

IMPORTANT NOTICE **NOT TO BE PUBLISHED OPINION**

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2006-SC-000850-WC

DATE 6-14-07 E.A. Graw DC

KIM PIKE

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2006-CA-001414-WC
WORKERS' COMPENSATION NO. 00-74388

FAMILY DOLLAR STORE,
HON. HOWARD E. FRASIER,
AND ADMINISTRATIVE LAW JUDGE
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

KRS 342.125(1)(d) permits the reopening of a final workers' compensation award if the worker experiences a change of disability as shown by objective medical evidence of a worsening of impairment. Having found that the claimant's affidavit and the restrictions contained her physician's in return-to-work statements did not constitute a prima facie showing under the statute, an Administrative Law Judge (ALJ) denied her motion to reopen. The Workers' Compensation Board and the Court of Appeals affirmed. Because the record reveals no abuse of the ALJ's discretion, we affirm.

On August 28, 2001, the claimant cut the small finger of her right hand on a metal divider, while working as a cashier. She was treated at a hospital emergency room and later sought treatment with Dr. Kutz. He diagnosed a small right finger

laceration and neurapraxia of the ulnar digital nerve but permitted the claimant to work with restrictions. In May, 2002, he performed exploratory surgery, noting that he found no injury to the ulnar digital artery and nerve. He did find and remove some scar tissue surrounding the nerve and a small branch with a probable neuroma. He released the claimant to work without restrictions on July 8, 2002. When she returned on August 13, 2002, and complained of swelling, he again restricted her to the occasional use of the right hand and to lifting no more than five pounds with the hand. In his opinion, the claimant had reached maximum medical improvement (MMI) as of April 8, 2003, and had a 4% permanent impairment rating. After a functional capacity evaluation performed in November, 2004, he continued to restrict the claimant to lifting no more than five pounds with the right hand. He recommended that she avoid the use of vibratory tools and avoid climbing to unprotected heights if the right upper extremity were required to support her full body weight.

The claimant last worked on August 28, 2002. Dr. Gabriel evaluated her on September 9, 2002. She reported nerve pain and hypersensitivity in the finger, but she had a full range of motion and normal x-rays. Dr. Gabriel found no evidence of a significant digital nerve injury and attributed the persistent pain to a neuroma or nerve contusion. He found her to be at MMI, assigned a 1% permanent impairment rating based on her self-modifying behavior, and recommended that she increase the use of her hand to the extent tolerable.

The claimant testified that she experienced constant, intolerable pain and that she could not perform any of her previous work. When cross-examined, she acknowledged that she was not prohibited from using her right hand and that she used it to perform activities of daily living. She also acknowledged that the need to care for a

disabled daughter was the only reason that she failed to attempt any work.

In a decision rendered on April 21, 2005, an ALJ found that the claimant had a 4% permanent impairment rating and could still operate a cash register but could not stock and unload trucks. Therefore, she was entitled to an enhanced partial disability benefit. The ALJ found that the claimant reached MMI on September 9, 2002, and was able to perform her former position processing checks no later than October 19, 2002. No appeal was taken from the decision.

On December 22, 2005, the claimant filed a motion to reopen, alleging that she was either temporarily or permanently more disabled than she had been eight months earlier, when she received her award. She supported the motion with her affidavit, which stated that she continued to work after the initial award, that she continued to have problems with her hand, and that her condition had gradually worsened. It stated that she underwent additional surgery in August, 2005, and that Dr. Kutz had placed her on work restrictions, had not released her to return to work, and had not stated that she was at MMI. The claimant acknowledged that her employer had paid for the surgery but asserted that she was also entitled to either temporary or permanent total disability benefits. The supporting medical evidence consisted of return-to-work statements, dated September 13 and November 1, 2005, both of which limited her to the occasional use of her right hand, to wearing a buddy splint, and to lifting no more than five pounds with the hand. The latter statement indicated that the restrictions were effective until the next office visit, which was scheduled for December 20, 2005.

Although KRS 342.305 permits a final workers' compensation award to be enforced in circuit court as a judgment, KRS 342.125 provides some relief from the principles of the finality of judgments. Under KRS 342.125(1), a final award may be

reopened and amended upon a motion that is supported by proof of certain conditions.

To prevent parties from being put to the expense of defending unwarranted motions to reopen, the court determined in Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681, 682 (Ky. 1972), that reopening should be a two-step process in which the movant must offer prima facie evidence indicating a substantial possibility that a condition warranting a change in the award exists. If the movant prevails, the proof is reopened and the merits are adjudicated. If the ALJ determines that the movant's prima facie showing is inadequate to justify reopening the proof, the ruling is reviewed for an abuse of discretion. See Hodges v. Sager Corp., 182 S.W.3d 497 (Ky. 2005).

KRS 342.125(4) provides, in pertinent part, as follows:

Reopening shall not affect the previous award as to any sums already paid thereunder, and any change in the amount of compensation shall be ordered only from the date of filing the motion to reopen.

Income benefits, including those for TTD, are forms of compensation. Therefore, the question before the ALJ in the present case was whether the claimant made an adequate prima facie showing that she was more disabled when she filed the motion than she had been at her award.

KRS 342.125(1)(d) requires increased disability to be shown by objective medical evidence of increased impairment. The claimant offered no medical evidence of a post-award increase in her permanent impairment rating such as would be required for additional partial disability benefits. Although she argues that she is entitled to either temporary or permanent total disability benefits, she offered no objective medical evidence that her impairment under the standard addressed in Colwell v. Dresser Instrument Division, ___ S.W.3d ___ (Ky. 2006), was any greater on December 22,

2005, than it had been on April 21, 2005. Therefore, she failed to establish a substantial likelihood that she would be able to prevail on the merits. To deny the motion under such circumstances was no abuse of discretion.

The decision of the Court of Appeals is affirmed.

All concur.

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