an attachment to his Form 101, Cunigan stated that his doctor had ordered him to get an MRI to determine the cause of his leg pain, but the request was denied. Kuhlman contested the claim and filed a separate Form 112 medical fee dispute. In the Form 112, Kuhlman stated that the requested lumbar MRI had been denied as not medically necessary or reasonable. Kuhlman relied upon a June 23, 2008, letter from Dr. Michael M. Best, in which Dr. Best stated that he found no evidence of radiculopathy or myelopathy in his examination and therefore did not find any medical necessity for an MRI. Kuhlman moved to join Cunigan's medical provider, Dr. J. Rick Lyon,

who had requested the MRI, as an indispensable party to the medical fee dispute. The matters were assigned to ALJ Justice, and the motion to join was granted. Kuhlman also relied upon the 2008 medical evaluation of Dr. Bart J. Goldman, who diagnosed a hamstring sprain.

Cunigan failed to appear at the benefit review conference, but he did appear at the hearing. The ALJ continued the hearing to permit Cunigan to seek an attorney to represent him. Kuhlman moved for a ruling in its favor because Cunigan failed to put on any proof and had not complied with the ALJ's order to retain an attorney. Cunigan requested an extension of time to retain an attorney, which the ALJ granted on October 29, 2009. He sent a letter to the ALJ, which was received on December 4, 2009, explaining that he could not find an attorney who would take his case because his physician had not given him a permanent impairment rating due to the lack of an MRI to review. On December 7, 2009, Kuhlman moved the ALJ to set the matter for a final hearing, noting that no attorney had made an appearance on behalf of Cunigan. The same day, the ALJ ordered a University Evaluation to assist him in determining Cunigan's medical condition, but he later set this order aside on Kuhlman's petition for reconsideration. The ALJ also set the matter for a final hearing.

Cunigan failed to appear at the February 18, 2010, final hearing, and the ALJ ordered him to show cause as to why the matter should not be decided in favor of Kuhlman. Cunigan responded and stated that he had gotten lost on the way to the hearing site. The ALJ rescheduled the hearing for May 21, 2010.

Kuhlman filed a second Form 112 medical fee dispute on May 6, 2010, contesting the compensability of a $276.00 bill from Dr. Lyon and Rebound Orthopaedics.

The final hearing was held on May 21, 2010, after which Cunigan filed Dr. Lyon's medical records. At the hearing, Cunigan testified that "All I want is to get the MRI, find out why a little old hamstring tear, I'm still hurting in the center, not in my, right below my belt, my butt, my leg swells. I stay up on it all day long. All I want is the MRI."

The ALJ entered an opinion, order, and award on August 23, 2010, in which he detailed both the medical and lay testimony, including the evidence from a private investigator. Relying on the evidence from Dr. Best and Dr. Goldman, the ALJ found that Cunigan had experienced a work-related hamstring strain from which he had recovered. The ALJ agreed with Dr. Best that an MRI "was not warranted under the evidence, as there did not appear to be any objective findings of radiculopathy." Cunigan had failed to prove that his injury caused a permanent impairment. The ALJ awarded Cunigan temporary total disability (TTD) benefits from April 25, 2008, through October 1, 2008, the date on which Dr. Goldman stated that he had reached maximum medical improvement (MMI). Regarding the medical fee disputes, the ALJ found that the MRI was not reasonable or necessary, but ordered Kuhlman to contact Dr. Lyon's office to determine whether the $276.00 bill was for services rendered for his work-related injury. If so, Kuhlman was to pay the bill. Finally, the ALJ did not find that Cunigan was entitled to any

future medical benefits due to a lack of objective medical evidence of a condition that would require treatment. Kuhlman filed a petition for reconsideration related to the award of TTD benefits, and the ALJ granted the motion to change the date on which TTD began and provided a credit for unemployment benefits Cunigan had received.

On September 21, 2010, Cunigan filed a *pro se* notice of appeal to the Board in which he stated that he had obtained an MRI through Dr. Richard A. Lingreen on August 23, 2010, that showed a large central disc herniation at L5-S1. Kuhlman moved to strike the notice of appeal and/or the attachment, noting that proof time had closed before the MRI was performed. On October 4, 2010, attorney Thomas G. Polites filed a notice of representation for Cunigan and moved the Board to dismiss the appeal. The Board granted the motion to dismiss on October 18, 2010, and denied Kuhlman's motion as moot.

On October 28, 2010, Cunigan filed a motion to reopen pursuant to Kentucky Revised Statutes (KRS) 342.125, based upon a change in disability due to a worsening of his condition since the entry of the opinion, order, and award. The motion was based upon the results of the MRI as well as the neurosurgical evaluation by Dr. Gregory Wheeler, who saw Cunigan on October 8, 2010. Dr. Wheeler tied the disc herniation to Cunigan's fall at work two years earlier and recommended surgical intervention. Cunigan argued that his problem had been misdiagnosed as a left hamstring injury because the request for an MRI had been denied by the carrier. Without the benefit of the MRI, Dr. Lyon could not properly

diagnose his condition. Cunigan asserted that the MRI report and Dr. Wheeler's opinions constituted newly discovered evidence pursuant to KRS 342.125(1)(b), which provided a *prima facie* case to support reopening his claim. Kuhlman objected to the motion to reopen, arguing that the ALJ's findings were *res judicata*. It argued that Cunigan failed to preserve the back issue by filing any evidence related to the lumbar spine. Kuhlman also argued that the MRI results did not constitute newly discovered evidence, noting that Cunigan had the ability to develop the same evidence prior to the ALJ's decision. On January 14, 2011, the Chief ALJ granted Cunigan's motion to reopen to the extent that the claim would be assigned to an ALJ for further adjudication. The claim was assigned to ALJ Jeanie Owen Miller.

On March 7, 2011, Kuhlman filed a Form 112 medical fee dispute in which it disputed the compensability of bills submitted by Healthcare Recoveries, UK Healthcare/Good Samaritan Hospital, Commonwealth Anesthesia/Dr. Roth, Dr. Lyon/Rebound Orthopedics, and Dr. Wheeler. Kuhlman also moved to join the medical providers as indispensable parties, which was granted by the ALJ. Kuhlman filed a new evaluation from Dr. Best dated April 14, 2011. Dr. Best noted that Cunigan had undergone a left L5-S1 laminotomy, microdiscectomy on December 10, 2010. However, Dr. Best did not believe that Cunigan's L5-S1 disc herniation was causally related to his work injury based upon the EMG and nerve conduction study performed in July 2008 showing no evidence of radiculopathy. Dr. Best did not assign any permanent whole body impairment. Cunigan

introduced the April 2011 deposition testimony of neurosurgeon Dr. Wheeler, who performed a successful back surgery on December 10, 2010. Dr. Wheeler attributed Cunigan's disk herniation to his work-related fall in 2008, but did not assign a permanent impairment rating because he had not yet reached MMI.

The ALJ placed the proceedings in abeyance on June 15, 2011, until Cunigan had reached MMI and the matter was ready for adjudication. The benefit review conference was eventually held on March 5, 2012. The ALJ ordered that proof would remain open until the May hearing date, and a supplemental benefit review conference would be held immediately before the hearing. Other medical proof continued to be filed. However, prior to the May hearing date, the ALJ entered an order of recusal, and the matter was reassigned to ALJ Chris Davis. On May 29, 2012, Kuhlman filed an amended medical fee dispute naming several additional medical providers and asserted that the bills submitted were non-compensable. Kuhlman also filed a motion to join these providers as indispensable parties, which was later granted. The ALJ scheduled a benefit review conference/final hearing for November 14, 2012.

The hearing was held as scheduled, and the parties filed briefs arguing their respective positions on the contested issues, including the motion to reopen, the medical fee dispute, *res judicata*, failure to raise all claims at the time of the original filing, statute of limitations, and the statutory threshold for reopening. The ALJ entered an opinion and order January 10, 2013, dismissing the reopening.

After summarizing the claim and the evidence submitted, the ALJ concluded as follows:

> I have, I hope, given the potential gravity of the Plaintiff's low back injury, carefully weighed the equities, facts and law herein. I agree entirely with the Plaintiff that a condition that is originally found to be a temporary condition can be re-opened to show a worsening of condition into a permanent condition.
>
> I have also considered that at the time of the original litigation the Plaintiff was acting *pro se*, with all of its difficulties and disabilities. I have further[] taken into account the fact that the Plaintiff may have a serious low back injury.
>
> Nonetheless, it is clear to me that when Justice Palmore, *Messer [v.] Drees*, 382 S.W.2d 209 (Ky. 1964) spoke of 'mistake' and 'change of condition' he was not speaking of a Plaintiff, on re-opening, alleging an entirely new injury and body part.
>
> Furthermore, while the Plaintiff correctly argues that no physician, at the time of Judge Justice's original opinion, affirmatively stated the Plaintiff had a herniated disk it was clear that Dr. Lyons [sic] had requested a lumbosacral MRI. That MRI was denied and the issue of it was before Judge Justice. Therefore, the issue of whether or not the Plaintiff might have a work-related low back injury was before Judge Justice but he concluded that the Plaintiff only had a temporary hamstring injury.
>
> Finally, on this issue, it is clear that the Plaintiff is not arguing that the herniated disk arose subsequent to the Opinion by Judge Justice, as a result of wear and tear or some other possible theory, but was present and work-related prior to the Opinion by Judge Justice. And, as discussed, Judge Justice was not persuaded.
>
> Therefore, based on the following, including but not limited to the fact that the herniated disk was in existence at the time Judge Justice wrote his opinion, the

issue of further lumbosacral treatment was before him and denied, and the only work-related finding was of a temporary hamstring injury[,] the Plaintiff, as a matter of law, is precluded, based on the doctrine of *res judicata*, from now arguing that he has a work-related low back injury.

Accordingly, all of his claims in this matter, at this time, are dismissed because, as a matter of law and procedure, he does not have a work-related low back injury.

I note, again, for emphasis, that this issue is markedly different from a psychological injury that arises subsequent to an original opinion due to increasing and unabated pain. It differs from wear and tear on an adjacent or effected [sic] body part to an original injury. It is a condition that was in existence, allegedly, from April 24, 2008, considered by Judge Justice, and rejected.

I am compelled to address the Plaintiff's argument that at the time of Judge Justice's original opinion neither the physicians, the parties, nor the Judge had the benefit of the MRI. Whether or not this is newly discovered evidence is not properly before the undersigned and will not be considered. Certainly the issue of the work-relatedness of the lumbar spine was before Judge Justice.

I am dubious that the argument of joinder of claims is applicable since, at the time of Judge Justice's original opinion, the issue of a lumbosacral condition was clearly tried by consent and before Judge Justice.

This re-opening is dismissed, in its entirety, on the doctrine of *res judicata*, according to the above analysis.

Cunigan filed a petition, and an amended petition, for reconsideration disputing the ALJ's analysis of the relevant law. The ALJ denied the petition and amended petition on February 26, 2013, stating, in relevant part:

> 1. The Administrative Law Judge did not find that the issue of the work-relatedness of … the low back injury was tried by consent before ALJ Justice, I found and stated that the work-relatedness of the lumbar MRI and thus the lumbar injury was specifically and by the terms of the then relevant Benefit Review Conference Memorandum clearly before him. Judge Justice made an unambiguous finding that the lumbar MRI was not work-related.
>
> 2. Judge Justice also made an unambiguous finding and Order that the only work-related injury was to the hamstring.
>
> 3. Based on the foregoing to find that on Re-Opening the undersigned is vested with the authority to mingle and blur the lines between "mistake" and "change of condition" so as to find that the Plaintiff has a work-related lumbar disk injury and herniation is not what is intended by either the statute or Justice Palmore.
>
> 4. The Plaintiff does not even argue that the hamstring injury caused his herniated disk. He simply wishes to use "mistake" and "change of condition" interchangeably to morph what is, as a matter of law, a hamstring pull into a herniated disk. This is not logical.
>
> 5. A re-opening for mistake is based on newly discovered evidence that could not have been reasonably discovered at the time of the original litigation. A re-opening for change of condition is when a condition of a Plaintiff has already been found to have changes, or that condition reasonably causes a new condition.

Cunigan filed a notice of appeal to the Board. Following briefing by the parties, the Board entered an opinion on July 30, 2013, reversing and remanding the ALJ's decision. The Board held that the doctrine of *res judicata* did not bar Cunigan's motion to reopen because he established the requisite showing to reopen on two grounds set forth in KRS 342.125 – newly discovered evidence and mistake

– but not on a third ground, worsening of condition. This petition for review by Kuhlman now follows.

On appeal, Kuhlman contends that the Board erred when it held that Cunigan's low back injury was not barred by the doctrine of *res judicata* and that Cunigan had established two grounds to support reopening his claim. Cunigan, in turn, argues that the Board ruled correctly.

In *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992), the Supreme Court of Kentucky addressed its role and that of the Court of Appeals in reviewing decisions in workers' compensation actions. "The function of further review of the WCB 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." With this standard in mind, we shall consider the parties' arguments.

KRS 342.125 provides for the reopening of workers' compensation cases pursuant to several enumerated grounds:

> (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:
>
> (a) Fraud;
>
> (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;

(c) Mistake; and
(d) Change 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.

In *Turner v. Bluegrass Tire Co., Inc.*, 331 S.W.3d 605 (Ky. 2010), the Supreme Court of Kentucky addressed the question of finality in such actions as well as the application of KRS 342.125:

> Proceedings under Chapter 342 are adversarial. Final workers' compensation awards, like other judgments, are subject to the doctrine of finality. The doctrine precludes further litigation of issues that were decided on the merits in a final judgment in instances where there is an identity of parties and an identity of causes of action. The principle supporting the doctrine is that litigation should end when the rights of the parties have been finally determined.
>
> . . . .
>
> KRS 342.125(1) permits a final workers' compensation award to be reopened and modified on four specified grounds. The claimant's motion included fraud, mistake, and newly-discovered evidence. A motion to reopen based on one or more of these grounds is in effect a request for a new trial and, thus, is governed by the criteria for granting new trials under CR 60.02. A new trial request may not be granted under CR 60.02 if based on new evidence that could and should have been discovered and produced in the initial trial. Each party to a cause of action must, therefore, exercise due diligence in discovering and introducing evidence sufficient to prove its case before the matter is submitted for a decision.

Turner, 331 S.W.3d at 608-09 (footnotes omitted). The *Turner* Court went on to discuss the standard a movant must meet in order to justify reopening a claim:

> A *prima facie* showing adequate to support granting a motion to reopen need not be sufficient to support a finding for the movant on the merits in the event that the respondent fails to go forward with evidence to the contrary. The standard for deciding the motion is whether the movant has made a preliminary showing of the substantial possibility of proving one or more of the prescribed conditions sufficient to justify putting the adversary to the expense of re-litigation. The standard for review on appeal is whether or not the decision was an abuse of the ALJ's discretion because it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."

Id. at 609 (footnotes omitted).

Kuhlman contends that the MRI results cannot be considered newly discovered evidence pursuant to KRS 342.125(b) because it did not come into being until the day the original workers' compensation award was signed. The Supreme Court of Kentucky addressed this exception in *Russellville Warehousing v. Bassham*, 237 S.W.3d 197, 201 (Ky. 2007):

> . . . *Black's Law Dictionary* 579 (7th ed. 1999) explains that "newly discovered evidence" is a legal term of art. It refers to evidence that existed but that had not been discovered and with the exercise of due diligence could not have been discovered at the time a matter was decided. *Stephens v. Kentucky Utilities Company*, 569 S.W.2d 155 (Ky. 1978), explains further that when the term is used in a statute, it may not be construed to include evidence that came into being after a matter was decided. The decisive effect of evidence does not arise unless it is properly viewed as being "newly discovered." *See Walker v. Farmer*, 428 S.W.2d 26 (Ky. 1968). Bassham's autopsy report was not newly discovered evidence for the purposes of KRS 342.125 because it did not exist when Bassham's award was rendered; therefore, its decisive effect was immaterial unless another ground existed for reopening.

See also Turner, 331 S.W.3d at 609 ("As used in KRS 342.125(1), 'newly-discovered evidence' refers to evidence existing at the time of the initial proceeding that the moving party did not discover until recently and with the exercise of due diligence could not have discovered during the pendency of the initial proceeding. Moreover, the evidence must not be merely cumulative or impeaching but must be material and, if introduced at reopening, probably result in a different outcome." [Footnotes omitted]).

Kuhlman also contends that mistake cannot serve as a basis for reopening because the mistake must be a mutual one made by the parties, not by the experts. It relies upon the explanation of the law in *Bassham*:

> Consistent with the principle of *res judicata*, subsequent decisions make it clear that the "mistake" provision is not an invitation to retry a litigated claim and that litigation must end when a decision becomes final unless extraordinary circumstances exist. Where the parties present conflicting evidence on a question of fact in the initial proceeding and a decision on the matter is final, subsequent evidence that the finding was mistaken does not show a "mistake" within the meaning of KRS 342.125. *See Darnall v. Ziffrin Truck Lines*, 484 S.W.2d 868 (Ky. 1972); *Young v. Harris*, 467 S.W.2d 588 (Ky. 1971). Nor is such evidence the type of "very persuasive reason" to which the court referred in *Slone v. R & S Mining, Inc.*, *supra* at 261.

Bassham, 237 S.W.3d at 202. The former Court of Appeals also addressed mistake:

> When subsequent events indicate that an award was substantially induced by a misconception as to the cause, nature or extent of disability at the time of the hearing,

> justice requires further inquiry. Whether it be called a 'mistake' or a 'change in conditions' is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it. *Cf. Blue Diamond Coal Company v. Meade*, Ky., 289 S.W.2d 503 (1956).

Messer v. Drees, 382 S.W.2d 209, 213 (Ky. 1964).

Under the specific circumstances of this case, we believe that the Board correctly reversed the ALJ's decision in this case in holding that Cunigan established two grounds to support the reopening of his claim; namely, newly discovered evidence and mistake. Therefore, we shall rely upon the relevant portions of the Board's opinion as our own:

> Because Cunigan's argument regarding ALJ Justice deciding whether Cunigan sustained a low back injury is difficult to follow, we feel compelled to first address that issue. We conclude that ALJ Davis correctly determined the issue of whether Cunigan sustained a work-related low back injury was before ALJ Justice as he concluded the only injury Cunigan sustained was a temporary hamstring injury. A review of ALJ Justice's findings in his October 10, 2011, opinion, award, and order reveals Cunigan only introduced evidence regarding the hamstring strain, and the testimony of Drs. Best and Goldman persuaded him [that] Cunigan had a "hamstring strain or tear." ALJ Justice was also persuaded by Dr. Best that the lumbar MRI was not warranted as there were no objective findings of radiculopathy. Therefore, we believe ALJ Justice had before him the issue of whether Cunigan sustained a low back injury and ultimately determined he did not.
>
> That said, in arriving at our decision we do not find that determination to be significant. Because we believe *res judicata* did not bar Cunigan's motion to

reopen, we reverse ALJ Davis' decision and remand for further proceedings.

. . . .

In the case *sub judice*, we believe Cunigan made the requisite showing of two grounds set forth in KRS 342.125. First, Cunigan made a *prima facie* showing of newly discovered evidence. [Definition of newly discovered evidence as set forth in *Turner*, *supra*, omitted.]

Here, Cunigan established evidence existed at the time of the initial proceeding that he did not discover until recently and with the exercise of due diligence could not have discovered during the pendency of the initial proceedings. We acknowledge that results of the MRI were not in existence until after ALJ Justice decided the claim. Cunigan acknowledged in the April 18, 2011, deposition, that after the ALJ's decision, he could turn in the cost of the MRI on his wife's insurance and obtain the MRI. The MRI revealed he had a significant herniated disc. Although Kuhlman correctly notes the MRI report was not in existence at the time of the proceedings, that fact is a distinction without a difference as Kuhlman fought to prevent the existence of the evidence sought, the MRI report.

In filing the action, Cunigan listed a leg injury which was the only body part which he knew was causing him significant pain. He did not have any back pain. Throughout the proceedings, Cunigan consistently emphasized [that] he desired a lumber MRI be performed. Dr. Lyon initially recommended a lumbar MRI and then stated in a report dated July 28, 2008, the MRI was not needed. However, on February 9, 2009, and November 18, 2009, Dr. Lyon emphasized an MRI was needed in order to obtain the right diagnosis. Cunigan testified Dr. Lyon would not let him return until he obtained the MRI. The record reveals Cunigan tried diligently to obtain an MRI and was blocked by Kuhlman at every turn. After Cunigan filed a Form 101, Kuhlman immediately filed a medical fee dispute contesting the

necessity for the MRI. In fact, even though its own physicians agreed with Dr. Lyon's diagnosis of hamstring strain, Kuhlman filed a medical fee dispute contesting Dr. Lyon's medical bills of $276.00. Cunigan tried diligently to obtain the MRI, but could not because Kuhlman prevented him from obtaining it.

Also of significance is the fact [that] ALJ Justice initially ordered a university evaluation and, based upon Kuhlman's petition for reconsideration, reversed himself. Before an accurate diagnosis could have been rendered, it is clear an MRI should have been performed. We believe it is logical to conclude [that] the MRI would not have been performed until ALJ Justice resolved the medical fee dispute concerning the reasonableness and necessity of the MRI. Thus, the fact [that] the MRI was obtained after ALJ Justice's decision does not blur the fact [that] it was sought by Cunigan, based on the recommendation of Dr. Lyon, and was resisted by Kuhlman through the use of numerous reports and letters of Drs. Best and Goldman.

Kuhlman's assertion [that] the results of the MRI [were] not evidence in existence at the time of the initial proceedings rings hollow given its efforts to block Cunigan from obtaining the MRI. Moreover, the MRI report was not cumulative evidence but was material and probably would result in a [different] outcome.

Cunigan made a *prima facie* showing adequate to support granting his motion as required by *Turner v. Bluegrass Tire Co., Inc.*, *supra*. Cunigan "made a preliminary showing of the substantial possibility of proving one or more of the prescribed conditions sufficient to justify putting the adversary to the expense of re-litigation." *Id*. at 609. Dr. Wheeler unequivocally stated the herniated disc necessitating the surgery was caused by the work injury of April 24, 2008. Dr. Wheeler's opinion is reinforced by Dr. Owen's opinion. Thus, ALJ Davis erred in applying the doctrine of *res judicata* and not determining Cunigan satisfied his burden under KRS 342.125(1)(b) by making a *prima*

facie showing of newly discovered evidence which could not have been discovered with the exercise of diligence.

We also believe Cunigan made a *prima facie* showing of mistake pursuant to KRS 342.125(1)(c) in that all the physicians initially diagnosed a hamstring strain. Although in his later records Dr. Lyon diagnosed a pelvic sprain and restless leg syndrome, his earlier records reveal he had diagnosed a hamstring strain.[1] More importantly, the reports of Drs. Best and Goldman introduced during the proceedings reveal their agreement with Dr. Lyon's diagnosis of a hamstring strain. ALJ Justice relied upon these opinions in concluding [Cunigan's] work injury caused only a hamstring strain.

We believe the rationale enunciated in *Kendrick v. Bailey Vault Company, Inc.*, 944 S.W.2d 147 (Ky. App. 1997) is applicable. Kendrick sustained a work-related back injury and was "treated by and underwent surgery at the hands of, Dr. Richard Mortara." *Id*. at 148. Thereafter, Dr. Mortara assessed an 8% functional impairment, opined Kendrick was physically restricted for one year and stated Kendrick had reached MMI. Kendrick and the employer's carrier agreed to settle his claim for a lump sum payment of $13,000 plus two years of medical expenses. Kendrick testified that he understood after two years following the date of approval of the settlement he would no longer be entitled to medical benefits. The settlement agreement included language that the claim against Bailey Vault Company, Inc. would be dismissed with prejudice and Kendrick waived the right to reopen the claim. With the passage of time, Kendrick realized his condition did not improve as predicted by Dr. Mortara. Instead, additional surgery was required.

Kendrick retained counsel and filed a motion to set aside the settlement agreement as unconscionable. *Id*. at 148. The motion was granted to the extent [that] the

[1] See Dr. Lyon's July 28, 2008, record. In that notation, Dr. Lyon stated treatment options were discussed with Cunigan and the nerve studies were negative. Dr. Lyon stated an MRI was not warranted and recommended resuming physical therapy and diagnosed a hamstring strain. [Footnote 8 in original.]

claim would be reopened for the taking of proof. Bailey Vault Co. Inc. asserted the reopening was barred by *res judicata*. The ALJ ruled the dismissal with prejudice and the waiver of reopening were not enforceable. The Board concluded the ALJ so ruled because he determined both parties were under a mutual mistake with respect to Kendrick's ability to return to work as predicted by Dr. Mortara. *Id*. at 149. The Court of Appeals affirmed the Board's holding as to mutual mistake. [Footnote omitted.] The Court of Appeals ultimately determined it was undisputed both sides relied upon Dr. Mortara's opinion [that] Kendrick had reach MMI, was 8% functionally impaired, and would have restrictions for only one year. In fact, Dr. Mortara was incorrect. *Id*. at 150. The Court of Appeals held as follows:

> Clearly, this scenario amounts either to constructive fraud or mutual mistake. In either case, Kendrick has presented a compelling case for setting aside the settlement agreement.

Id.

The same rationale applies in this case. All the physicians diagnosed a hamstring strain which ALJ Justice relied upon in determining [that] Cunigan sustained only a hamstring strain. When Cunigan was able to obtain an MRI, because he could turn in the bill on his wife's insurance, it revealed the pain he had constantly experienced since the April 24, 2008, injury was due to a large herniated disc at the L5-S1 level. Mistake as defined in *Kendrick v. Bailey Vault Co., Inc., supra*, is present in the case *sub judice*.

. . . .

Finally, although not necessarily on all squares with this case, we believe the principles enunciated in *Messer v. Drees*, *supra*, mandate vacating the ALJ's decision. [Discussion of facts and analysis in *Messer v. Drees* omitted.]

> The above [omitted] language is applicable in the case *sub judice*. Here, after filing a Form 101 alleging an injury to the only body part that hurt, Cunigan continuously sought an MRI of the lumbar spine. Dr. Wheeler's testimony sufficiently explains why Cunigan did not experience back pain and that he may well have had a full range of motion of the lumbar spine given the location of the herniated disc. In addition, Dr. Wheeler believed [that] on the first examination by Dr. Lyon, Cunigan had a positive test for a ruptured disc because the straight leg test reproduced leg pain. Further, Dr. Wheeler's testimony establishes a ruptured disc at L5-S1 would cause the exact symptoms experienced by Cunigan from the time of the injury until he saw Dr. Wheeler post-award. In addition, the following observation of Dr. Goldman in his June 15, 2010, letter [is] insightful:
>
>> I am still at a loss as to what Dr. Lyon is looking for and how an MRI will change this gentleman's treatment, nor is it medically necessary. However, as he is now over 2 years out from this injury, if he is still having pain in that region, an MRI may be reasonable if for no other reason than to convince this gentleman, and possibly treating physicians, that there is nothing further that needs to be done.
>>
>> Therefore, once again it is recommended while possibly reasonable the MRI is not medically necessary.
>
> Accordingly, the January 10, 2013, opinion and order and the February 25, 2013, order ruling on the petition for reconsideration and amended petition for reconsideration of ALJ Davis are REVERSED. This claim is REMANDED to ALJ Davis for a determination of whether Cunigan sustained a work-related low back injury on April 24, 2008, and, if appropriate, an award of income and medical benefits.

For the foregoing reasons, the Workers' Compensation Board's July 30, 2013, opinion is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

George T.T. Kitchen, III
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BRIEF FOR APPELLEE, REX CUNIGAN:

Roy Gray
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