

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: June 17, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0431-WC

DATE 7-8-04 E.A.G. Grew: H.D.L.

FRANKIE LEWIS

APPELLANT

V. APPEAL FROM COURT OF APPEALS
2002-CA-0390-WC
WORKERS' COMPENSATION BOARD NO. 96-08085

LANTECH, INC.; HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The claimant quit working on May 13, 1996, and on October 20, 1997, he was awarded benefits for cumulative trauma injuries to his shoulders. On January 22, 1998, he was informed that a cervical condition, which had been diagnosed shortly after he quit working, also was probably work-related. On January 11, 2001, he moved to reopen the initial claim, asserting that the shoulder condition had worsened and that the cervical condition had developed. The Administrative Law Judge (ALJ) awarded an increase in benefits for the shoulder injuries but determined that a claim for the cervical condition was barred by KRS 342.185. Although the claimant maintained that he could raise the cervical condition within the four-year period for reopening, the Workers' Compensation Board (Board) and the Court of Appeals affirmed. Likewise, we affirm.

The claimant worked as a material handler. He described the work as being very physically demanding and as requiring repetitive lifting, carrying, and bending while

supplying assembly line workers with parts that were often bulky and as much as 70 pounds in weight. After a year of experiencing increasingly severe shoulder discomfort, he quit working on May 13, 1996. At about that time, he began to experience neck pain and headaches. On May 31, 1996, Dr. Makk, the orthopedic surgeon who was treating the claimant's shoulder problems, also diagnosed degenerative changes in his neck and "possible cervical radiculitis."

On December 2, 1996, the claimant filed an application for benefits for cumulative trauma injuries to his shoulders. The cervical symptoms worsened, and by February 17, 1997, he complained to Dr. Makk of cervical spasms and headaches. When deposed on March 17, 1997, Dr. Makk indicated that the cervical condition was separate from the claimant's shoulder conditions and expressed no opinion concerning its cause.

In August, 1997, the claimant sought treatment for the cervical condition from Dr. Petruska, a neurosurgeon. At that time, he complained of increasing neck pain, frequent headaches in the back of his head, paravertebral muscle spasm, inability to rotate his neck, and intermittent numbness in both arms, and he indicated that he dropped objects. Although previous diagnostic testing had been unremarkable, Dr. Petruska ordered another MRI, which revealed spinal stenosis at C3-4 and C4-5. Due to the severity of the symptoms, Dr. Petruska performed a cervical discectomy and fused the C3-C5 vertebrae on September 17, 1997. The related medical bills were tendered to the claimant's health insurance carrier.

On October 20, 1997, the claimant received a partial disability award for the left shoulder injury and an award of medical benefits for the right shoulder injury. Despite the surgery, his headaches and cervical symptoms continued. Treatment notes

indicated that as of January 22, 1998, Dr. Petruska would support an application for disability with a statement that the neck injury was probably related to the nature of his work. Approximately three years later, on January 11, 2001, the claimant moved to reopen the shoulder claim and alleged the development of a cervical injury as well.

Dr. Patrick examined the claimant on April 17, 1997, during litigation of the initial claim, and again on June 2, 2001. Although the claimant had been experiencing cervical problems for nearly a year at that time, the 1997 testimony concerned only the shoulder complaints. In 2001, Dr. Patrick testified that he thought the cervical condition was present but overshadowed by the left shoulder injury in 1997. He stated that the cervical fusion warranted a 25% impairment and attributed half of the impairment to the claimant's repetitive work. When deposed, he testified that although both the shoulder and cervical conditions resulted from the repetitive nature of the claimant's work, the cervical injury was "separate and apart" from the shoulder condition and did not result from it.

In addition to the cervical surgery, the claimant underwent right shoulder surgery in March, 1998. He was also involved in more than one motor vehicle accident. In November, 1997, his head hit the top of a truck cab. Medical records from Dr. Harpring indicated that there was an aggravation of the cervical problems due to a July, 1999, motor vehicle accident.

Dr. Makk reviewed the medical records and examined the claimant on December 4, 2000, for the purpose of assigning a permanent impairment rating. He assigned a 10% impairment for reduced range of motion in each shoulder and a 29% impairment for a reduced cervical range of motion, for a combined impairment of 49%. He did not express an opinion regarding causation.

Dr. Wood, an orthopedic surgeon, performed an independent medical examination and reviewed the medical records. He noted evidence of symptom magnification that interfered with an accurate measure of cervical range of motion. Dr. Wood noted that the cervical symptoms did not begin until after the claimant quit working and concluded that the cervical problem was not work-related.

After reviewing the evidence, the ALJ noted that the cervical symptoms and headaches began at the very end of the employment. There was no indication that either the claimant or his treating physicians gave any serious consideration to whether they were work-related at that time. The first indication of such a relationship was found in Dr. Petruska's note of January 22, 1998, and the relationship was supported by Dr. Patrick's testimony. The ALJ determined that the claimant sustained a work-related cervical injury but that a claim for the injury was barred by KRS 342.185.

The claimant asserts that he could not have filed a new claim for the cervical injury when he discovered it because it was due to the same trauma that formed the basis for the original claim. He argues that the cervical condition resulted from the same repetitive activity that caused the shoulder injuries but was latent at the time of the initial claim and also argues that such a condition may be raised for the first time at reopening. Relying upon Fischer Packing Co. v. Lanham, Ky., 804 S.W.2d 4 (1991) and Mays v. Potter and Brumfield, Inc., Ky., 427 S.W.2d 567 (1968), he asserts that the cervical condition could be raised within the four-year period for reopening, as set forth in KRS 342.125(3), rather than the two-year period for filing a claim, as set forth in KRS 342.185. Since the period for reopening had not expired, he concludes that compensation for the cervical condition was not barred.

Like the present claim, Fischer Packing Co. v. Lanham, *supra*, and Mays v. Potter and Brumfield, *supra*, involved injuries due to trauma that occurred before December 12, 1996. At that time, the term “injury” was defined as a harmful change in the human organism, and KRS 342.185 required that a claim for an injury must be filed within two years of the “date of accident.” When the claims were reopened, KRS 342.125 permitted reopening “at any time,” upon proof of a change of condition, fraud, mistake, or newly-discovered evidence; whereas, KRS 342.125(3) imposed a four-year limitation on the period for reopening the claimant’s award. Lanham and Mays are distinguishable from the present case in ways that are significant to the outcome.

In Mays v. Potter and Brumfield, *supra*, the worker alleged a nervous condition in her initial claim, but the fact-finder determined that she failed to prove a work-related neurosis. At reopening, she alleged that the condition had become totally disabling and prevailed before the fact-finder. Upholding the award, the court determined that the rationale of Messer v. Drees, Ky., 382 S.W.2d 209 (1964), governed the reopening and that she had proved a substantial post-award change of condition. *Id.* at 568. Unlike Ms. Mays, the claimant did not raise his cervical condition in the initial claim.

In Fischer Packing Co. v. Lanham, *supra*, the worker was awarded benefits for a work-related back injury. At reopening, he alleged that he had developed severe depression as a result of the back injury, and the ALJ increased the award. Upholding the decision, the court noted that either a worsening of the back injury or the appearance of a new condition as a result of the back injury would support reopening the award. *Id.* at 5. Lanham is not authority for the proposition that a new condition may be raised for the first time at reopening simply because it is due to the same

trauma that caused an injury for which the worker was previously awarded compensation.

Dr. Patrick testified that the claimant's cervical condition was due to the same trauma that caused the shoulder condition. Unlike the situation in Lanham, he also testified that it was a separate condition and did not result from the shoulder injury. Therefore, Lanham is not authority for permitting the claimant to raise the cervical condition for the first time via a reopening.

The present case is more akin to Slone v. Jason Coal Co., Ky., 902 S.W.2d 820, 821 (1995), in which the worker was awarded benefits for a back injury in a pre-1996 Act claim. In a subsequent motion to reopen, he alleged that a disabling psychological condition had become manifest since the award and was due to the injury. The court noted, however, that medical evidence established the presence of the psychological condition at the time of the initial claim and determined that the worker's failure to present the condition at that time could not be cured by a motion to reopen more than two years later. The court noted the prohibition against piecemeal litigation and also distinguished Fischer Packing Co. v. Lanham, *supra*, and Messer v. Drees, *supra*, on the ground that the psychological condition was not newly discovered but was present at the time of Slone's initial award. Although he argued that he did not know the psychological condition was work-related when litigating the initial claim, the court characterized a failure to obtain such knowledge as being due to a lack of diligence. *Id.* at 822.

Contrary to the claimant's assertion that the cervical injury was latent at the time of the initial award, the injury was diagnosed at about the time he quit work and nearly a year and a half before the initial award. Dr. Makk was questioned about the condition

when deposed on March 17, 1997, in the initial proceeding but expressed no opinion concerning its cause. Although the condition became severe enough to warrant fusion surgery, the matter of causation was not pursued until after an award was rendered. Under the circumstances, the condition was not properly the subject of a reopening and was barred by KRS 342.185.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

George M. Streckfus
Jeffrey Judge Paige
Howes Paige PLLC
Watterson City West, Suite 1020
1941 Bishop Lane
Louisville, KY 40218

COUNSEL FOR APPELLEE:

Laurie Goetz Kemp
Woodward, Hobson & Fulton
2500 National City Tower
Louisville, KY 40202