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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 19, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000789-WC

J.L. FRENCH AUTOMOTIVE — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2007-CA-000423-WC
WORKERS' COMPENSATION BOARD NO. 05-01524

WILLIAM JAMES DANIEL,;
HON. HOWARD E. FRASIER, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant's employer failed to make an adequate prima facie showing of fraud, mistake, or change of disability to support a motion to reopen his settled workers' compensation award. The Workers' Compensation Board and the Court of Appeals affirmed. The employer continues to assert that it made a sufficient showing to authorize further litigation but fails to show an abuse of the ALJ's discretion; therefore, we affirm.

The claimant worked for the defendant-employer as a die cast machine operator, manufacturing 40-pound automobile crank cases. He hammered extraneous material from each crank case, lifted each from a conveyor, trimmed it further with a saw, and placed it back on the conveyor. The claimant injured his low back in April or May 2004,

when attempting to free a crank case that became stuck on the conveyor belt. He experienced an immediate onset of pain in his right buttock that extended into his leg. He reported the incident to his supervisor and sought medical treatment. After about a week of treatment with muscle relaxants, he returned to light-duty work. He continued in that capacity through June 2004, when a progression of his symptoms prompted further diagnostic testing.

MRI performed in July 2004 confirmed the presence of a herniated disc at L4-5 and some compression of the L5 nerve root. Injection therapy provided sufficient relief to enable the claimant to return to work in September 2004 with a 30-pound lifting restriction, which was later lifted. His symptoms worsened, however, and MRI performed in January 2005 revealed "quite a bit of enlargement" in the herniation. Thus, Dr. Singer performed a hemilaminotomy and diskectomy at L4-5. In July 2005 Dr. Singer noted some inflammation at the nerve roots and recommended steroid injections to relieve the claimant's "miserable" leg pain. He determined that the claimant could return to work with permanent restrictions against lifting more than 10 pounds repetitively; bending, stooping, or twisting repetitively; and maintaining the same work posture for a prolonged period of time, such as prolonged sitting. Dr. Singer reported on September 21, 2005, that the claimant had reached maximum medical improvement (MMI) and retained a 13% permanent impairment rating under DRE category III.

The claimant's employer dismissed him on August 5, 2005, after which he filed an application for benefits. When deposed, he testified that he had attempted to find work locally and had later expanded his search to no avail. He stated that he received

unemployment benefits. His wife received disability benefits due to cancer.

The employer's representative, Judith Kreusser, testified that the claimant's permanent restrictions precluded a return to work as a die cast machine operator. She explained that the company accommodated restrictions due to work-related injuries for a period of 90 days. Although it allowed for extensions in certain cases, the claimant's was not one of them. She acknowledged that the light-duty position he performed for a period of time was not "makeshift" work and would have been resumed by another full-time employee. Asked why the claimant was not permitted to continue in that position, she attributed his termination to company policy.

A memorandum of the February 15, 2006, benefit review conference indicates that the only contested issue was the claimant's physical capacity to return to the type of work performed at the time of injury. Dr. Singer's unrebutted medical evidence addressed the claimant's permanent restrictions, and Ms. Kreusser conceded that he could not operate the die cast machine. As a consequence, the parties agreed to settle the claim and submitted a Form 110 to the ALJ at the final hearing. As approved on March 3, 2006, the agreement noted the claimant's permanent restrictions and provided a permanent partial disability benefit that was based on a 13% permanent impairment rating that was tripled under KRS 342.730(1)(c)1.

In a subsequent office note, dated April 26, 2006, Dr. Singer stated as follows:

> HISTORY:
> James Daniel has been complaining about his pain in his back since surgery. He has had some improvement. He had been taking pain medicines on a fairly regular basis and has felt like he was unable to return to work.
>
> TREATMENT:
> There has been a conclusion to his worker's [sic] compensation case, being that the place of business went

> bankrupt and moved out of town. No further claims are being pursued by Mr. Daniel. He states that now that his back feels fine he has minimal discomfort and does not require pain medicine anymore he would like to be released to full duty work with no restrictions so he can find employment. I certainly have released him today to full duty with no restrictions. No prescriptions were written today. I will see him back here on a prn basis only.

On July 6, 2006, the employer filed a motion to reopen "for the purpose of investigating whether a reduction in the award is appropriate pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2005) and KRS 342.730(1)(c)2 and on the grounds of mutual mistake, fraud, and/or constructive fraud." Attached to the motion were Dr. Singer's April 26, 2006, office note and work release as well as a June 29, 2006, report from Dr. Snider to the employer's attorney. The report indicates that Dr. Snider reviewed the attorney's summary of the claim and a copy of Dr. Singer's office note but does not indicate that he examined the claimant. Dr. Snider stated that the office note was consistent with a 10% permanent impairment rating under DRE category III, and the release to return to work without restrictions clearly indicated an ability to perform any type of work, including the work performed at the time of injury. Thus, the injury was considerably less severe than the settlement indicated.

In a verified response, the claimant listed 23 businesses to which he had applied for work, without success, between his dismissal on August 5, 2005, and early November 2005. He stated that he had also applied to two temporary employment agencies, without success, and was advised by one of them that he could not be placed if he had permanent restrictions. He still had not found work by April 2006, feared losing his home through foreclosure, had no health insurance for himself, and had to pay a $442.75 monthly premium for his wife's continuation coverage. Thus, desperate

for work, he asked Dr. Singer to remove his restrictions. He stated that a business that had rejected him due to his back condition and restrictions agreed to hire him based on Dr. Singer's medical release. He indicated that the job was light work, brazing copper tubes that weighed from one to twenty pounds, and that it was less demanding and paid less than the work he performed for the defendant-employer. He stated that his current level of pain was not substantially different from what it had been before the settlement and that he was incapable of working as a die cast machine operator.

The same ALJ who approved the settlement considered and denied the motion to reopen, stating that it failed to make an adequate prima facie showing. The ALJ noted that Dr. Singer assigned the only permanent impairment of record at the time of the settlement and that the motion to reopen failed to include any proof to show mutual mistake or fraud concerning the claimant's physical capacity to work as a die cast machine operator, his permanent impairment rating, or the applicable multiplier. Noting that reopening is not designed to give a party "two bites at the apple," the ALJ determined that the claimant's request to have his restrictions removed so that he could find work did not negate the substantial medical evidence supporting the parties' agreement. Moreover, Dr. Snider failed to examine the claimant or to base his conclusions on objective medical findings of an improvement in impairment and Dr. Singer's office note referred to no such findings.

The employer asserts that it submitted adequate evidence to meet the "substantial possibility" test in order to warrant further litigation. It asserts that Dr. Singer's April 2006 office note may be read to imply: (a.) that the permanent restrictions assigned in July 2005 and incorporated into the settlement were falsely overstated or

mistaken; (b.) that April 2006 office note falsely understated the claimant's restrictions; or (c.) that the claimant's impairment improved between July 2005, when the restrictions were assigned, and April 2006, when they were removed. Thus the award must be reopened to consider the possibilities. We disagree.

KRS 342.265(1) and KRS 342.305 equate an approved settlement or fully-litigated award to a judgment and permit it to be enforced in circuit court. Whittaker v. Hall, 132 S.W.3d 816, 818 (Ky. 2004), explains that KRS 342.125(1) permits a final award to be reopened upon a showing of one or more of the specified grounds and that a motion to reopen is the procedural device for invoking the jurisdiction of the Office of Workers' Claims to do so. The "mistake" provision permits an award to be reopened to address a mutual mistake of fact or a misperception of the cause, nature, or extent of the worker's disability that existed at the time of the award. Relying on Stambaugh v. Cedar Creek Mining Company, 488 S.W.2d 681 (Ky. 1972), Hodges v. Sager Corporation, 182 S.W.3d 497, 500 (Ky. 2005), noted that the movant must make a reasonable prima facie showing of a substantial possibility that one or more of the conditions listed in KRS 342.125(1) exists before the opposing party will be put to the expense of re-litigation. Hodges also noted that the applicable standard for review is whether the decision to grant or deny the motion constitutes an abuse of the ALJ's discretion. Sexton v. Sexton, 125 S.W.3d 258, 272 (Ky. 2004), explains that a decision constitutes an abuse of discretion if it is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."

KRS 342.0011(1) requires the existence of a harmful change in the human organism to be shown with objective medical findings. Noting KRS 342.0011(1), the

court determined in Colwell v. Dresser Instrument Division, 217 S.W.3d 213, 218 (Ky. 2006), that KRS 342.125(1)(d) requires a worsening or improvement of impairment due to an injury to be shown by objective medical findings. Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), makes it clear that a worker's statements concerning symptoms are not objective medical findings as defined by KRS 342.0011(33).

This is not a case in which the ALJ confused an adequate prima facie showing under KRS 342.125(1) with the evidence necessary to prevail on the merits. The parties submitted proof and settled the initial claim at the hearing. The evidence consisted of the claimant's deposition, the records from his treating physicians, and the testimony from Ms. Kreusser. Unrebutted lay and medical evidence supported the statements contained in the settlement. The claimant's medical records contained objective medical findings concerning the nature of his back injury, his response to treatment, and his permanent impairment rating and restrictions at MMI. They clearly showed that he sustained a significant injury that involved nerve compression and required surgery. Although his pain had lessened when he reached MMI and received a permanent impairment rating, his surgeon prescribed significant restrictions. The claimant's deposition revealed his fruitless attempts to find other work, his wife's illness, and their financial distress.

The record indicates that the ALJ decided the employer's motion to reopen in compliance with KRS 342.125(1). Dr. Singer's post-settlement office note did not indicate that he considered the claimant's condition to be improved. It indicated only that the claimant stated that he no longer required pain medication and that his

restrictions were removed at his own request "so he can find employment." Neither the office note nor Dr. Snider's report contained objective medical findings to document the claimant's present condition. Absent such findings, the medical evidence failed to show a substantial possibility that an "improvement of impairment" occurred between March and July 2006. Absent such findings, Dr. Singer's decision to remove restrictions at the claimant's request failed to show a substantial possibility that he considered the restrictions to be unwarranted when imposed or at reopening. Absent such findings, Dr. Singer's office note and Dr. Snider's report failed to show a substantial possibility that any statement contained in the settlement resulted from mutual mistake or fraud. Although the claimant found work brazing pipe after the settlement, no evidence indicated that it involved the same or greater physical capacity than his work as a die cast machine operator. Thus, the evidence failed to show a substantial possibility that he had regained or never lost the physical capacity to perform his previous work. The decision to deny the motion was reasonable under such evidence and, therefore, did not constitute an abuse of discretion.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Cunningham, Minton, Noble, Schroder and Scott, JJ., concur. Abramson, J., not sitting.

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