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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 9-15-05 ELA Growth PC

2004-SC-0719-WC

LEONARD GOMILLIA — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-109-WC
WORKERS' COMPENSATION BOARD NO. 97-WC-1459

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

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an opinion of the Court of Appeals which upheld the Workers' Compensation Board in affirming a decision of the Administrative Law Judge in denying a motion to reopen the award.

Gomillia argues 1) that the decision regarding apportionment on reopening was in error; 2) that his award should be extended to lifetime benefits; 3) and that the case of Garrett Mining Co. v. Nye, 122 S.W.3d 513 (Ky. 2003), is dispositive of this appeal. Both the Uninsured Employers' Fund and the Special Fund filed briefs in opposition.

On reopening, the ALJ found Gomillia had failed to sustain his burden of proof that the change in condition of his lower back was related to the August 23, 1996 work injury at Baesel & Asher Enterprises. The ALJ found the change in medical condition

and any increase in occupational disability was related to earlier injuries and surgery, and thus denied the motion to reopen.

Gomillia, age 43, began working for Baesel & Asher in 1996. He was performing roofing work on August 23, 1996, on the Federal Building in Paducah, when he was injured while operating a kettle in which tar was cooked. As part of his work, he picked up a keg of tar and experienced pain in his back and leg. He was referred to Dr. Gallo who performed surgery on November 7, 1996, and on October 23, 1998, an ALJ determined that Gomillia had received a 70% occupational disability with 60% being preexisting and active, and 10% relating to the August 23, 1996 injury. He was awarded benefits of 525 weeks.

Gomillia's employment history is one of periodic work through various labor services and independent odd jobs. He first injured his low back in 1985 while working for the Gilliam Candy Company. He underwent surgery and settled the claim. In 1992, he aggravated the injury while at home and had two more surgeries. In 1994, he sustained a back injury and underwent a fourth surgery. Based on these additional surgeries, he reopened his claim for the 1985 injury and settled in 1995 for approximately $60,000. The reopening was settled as a social security wrap-around with all parties agreeing he was permanently and totally disabled.

On March 19, 2002, Gomillia filed a motion to reopen the claim for the 1996 injury claiming that he was now totally occupationally disabled. He testified that following the 1998 opinion by ALJ Nanney, he had a significant increase in pain and dysfunction in his lower extremities. He then underwent three additional surgeries on the low back on January 29, 2001, and on February 1 and March 11, 2002. He testified that no single event caused any increase in his problem and he had no specific injury since the 1996 work incident. He also testified that he had been able to work only for

approximately two weeks bussing tables since the 1996 injury, and that he was unable to continue working because it was aggravating the pain in his back and legs.

The only medical evidence presented at the reopening came from testimony by Dr. Spangler, an orthopedic surgeon and chairman of the department of orthopedics at Vanderbilt University School of Medicine. Gomillia was referred to Dr. Spangler by Dr. Gallo. Dr. Spangler performed back surgeries on Gomillia in January and February 2001, as well as back surgery in March 2002. In addition, surgery was performed on the neck, unrelated to the lumbar surgeries. Dr. Spangler, citing the 5th edition of the AMA Guides, assessed Gomillia as having a 28% functional impairment to the whole person. He also diagnosed Gomillia as having a transitional syndrome which is an unusual occurrence where the spine continues to break down in an area above a prior surgically stabilized area. The surgeon testified that "transition just means that you fix a segment and then that segment above breaks down and you fix that, and then the one above that." The surgeon stated that he believed that the transitional syndrome was caused by the first surgery in 1985.

The ALJ determined that Gomillia had failed to sustain the burden of proof that there was a change in medical condition in the lower back which was related to the August 23, 1996 work-related injury. The ALJ relied on the opinion of Dr. Spangler, and indicated that he drew inferences from that testimony; that the doctor believed the overall problem was related to the1985 injury and surgery. The ALJ determined that the worsening and increase in occupational disability and change in medical condition was not related to the August 23, 1996 injury, but rather to earlier injuries and surgeries. Therefore, he denied the motion to reopen. A motion for reconsideration was subsequently denied by the ALJ, and the Board affirmed the ALJ's original decision as did the Court of Appeals. This appeal followed.

I. Reopening

Gomillia had the burden of proving that a change in his medical condition caused increased occupational disability related to the 1996 injury. He was unsuccessful. On appeal he must demonstrate that the evidence compelled a change of medical condition and occupational disability related to the work injury. Such compelling evidence is defined as that which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky.App. 1985). If the opinion of the ALJ is supported by substantial evidence, it cannot be said that the evidence compelled a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Moreover, the ALJ, as the finder of fact, has the sole authority to determine the weight, credibility and substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The Board cannot substitute its judgment for that of the ALJ in matters involving the weight to be accorded to the evidence in questions of fact. KRS 342.285(2).

On the basis of the testimony of Dr. Spangler, the ALJ correctly found that the worsened condition was not the result of the 1996 injury, but rather of complications from the original 1985 problem. The ALJ determined that the award for the 1996 injury could not be increased. Whittaker v. Ivy, 68 S.W.3d 386 (Ky. 2002). It is well settled that the ALJ has authority to draw any reasonable conclusion from the evidence presented. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). Here, the evidence presented does not compel a finding in favor of Gomillia. KRS 342.185(8) does not allow a reopening of the 1985 injury. Moreover, the 1985 injury had been previously reopened and settled with all parties agreeing that he was permanently totally disabled.

II. Lifetime benefits

Gomillia argues that he is entitled to lifetime benefits by virtue of the fact that he is now totally occupationally disabled and that his disability is a result of work-related injuries. We disagree as did the Court of Appeals. KRS 342.125 permits awards to be increased only in the course of a reopening. Here, the 1998 award cannot be increased because the injury underlying that award did not cause the increased disability. As noted earlier, the original award cannot be reopened because of the statute of limitations.

III. Garrett

The argument that the Garrett case should change the result of this case is without merit. The Court of Appeals considered Garrett and determined that it did not apply to this case. We agree. The 1998 award concerning the 1996 injury could be reopened and result in an increased award if the increased occupational disability resulted from a worsening of the 1996 injury. It did not. The only evidence clearly shows that the increased disability was a result of the original injury in 1985.

The decision of the Court of Appeals is affirmed.

All concur except Graves, J., who concurs in result only.

COUNSEL FOR APPELLANT:

Rodger W. Lofton
928 Broadway
P.O. Box 1737
Paducah, KY 42002-1737

COUNSEL FOR APPELLEES:

Elizabeth A. Myerscough
Assistant Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, KY 40601-8204

James Landon Overfield
739 South Main Street, Suite B
Henderson, KY 42420

Michael A. Richardson
Assistant Attorney General
Uninsured Employers' Fund
1024 Capital Center Drive
Frankfort, KY 40601-8204

David W. Barr
Kentucky Labor Cabinet
Division of Special Fund
1047 US Hwy 127 South, Suite 4
Frankfort, KY 40601