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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE EllaGrantP.C.

2005-SC-0564-WC

STEVE NORRIS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-2157-WC
WORKERS' COMPENSATION NO. 01-00444

CONWAY & HEATON, HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board (Board) and the Court of Appeals affirmed an Administrative Law Judge's (ALJ's) order overruling the claimant's motion to reopen his dismissed application for benefits. Appealing, the claimant asserts that the decision in his initial claim was the product of mistake and that KRS 342.125(1)(c) authorized reopening. Messer v. Drees, 382 S.W.2d 209 (Ky. 1964). We affirm.

The claimant was born in 1977. He graduated from high school and then trained in carpentry and cabinet making for about two years at a technical college. In 1998, he began working for the defendant-employer as a motor vehicle mechanic. On May 18, 2000, the chain suspending a motor over his head slipped, causing it to fall some distance and strike him on the head. His application for benefits alleged injuries to his head, jaw, shoulders neck, back, and lower extremities.

When deposed, the claimant testified that the blow caused him to see stars but did not knock him unconscious. Although he did not go to the hospital, he asked to see a doctor because his head was bleeding in three or four places. He stated that the doctor performed a physical exam that did not include x-rays, after which he returned to work and completed his shift. On September 1, 2000, he began to miss work and to see a chiropractor. He also saw Dr. Nazar, who ordered a lumbar MRI and kept him off work. The claimant could not recall when Dr. Nazar released him, but he returned to work in January, 2001, beginning with light duty. He stated that he was performing alignments presently, that he was paid for working 88 hours in the previous two weeks, and that he earned $7.25 per hour plus overtime.

On September 1, 2000, Dr. Yuhas noted that the claimant complained of lower back pain that sometimes extended into his legs. He gave a history of the work-related incident, stating that the motor hit his head, compressing his body to the point that his knees buckled. Dr. Yuhas found no significant abnormalities on neurological and orthopedic exams except for a limited range of motion and a positive Valsalva maneuver. Noting that the claimant reported no other trauma during the preceding year, his opinion was that the symptoms were due to the work-related accident. He recommended a course of chiropractic treatment and referred the claimant to Dr. Nazar, a medical doctor.

On September 22, 2000, the claimant gave Dr. Nazar a history of low back pain that began about three months earlier, one or two weeks after the accident at work. He denied any other recent injuries. His present symptoms included a radiation of pain down the back of both legs to the ankles. After a physical and neurological exam, Dr. Nazar diagnosed a probable lumbar sprain/strain, noting that there were no associated

neurological aspects to the pain. In a report to Dr. Yuhas, he stated that the claimant's neurological exam was normal and that although he had some very equivocal pain involving his legs and back with straight leg raising, it did not follow a specific neurological distribution. In Dr. Nazar's opinion, there was no evidence to support a diagnosis of radiculopathy, and conservative treatment was the best strategy. After a lumbar MRI performed on October 2, 2000, was normal, Dr. Nazar released the claimant from his care.

On October 3, 2000, the claimant reported to the emergency room at Flaget Hospital, complaining of back and leg pain. Dr. Parrish noted that he gave a history of the work-related accident, stating that he had been sutured at the Flaget Health Center but had no back or neck pain at that time. He reported that he experienced lower back pain and trembling in his lower extremities while playing basketball about a month later. He also reported that his symptoms had improved with chiropractic treatment but still remained and that his employer required a statement from a physician rather than a chiropractor. Dr. Parrish noted that when he informed the claimant that he would probably refer him to Dr. Nazar, the claimant reported that he had seen Dr. Nazar earlier that day regarding the MRI results, which were normal. Dr. Parrish noted that the claimant then began to complain of dizziness, jaw discomfort, shoulders that felt like they were popping out of place, and numbness down the back of his legs to the ankles. Dr. Parrish diagnosed back pain for which he prescribed medication.

The claimant submitted records from Dr. Perez, which consisted primarily of off-work slips from October, 2000, through January, 2001. They did not include a history or any physical findings. Nor did they include an impairment rating.

The employer conceded that the accident occurred and that the claimant

suffered non-disabling head lacerations but maintained that his other problems were unrelated to the accident. It also maintained that he earned more presently than he did on May 18, 2000, and that the accident caused no compensable disability.

The memorandum of the August 16, 2001, benefit review conference (BRC) indicates that the claimant sustained "alleged" work-related injuries on May 18, 2000, noting "on all but head injury." The parties stipulated that the employer paid $124.55 in medical expenses but no income benefits. They limited the contested issues to extent and duration of disability and also to work-relatedness and notice "on all but head injury." The BRC memorandum notes that the claimant failed to appear and that counsel was unable to contact him. On September 25, 2001, the ALJ ordered the claimant to show cause within 15 days why the claim should not be dismissed. The record contains no response, and on May 29, 2002, the ALJ dismissed the claim without prejudice.

On July 5, 2002, the claimant filed a second application for benefits based on the May 18, 2000, accident. Among other things, the employer moved to dismiss the claim on the ground that it was barred by limitations. The ALJ passed the motion to a consideration of the merits and set the claim for a hearing.

At the hearing, the claimant denied having any pre-accident back problems. He stated that he had only minor back pain after the accident, but it worsened over time, began to affect his sleep, and eventually made it difficult to bend. His present symptoms included low back and upper neck pain that he rated at ten on a scale of one to ten. He stated that he continued to be treated by a chiropractor and Dr. Nazar and that he was working for a different employer, operating a laminating machine.

When cross-examined, the claimant admitted that he did not seek treatment

from a medical doctor between May and October, 2000, and that he told Dr. Parrish his neck and back pain began after he played a game of basketball. He testified, however, that he had been responding to a question regarding when he realized that he could not deal with his pain and had stated that it occurred when the pain affected his ability to play basketball and other sports. He also testified that his employer terminated him not long after his May, 2001, deposition and that he received unemployment benefits for six months. After passing a pre-employment physical, he began working for his present employer in May, 2002, earning $14.54 per hour.

In a decision rendered on April 17, 2003, an ALJ determined that the claimant received a blow to the head, that the injury was minor, and that any residuals he suffered "arose out of some superseding event such as playing basketball." Therefore, the ALJ was not persuaded that the claimant met his burden of proving he suffered an injury as defined by the Act. The claimant's petition for reconsideration requested temporary total disability benefits, but the ALJ denied it as being a re-argument of the merits. Although the claimant filed a notice of appeal, he later requested a voluntary dismissal. The appeal was dismissed on July 11, 2003, at which point, the ALJ's opinion and order became final. Therefore, it could not be disturbed "absent fraud, mistake, or other very persuasive reason that would warrant reopening." Slone v. R & S Mining, Inc., 74 S.W.3d 259, 261 (Ky. 2002).

On April 5, 2004, the claimant filed a motion to reopen, asserting that there was prima facie evidence of both a change of condition and mistake. See Messer v. Drees, supra. Attached to the motion were three medical reports. The report of a thoracic and lumbar spine MRI performed on April 2, 2003, noted cervical, thoracic, lumbar, and sacral abnormalities. A December 4, 2003, cervical MRI report noted cervical spine

abnormalities. A January 7, 2004, letter from Dr. Nazar stated that, given the claimant's young age, he attributed a moderate cervical disc herniation shown on the latter MRI to the work-related accident and thought that it "might explain some of his [subsequent] symptoms."

The same ALJ who decided the initial claim noted that the claimant appeared to be arguing that his cervical condition had worsened since the previous decision, that it now required surgery, and that Dr. Nazar considered the condition to be work-related. Whereas, the employer asserted that the motion was barred by limitations and by the doctrine of res judicata. After reviewing the file, the ALJ overruled the motion, citing KRS 342.125(2) and noting that the previous claim was dismissed. In affirming, both the Board and the Court of Appeals determined that the initial finding regarding causation was final and that there was no evidence the finding had been prompted by a mistake or misconception. Therefore, reopening was unauthorized.

KRS 342.0011(1) defines "injury" as being a work-related traumatic event that is the proximate cause producing a harmful change in the human organism as evidenced by objective medical findings. In the initial proceeding, the claimant alleged that the work-related blow to his head caused a number of harmful changes, including lacerations to his head as well as pain and other symptoms in his neck, back, and lower extremities due to the effects of the blow on his spine. He maintained that the symptoms caused a temporary total disability from September 1, 2000, through January 1, 2001. Although the employer conceded that the traumatic event caused lacerations to the claimant's head that required medical treatment (i.e., an injury), it asserted that the injury was not disabling. Moreover, it contested work-relatedness and notice regarding the other harmful changes. After reviewing the evidence regarding the

contested harmful changes, the ALJ was convinced that they were due to some superseding event rather than the work-related accident and dismissed the claim.

KRS 342.125 provides, in pertinent part, as follows:

> (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:
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> (a) Fraud;
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> (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;
>
> (c) Mistake;
>
> (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.
>
> (2) No claim which has been previously dismissed or denied on the merits shall be reopened except upon the grounds set forth in this section.

Messer v. Drees, supra, was decided under the pre-1996 definition of "injury." It stands for the principle that KRS 342.125(1) permits reopening if evidence unavailable at the time of the initial proceeding shows that "an award was substantially induced by a misconception as to the cause, nature, or extent of disability at the time of the hearing." Id., 382 S.W.2d at 213.

The claimant maintains that the Board and the Court of Appeals misconstrued his argument. Acknowledging that symptoms due to harmful changes in his spine were found not to be a work-related injury under KRS 342.0011(1), he points out that the claim also involved head lacerations, which the employer conceded were work-related and the ALJ characterized as being a "minor injury." He maintains that the initial decision was the product of a misconception regarding the nature and extent of that

"minor injury." See Messer v. Drees, supra.

As the party requesting a reopening, it was the claimant's burden to make a prima facie showing under one or more of the grounds set forth in KRS 342.125(1). He accompanied his motion with MRI evidence of changes to his spine that occurred both before and after the initial decision as well as Dr. Nazar's statement of a relationship between the latter changes and the accident at work. This evidence did not relate to the scalp lacerations or their effects; therefore, it did not warrant reopening that portion of the claim on any ground. It was an attempt to re-litigate the final decision attributing the contested harmful changes to a superseding event rather than the work-related trauma. Under the circumstances, the ALJ did not err in refusing to reopen the matter.

The decision of the Court of Appeals is affirmed.

All concur.

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