

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: February 19, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0123-WC

DATE 3-11-04 ELLA G. GIBBINS, D.C.

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF TRANSPORTATION

APPELLANT

APPEAL FROM COURT OF APPEALS

2002-CA-1538-WC

V.

WORKERS' COMPENSATION BOARD NOS. 94-42764

TODD A. WARD; HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE; SPECIAL FUND;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board (Board) and the Court of Appeals have affirmed the decision in a reopening whereby the claimant's occupational disability from a 1994 injury was increased from 55% to 100%. Appealing, the employer maintains that both the Administrative Law Judge (ALJ) who granted the motion to reopen and the ALJ who considered the merits and increased the award erred by failing to apply the December 12, 1996, version of KRS 342.125(1)(d). Other arguments are that the increased award was not supported by substantial evidence under KRS 342.125(1)(d) and that the ALJ erred by refusing to admit a supplemental medical report. We affirm.

On October 10, 1994, the claimant was injured while operating an end loader. He testified that his low back, neck, and legs were affected; that he could neither twist

nor bend his neck; and that he experienced continuous low back pain that radiated down his left leg into his left foot. He also alleged a psychological condition due to nervousness and depression. Although he attempted to return to work, he testified that he was forced to quit after a few days due to pain. He maintained that he was totally disabled.

In a decision that was rendered on April 2, 1996, and amended following a petition for reconsideration, the ALJ awarded a 55% occupational disability due to the neck and back injuries but determined that the psychological condition was not disabling. The decision relied upon testimony from Drs. Vaughn and Weikel. Dr. Vaughn reported a protruding L5-S1 disc, possible S1 radiculopathy, and bony ridging that slightly encroached on the interior margins of the spinal canal at C4-5 and C5-6, with disc bulging. He diagnosed a chronic lumbar sprain and prohibited lifting more than 25 pounds, repetitive bending or twisting of the neck and back, and standing or walking for more than six hours per day. Furthermore, he indicated that the claimant should avoid being subjected to vibrations, jars, and jolts. In his opinion, the claimant's conditions were work-related. Dr. Weikel offered vocational testimony that in view of the claimant's educational level, the conditions resulted in a significant occupational loss but did not preclude a return to light work.

On December 7, 2000, the claimant filed a motion to reopen, alleging a worsening of his medical condition. Accompanying the motion was a report from Dr. Adams, his family physician. The report indicated that an initial MRI revealed degenerative changes at L5-S1 with mild central disc protrusion; whereas, a January 28, 2000, MRI revealed a slight annular bulge at L4-5 with encroachment upon the spinal canal. On that basis, Dr. Adams was of the opinion that the claimant's pain had

become more severe. The employer objected to the motion on the ground that the claimant failed to offer prima facie evidence of increased disability as shown by objective medical evidence of a worsening of impairment. KRS 342.125(1)(d).

Nonetheless, the ALJ who considered the motion determined that the claimant made an adequate prima facie showing under KRS 342.125 and Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972), and ordered the taking of further proof.

Just as in the initial claim, the evidence at reopening was voluminous. The June 15, 2001, Benefit Review Conference memorandum indicates that the claimant's evidence consisted of medical reports from Drs. Adams, Tibbs, and Thorndyke. The employer's medical evidence was as follows: deposition of Dr. Thorndyke on cross-examination, a report and deposition of Dr. Zerga, a report and deposition of Dr. Wagner, a report and deposition of Dr. Demos, a report and deposition of Dr. Granacher, and a deposition of Dr. Adams.

The claimant testified that his back pain was much greater at reopening than at the time of the initial award and that it radiated from his low back, through his left leg, and into his left foot and toes. At least twice, the leg had given way, causing him to fall and sustain other injuries that required medical treatment. Furthermore, he began to experience bladder problems, and his depression increased.

Dr. Adams testified that he saw the claimant monthly, that he complained of progressively more severe back pain, and that he complained of recent bladder problems. Based on the most recent MRI, Dr. Adams's opinion was that the back pain had increased. He referred the claimant to Dr. Thorndyke with regard to the bladder and urinary problems. Dr. Thorndyke's physical examination revealed a neurosensory

loss in the left leg, a diminished deep tendon reflex, and a progressive voiding dysfunction, but he did not attribute them to the 1994 injury.

Dr. Tibbs examined the claimant and reviewed the MRI before recommending a posterior interbody fusion at L5-S1. In contrast, Dr. Wagner examined the claimant, noted that the neurological examination was normal, and concluded that he was not a surgical candidate. In Dr. Wagner's opinion, there was no objective medical evidence upon which to base a permanent impairment rating.

Dr. Zerga examined the claimant and reviewed the results of a February, 2001, MRI scan. Although the test revealed a small central herniated nucleus pulposus at L5-S1, there was no nerve root compression or spinal canal stenosis. Comparing the results with those of earlier scans, his opinion was that neither the scans nor EMG/NCV testing revealed any objective findings of a change in the claimant's lumbar or cervical spine. Furthermore, he did not think that the bladder problems were due to the work injury. In his opinion, the claimant magnified his complaints.

Dr. Demos, a urologist, examined the claimant for the employer in May, 2001. The claimant complained of an inability to determine when he needed to urinate, indicating that the problem had existed for about the past six months. He also complained of back, leg, and neck pain since the work-related injury. Dr. Demos's physical examination and urodynamic study revealed no sensory motor loss of bladder function that was attributable to the injuries; however, it did reveal the lack of a bulbocavernosus reflex. When deposed on June 13, 2001, Dr. Demos testified that the finding could be attributable to a neurologic injury of the lower spinal cord, but he deferred to a neurologist or neurosurgeon concerning its significance in this case. He

also stated that the finding could be attributable to either the immediate effects of a spinal injury or to a worsening of those effects.

Dr. Granacher testified that the claimant would have a work-related psychiatric impairment only to the extent that his bladder condition was work-related and failed to improve.

Dr. Conte, a vocational expert, testified in both the initial claim and the reopening proceeding. In his opinion, the claimant was no more disabled at reopening than he had been previously.

At the Benefit Review Conference, which was held after the time for taking proof had closed, the employer moved for leave to introduce Dr. Zerga's supplemental report of June 13, 2001. The report was obtained on the same day as Dr. Demos's deposition and stated, in pertinent part, as follows:

The absence of a bulbocavernosus reflex is a common finding even in normal individuals. If this reflex is absent from the original injury of 1994 it would not have predisposed this patient to any progression or worsening of his low back condition since April 2, 1996. These opinions are based upon reasonable medical probability.

The employer's motion was denied, after which the employer petitioned for reconsideration. Its argument was that Dr. Demos deferred to the opinion of a neurologist or neurosurgeon concerning the cause for the absent bulbocavernosus reflex and that the supplemental report established that the cause was not a worsening of the 1994 injury. Responding to the petition, the claimant maintained that Dr. Demos's testimony was evidence of a worsening of his neurologic condition and that the employer was attempting to impeach the testimony of its own witness with the supplemental report. In another motion, the employer sought to introduce a supplemental report by Dr. Granacher. Overruling both motions and the petition for

reconsideration, the ALJ noted among other things that even without counting the testimony on cross-examination, the employer had already disregarded KRS 342.033 by introducing the direct testimony of more than two physicians.

After reviewing the evidence at reopening, the ALJ determined that there was no worsening of the psychological condition and that the bladder and urinary problems were unrelated to the 1994 injury. Noting, however, that Dr. Demos's finding concerning the lack of a bulbocavernosus reflex gave credence to the claimant's testimony and that of Dr. Adams, the ALJ determined that the claimant had met his burden of proving a worsening of his physical condition. Concluding that the claimant was no longer a candidate for any work that he had previously performed or for which he could reasonably be considered, the ALJ determined that his occupational disability was permanent and total. Following a denial of its petition for reconsideration, the employer appealed.

Reopening is the remedy for addressing certain changes that occur or situations that come to light after benefits are awarded. Under KRS 342.125, a motion to reopen is the procedural device for invoking the jurisdiction of the Department of Workers' Claims to reopen a final award. In order to prevail, the movant must offer prima facie evidence of one of the grounds for reopening that are listed in KRS 342.125(1) that will establish a probable likelihood of prevailing on the merits. Stambaugh v. Cedar Creek Mining Co., supra. Only after the motion has been granted will the opponent be put to the expense of litigating the merits of an assertion that the claimant is entitled to additional income benefits under KRS 342.730. Id.

The grounds for reopening and the standards for awarding increased benefits after a motion to reopen is granted are not necessarily consistent. In Peabody Coal Co.

v. Gossett, Ky., 819 S.W.2d 33 (1991), the 1987 amendment to KRS 342.125(1) aligned what, at the time of Mr. Gossett's injury, had been inconsistent standards for reopening and awarding income benefits. Relying on the principle that statutes relating to remedies or modes of procedure do not normally come within the legal conception of a retrospective law, the Court determined that the amendment was remedial. Thus, it governed motions to reopen that were filed on or after its effective date and was the standard by which Gossett's motion to reopen his 1981 award should have been decided. Since Gossett had offered prima facie evidence of increased occupational disability, as required by the amended standard, we remanded the claim for the taking of further proof and a decision on the merits.¹

Effective December 12, 1996, the legislature amended KRS 342.125(1) by enacting KRS 342.125(1)(a) - (d). KRS 342.125(1)(d) permits the reopening of a final award upon evidence of 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." This requirement differs from the previous standard for granting a motion to reopen where increased income benefits are sought under KRS 342.730. It also differs from the standard for awarding such benefits in a pre-December 12, 1996, claim. As we attempted to explain in our recent decision in Woodland Hills Mining, Inc. v. McCoy, Ky., 105 S.W.3d 446 (2003), the amendment does not govern the type of evidence necessary to establish the right to greater benefits under KRS 342.730 with respect to a reopened claim. It changes only a procedural

¹ See also Campbell v. Universal Mines, Ky., 963 S.W.2d 623 (1998) and AAA Mine Services v. Wooten, Ky., 959 S.W.2d 440 (1998), which involved standards for reopening under KRS 342.125(2) [now KRS 342.125(5)] that differed from the applicable standards for proving an entitlement to increased benefits when the merits were considered.

requirement, i.e., one of the grounds upon which a motion to reopen may be granted and the taking of further proof ordered. In other words, KRS 342.125(1)(d) addresses the necessary prima facie showing in order to prevail on a motion to reopen that is filed on or after December 12, 1996. See KRS 342.0015. It has no effect on the substantive proof requirements for a claim that arose before its effective date. Id. The merits of a worker's right to receive additional income benefits at reopening are governed by the version of KRS 342.730 that was effective on the date of injury. See KRS 342.125(6); Maggard v. International Harvester Co., Ky., 508 S.W.2d 777 (1974). Thus, reliance on Peabody Coal Co. v. Gossett, supra, is misplaced where an appeal concerns the decision on the merits of a reopening for additional benefits under KRS 342.730.

Having determined that the claimant made an adequate prima facie showing under KRS 342.125 and Stambaugh v. Cedar Creek Mining Co., supra, the ALJ granted his motion to reopen and ordered the taking of additional proof. The merits of the claimant's assertion that he was entitled to greater income benefits at reopening were properly considered under the version of KRS 342.730 that was effective on the date of his injury, and he prevailed. The standard for reviewing the award of increased benefits is whether the award was supported by substantial evidence and, therefore, was reasonable. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

It was not until after proof had closed that the employer moved to introduce a supplemental report from Dr. Zerga following Dr. Demos's deposition. The supplemental report did not dispute Dr. Demos's finding that the bulbocavernosus reflex was absent, indicate when the reflex became absent, or dispute Dr. Demos's statement that the loss of reflex could develop over time if a spinal injury worsened. The supplemental report indicated only that an absent reflex was common in normal

individuals and that "if the reflex [was] absent from the original injury of 1994," it would not have predisposed the claimant to a post-award worsening of his back condition. Therefore, the report did not directly contradict Dr. Demos's testimony. Furthermore, the ALJ relied upon Dr. Demos's testimony only to the extent of determining that it gave credence to testimony by the claimant and Dr. Adams that the claimant's physical condition and occupational disability had worsened since the initial award. While it would have been within the discretion of the ALJ to reopen proof time and admit the report, we are not persuaded that the circumstances required the ALJ to do so. See Cornett v. Corbin Materials, Inc., Ky., 807 S.W.2d 56 (1971).

An ALJ has the sole authority to judge the credibility of witnesses and the weight of conflicting evidence. KRS 342.285. Here, the increased award was supported by what the ALJ found to be the credible testimonies of the claimant and his treating physician and by the testimony of Dr. Demos. The award was rendered under the version of Chapter 342 that was in effect on the date of injury, and the finding of increased occupational disability was supported by substantial evidence. Therefore, it was properly affirmed on appeal. In view of the fact that the claimant succeeded in prevailing on the merits, any error that might have been committed in granting his motion to reopen and ordering the taking of further proof would be harmless. See Stambaugh v. Ceder Creek Mining Co., supra. For that reason, it is unnecessary for us to determine whether the ALJ failed to consider the claimant's prima facie showing under the amended version of KRS 342.125(1)(d).

The decision of the Court of Appeals is affirmed.

All concur.

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