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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: October 20, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2005-SC-0244-WC

DATE 11-10-05 ElAGraath, D.C.

DAVID C. SUMMERS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-1547-WC
WORKERS' COMPENSATION BOARD NO. 00-59766

U.S. LIQUIDS; HON. SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

KRS 342.125 permits a worker to reopen an otherwise final workers' compensation claim upon a prima facie showing of one or more specified grounds. Among those grounds are "newly-discovered evidence" and "change of disability" as shown by objective medical evidence of a worsening of impairment. Rejecting the claimant's assertions that his post-award discharge constituted newly-discovered evidence and that he experienced a change of disability despite no worsening of impairment, an Administrative Law Judge (ALJ) dismissed his motion to reopen. The Workers' Compensation Board and the Court of Appeals also found no prima facie showing of a ground for reopening and affirmed. We affirm.

The claimant was born in 1955. He completed high school, more than two years of college, and two years of training in electronics. He had worked as a delivery truck driver, as a retail clerk, and for six months each as a parts analyzer and electronics

helper before the defendant-employer hired him as a maintenance mechanic. The work required lifting 100 pounds, climbing stairs and ladders, frequent stooping, considerable walking, and standing for several hours at a time. The parties stipulated that his average weekly wage was $813.75.

While working on December 9, 2000, the claimant injured his feet and hips in a fall from a height of about 14 feet. Dr. Petrik treated the injuries to his feet, performed several surgeries, and assigned a 40% AMA impairment. He stated that the claimant was unable to squat or crouch, could climb only one flight of stairs, could not climb ladders, could sit for about 30 minutes at a time, and could stand for eight to nine minutes at a time. He could walk 30-40 feet using a cane or crutches. Dr. Petrik explained that the claimant's injuries were very severe, would leave him markedly impaired for life, and would severely restrict his employment options. He would require analgesics, bracing, and ambulatory supports for the remainder of his life, and he might require further surgery.

When deposed in April, 2002, the claimant had returned to work and earned $600.00 per week. He testified that the employer had provided a sedentary job that complied with his restrictions. He had been told that it was not required to do so, and he had also been told that the job was not permanent. Asked if he had been told how long the job would last, he responded negatively. He stated that his present duties involved going through old paperwork in the office, but he would also be placing orders on the computer. He intended to continue working for the employer as long as there was a job for him. Asked about other employment opportunities, he stated that the future did not look bright in that regard. His brief to the ALJ requested 520 weeks of

benefits at the rate of $503.03 per week, the maximum permitted for permanent partial disability. KRS 342.730(1)(b), (c), and (d).

On August 7, 2002, an ALJ awarded temporary total disability benefits of $509.03 per week for the periods to which the parties stipulated. Relying on Dr. Petrik, the ALJ awarded a 520-week benefit for permanent partial disability, basing the amount on a 40% impairment and the 1.7 multiplier from KRS 342.730(1)(b). The ALJ also applied the 3.0 multiplier from KRS 342.730(1)(c)1., rejecting the employer's argument that the claimant had returned to full-time work, earning more than before the injury. The resulting benefit exceeded the maximum that was payable under KRS 342.730(1)(b) and, therefore, was limited to $503.93 per week. No appeal was taken.

In a motion to reopen filed on February 2, 2004, the claimant alleged that he had been working at the time of his award due to the employer's special accommodations and that the employer had terminated him on October 5, 2002, shortly after the award became final. Also, the injury required additional surgery to his right foot, which had been performed in September, 2003. Although the claimant acknowledged that his restrictions and impairment were virtually unchanged since the initial award, he maintained that the change in his employment status rendered him unable to secure or perform any meaningful work. He argued that the change was newly-discovered evidence that was not available at the time of the initial award and that the claim should be reopened to enable him to prove that his permanent disability had become total.

Appealing the decision to reaffirm the dismissal of his motion, the claimant maintains that manifest injustice must be considered when deciding whether evidence is newly-discovered and that public policy requires his claim to be reopened. Durham v. Copley, 818 S.W.2d 610 (Ky. 1991). Explaining his request for only a partial disability in

the initial proceeding, he maintains that a finding of total disability would have been "extremely doubtful" at that time due to his continued employment. He argues that the fact that he was terminated shortly after he was found to be partially disabled implies that the employer decided before the award to prevent him from receiving a total disability by accommodating his restrictions temporarily.

"Newly-discovered evidence" is a legal term of art. It refers to evidence that existed at the time a matter was decided but that has just been discovered and with the exercise of due diligence could not have been discovered earlier. Black's Law Dictionary 579 (7th ed. 1999). When the term is used in a statute, it may not be construed as including evidence that came into being sometime after a matter was decided. Stephens v. Kentucky Utilities Company, 569 S.W.2d 155 (Ky. 1978). Only if evidence is properly viewed as being "newly-discovered" does the question of its decisive effect arise. See Walker v. Farmer, 428 S.W.2d 26 (Ky. 1968).

The claimant relies upon Durham v. Copley, supra, in which the employer's insurance carrier received a report from its medical expert that strongly favored the claim. It withheld the report until seven weeks after the ALJ's decision. Upon receiving the report, the worker's counsel immediately moved to set aside the decision on the ground of mistake and/or newly-discovered evidence. Affirming a decision to dismiss the motion because an appeal was pending, the Board and the Court of Appeals noted that the worker could have discovered the report earlier with the exercise of due diligence. The Supreme Court reversed, however, finding it a manifest injustice to dismiss the motion where the reason that the worker could not produce the report earlier was both "obvious and compelling." Id. at 612. We view the decision as being

an extension of the mistake provision rather than a modification of the concept of newly-discovered evidence or the creation of an additional ground for reopening.

This case involved no worsening of impairment, and the circumstances did not compel reopening based on newly-discovered evidence, mistake, or any other ground. The fact on which the claimant based his motion did not exist at the time of his award (i.e., his job was not terminated until after the award). Therefore, the termination was not newly-discovered evidence. Nor was any implied pre-award decision to terminate him in light of his testimony that he had been told that the office job was only temporary and that the employer was not required to accommodate his restrictions.

In Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000), the court addressed the effect of the December 12, 1996, amendments to KRS 342.730. The decision explained that a finding of total disability continues to be based on some of the Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), factors and that KRS 342.0011(34)'s definition of "work" does not require an individual to be homebound in order to be totally occupationally disabled. Id.; see also, Gunderson v. City of Ashland, 701 S.W.2d 135 (Ky. 1985). Included in the analysis are a consideration of the likelihood that the worker will be able to find work consistently and to work dependably and the degree to which the worker's restrictions will interfere with vocational capabilities. Affirming a finding that the injury to Hamilton's back was totally disabling, the court noted that the ALJ properly considered his age, work history, and inability to continue working as a department store's assistant manager.

The present case was decided two years after Ira A. Watson Dept. Store v. Hamilton, supra. The claimant asserted in the initial proceeding that he lacked the physical capacity to return to work as a maintenance mechanic. He acknowledged that

he was told the office job was only temporary and that the employer was not required to comply with his restrictions indefinitely. He also acknowledged the absence of any other significant opportunities for work. Yet, he failed to assert that he would be unable to find work on a regular and sustained basis in a competitive economy. See KRS 342.0011(11)(c) and (34). Under the circumstances, we find no prima facie evidence to support a reopening based on a "mistake" and no manifest injustice such as occurred in Durham v. Copley, supra.

The decision of the Court of Appeals is affirmed.

All concur.

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