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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000305-WC

BRUNSWICK BOWLING LEAGUE — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-002155-WC
WORKERS' COMPENSATION BOARD NO. 99-54628

JOHN SIMS; HONORABLE CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that Slone v. Jason Coal Co.[1] precluded the claimant from raising a psychological condition at reopening because he knew of the condition at the time of a previous reopening but failed to raise it then. The ALJ also determined that the condition was not work-related. Reversing and remanding for additional findings, the Workers' Compensation Board held that the ALJ erred by extending Slone to successive reopenings and also misapplied the proximate cause doctrine. The Court of Appeals affirmed, and the employer appeals.

---

[1] 902 S.W.2d 820 (Ky. 1995).

We affirm. Neither Slone nor KRS 342.270(1) bars this psychological claim because neither pertains to successive reopenings. The ALJ misapplied the proximate cause doctrine by failing to consider that all of the injurious consequences of a work-related injury are compensable. Substantial evidence showed the lack of structure in the claimant's life after he quit working to be what aggravated his pre-existing ADHD. What the ALJ must determine on remand is whether he quit working due to the effects of the work-related injury and, thus, whether the aggravation of ADHD was compensable.

The claimant alleged that he sustained a work-related injury to his neck and left shoulder on November 11, 1999. Medical evidence submitted at the time referred to psychological as well as physical symptoms.

Dr. DeGruccio, the claimant's treating orthopedic surgeon, noted in March 2000 that most of his complaints towards the end of treatment showed evidence of symptom magnification, suggested a somatization syndrome, and appeared to be non-work-related. He testified later that the claimant suffered from a multi-disciplinary pain syndrome as well as a depressed state. He did not think that the depression "necessarily was caused by the reported injury."

Dr. Schiller, an orthopedic surgeon, evaluated the claimant in August 2000. He thought that there was "a very large psychosomatic component" to the pain complaints but recommended a shoulder MRI to rule out a rotator cuff

tear and a cervical MRI to rule out a herniated disc. He thought that the claimant should be referred to a neuropsychologist or a psychiatrist if the tests were normal.

The claimant returned to work for a different employer after the injury but was laid off after about two weeks. He found work as a handyman and continued to operate his own tool and die shop as he had done at the time of the injury. He stated that he experienced some anxiety and depression, which he attributed to his financial circumstances, and that he and his girlfriend had broken up. He stated that he had discussed his emotional problems with family, friends, and his minister but had not sought medical treatment.

An ALJ determined in November 2001 that the claimant was partially disabled and retained an 18% permanent impairment rating to the neck and shoulder. Multiplied by the applicable statutory factor, the impairment rating yielded a 27% disability rating for the purpose of calculating income benefits.

The claimant filed the first of two motions to reopen on March 2, 2004. In addition to alleging increased disability to his left shoulder and neck due to a worsening of the injury, he also raised a claim based on harm to the thoracic spine. He testified that he could no longer work, had been forced to close his tool and die shop, and had also been forced to give up his union membership because he could no longer afford to pay the dues. He had no source of income other than his workers' compensation award and food stamps, and his parents helped to support him.

The claimant's treating physician, Dr. Nair, stated that he exhibited significant pain and that his condition had worsened over time. He opined in August 2003, that the claimant had developed clinical depression secondary to his chronic pain. Another physician, Dr. Lach, stated that his condition had worsened considerably.

An ALJ dismissed the reopening on November 1, 2004, stating that no evidence revealed a greater permanent impairment rating at reopening and that Slone barred the newly-raised claim concerning the thoracic spine. The Board affirmed the decision and no further appeal was taken.

The claimant filed the motion to reopen that is presently at issue on October 24, 2005. He alleged a worsening of his physical condition and supported the motion with a December 2004 letter from Dr. Lach. The letter stated that the claimant could not work due to chronic pain syndrome and suffered from depression due to his condition. He assigned a 21% impairment rating based on the neck and shoulder conditions.

Although the Chief ALJ determined that the claimant failed to make the requisite prima facie showing, the Court of Appeals affirmed the Board's decision to reverse and remand for further proceedings. The ALJ assigned to the reopening granted the claimant leave to amend in April 2008 in order to include an allegation that the worsening of his physical condition produced psychological harm. Only that portion of the reopening is at issue presently. A summary of the relevant evidence follows.

Dr. Ballard, a physical medicine and rehabilitation specialist, found no change in the impairment rating for the claimant's physical complaints. She thought that his problems might by psychological.

Records from Jewish Patient Care indicated that the claimant presented on February 22, 2006, threatening suicide. Dr. Harris noted that the claimant complained of being in severe pain since Thanksgiving of 1999; that it failed to improve with medical treatment; that he thought he should be able to support himself and hated having to live with his parents; and that he thought no one would want to hire someone who was hyper and could not focus or think straight, like himself. He stated that he feared his doctors were turning him into a junkie and that he cried all the time, felt hopeless, and did not know what to do. Dr. Harris noted that he was unkempt, agitated, and restless. He exhibited obsessive and compulsive thoughts and behavior, ruminating primarily on his workers' compensation case. Dr. Harris diagnosed a work-related stress problem with suicidal ideation.

The claimant was hospitalized at Caritas Our Lady of Peace Behavioral Health Facility from February 22, 2006, until March 6, 2006. Diagnostic impressions included major depressive disorder, recurrent, severe; and rule out bipolar disorder, depressed. Medical records indicated that the symptoms were attributed to his chronic disability, inability to find work, and difficulty with pain management. He was advised to seek follow-up treatment upon release.

Dr. Lach evaluated the psychiatric condition in February 2008. He noted that the claimant had battled a depressive disorder secondary to the work injury for some time; that he improved little as a result of the psychiatric hospitalization; and that he worsened progressively thereafter. Dr. Lach assigned a Class III to IV psychiatric impairment.

Dr. Granacher performed a psychiatric evaluation for the employer in April 2008. He diagnosed severe attention deficit disorder with hyperactivity (ADHD) and functional illiteracy, and he opined that the claimant lacked the mental capacity to perform any work for which he had training, education, or experience. Dr. Granacher assigned a 30% impairment rating. He attributed a 25% rating to preexisting ADHD but stated that the work-related injury aggravated the condition, producing a 5% rating. He explained that the claimant did not have a mental disorder due to the injury but that "[t]he work injury became a precipitant to aggravate his preinjury [ADHD]. That has led to depression."

When deposed, Dr. Granacher stressed repeatedly that the work-related injury did not cause the claimant's ADHD. The following colloquy ensued:

> Q: In your opinion, Doctor, did the work injury itself in 1999 play any role in his ADHD?
>
> A: Not in causation, no sir. He was born with that. It's genetic. It's not related to work. I do think being out of work has aggravated it. I don't know if that's compensable. That's not my job. But I gave a five percent aggravation rating, but it's not causative. There's no proximate causation.

. . . .

Q: If I understand it, it's the lack of work, in your opinion, that aggravates it as opposed to the actual physical injury that would aggravate it?

A: Yes, sir. I mean, this man's living in poverty. He gets $73 a week, and his mother is basically supporting him, and I believe that's a significant aggravating factor.

. . . .

Q: Ideally would being employed potentially limit the effects of the ADHA in this situation or –

A: It would attenuate it or dampen it, yes, because it provides structure. And persons with ADHD do better if they have a structured life. They can't structure themselves. . . .

Q: Would he have, in your opinion, the effects that he has now of ADHD if he had lost a job for financial reasons or other aspect besides any kind of work injury or physical injury?

A: I don't think so because I believe the facts would have been different. You can corrects me if I am wrong, but at other times when he was between jobs or changing employment, in his mind, I believe he always had the opportunity to get another job. He now sees himself as unable to get another job. He's been without a job for almost ten years, and that's set in a sense of failure and lack of ability to get a job.

Dr. Granacher testified that the claimant would have experienced only a mild pre-injury impairment from ADHD due to the structure of his work. He

reiterated his opinion that the injury aggravated the preexisting, active ADHD and accounted for a 5% impairment rating. He opined that the depression treated in 2006 left no permanent impairment.

The ALJ dismissed the reopened claim in its entirety, having found that the physical condition was no more disabling than previously; that Slone barred the present claim for the psychological condition because the condition "was well known to the Plaintiff" before the decision in the 2004 reopening; and that the condition was not work-related. The ALJ relied on Dr. Granacher with respect to causation, finding that the claimant suffered from preexisting ADD with hyperactivity; that it had been undiagnosed previously and untreated; and that it was disabling before the 1999 injury. Convinced that only a superficial reading of Dr. Granacher's testimony might lead to the perception that there was a work-related aggravation of ADD, the ALJ pointed specifically to his statement: "I gave a five percent aggravation rating, but it's not causative. There's no proximate causation." The ALJ concluded that the whole of his testimony showed the lack of structure in the claimant's life to be what aggravated his ADD rather than the 1999 injury.

Seeking to have the ALJ's decision reinstated, the employer argues that both the Board and the Court of Appeals misconstrued Slone. The employer also argues that the Court of Appeals erred by failing to address what it characterizes as the Board's de novo review of the evidence. We disagree with both arguments.

An injured worker must include all conditions known to be work-related in a timely application for benefits, regardless of whether the worker knows a condition's precise diagnosis.[2] Slone stands for the principle that a reopening filed after the two-year limitations period has expired may not be used to raise a claim for a condition that was known to the worker during the initial litigation.[3] The General Assembly codified Slone in KRS 342.270(1), which requires a worker to raise all known causes of action against the employer during the pendency of the initial application for benefits. The rationale for Slone and for KRS 342.270(1) is to avoid the duplication of expense that results from piecemeal litigation.[4] Reopening involves different statutes and considerations. Neither Slone nor KRS 342.270(1) addresses successive reopenings.

A new condition that results from the work-related injury but does not arise until sometime after the initial award may be the basis for reopening.[5] If an ALJ finds the condition to be compensable, KRS 342.125(4) and (6) permit the worker to receive additional income benefits from the filing of the motion to reopen through the balance of the compensable period. Although the prohibition against retroactive benefits encourages a worker to include all

---

[2] Brummitt v. Southeastern Kentucky Rehabilitation Industries, 156 S.W.3d 276, 282 (Ky. 2005); American Printing House for the Blind ex rel. Mutual Insurance Corporation of America v. Brown, 142 S.W.3d 145, 149 (Ky. 2004).

[3] Whittaker v. Byard, 25 S.W.3d 119 (Ky. 2000).

[4] See Jeep Trucking, Inc. v. Howard, 891 S.W.2d 78 (Ky. 1995); Wagner Coal & Coke Co. v. Gray, 208 Ky. 152, 270 S.W. 721 (1925).

[5] Fischer Packing Co. v. Lanham, 804 S.W.2d 4 (Ky. 1991).

known causes of action against the employer in a reopening, nothing requires them to be included. Moreover, KRS 342.125(3) clearly anticipates that parties will file successive motions to reopen.[6] Although they may file successive motions, they may not use a reopening to raise an issue that was actually litigated; determined; and essential to the outcome in a previous reopening.[7]

The ALJ erred in the present case by holding that Slone barred the claimant from raising the psychological claim in the 2005 reopening. Medical evidence in the initial litigation contained some references to psychological symptoms, but no substantial evidence showed that the work-related injury caused them. Thus, Slone and KRS 342.170(1) did not bar a psychological claim at reopening.

Dr. Nair stated in an August 2003 letter that the claimant "developed clinical depression secondary to his chronic pain." The letter provided the earliest medical evidence of a causal link between a psychological condition and the work-related injury. The claimant's failure to raise a claim for secondary psychological overlay until the 2005 reopening limited the period during which he could receive benefits for the condition but did not bar him from raising it in 2005.

KRS 342.0011(1) defines a compensable injury as being a work-related traumatic event that is the proximate cause producing a harmful change in the

---

[6] KRS 342.125(3) prohibits a claim from being reopened more than four years "following the date of the original award or order granting or denying benefits" and prohibits a party from filing a motion to reopen within one year of a previous motion to reopen by the party.

[7] Charles F. Trivette Coal Co. v. Hampton, 509 S.W.2d 280 (Ky. 1974).

human organism. The statute includes a psychological, psychiatric, or stress-related harm if it is "a direct result of a physical injury."[8] The terms "proximate cause" and "direct cause" are synonymous legal terms of art that refer to an unbroken chain of causation.[9] Proximate causation is a legal issue for the ALJ to decide from the totality of the circumstances, regardless of a physician's statement on the matter. Medical causation is a medical issue which, unlike proximate causation, must be resolved from the medical testimony.[10]

The ALJ relied on Dr. Granacher with respect to whether the claimant's psychological condition was work-related. Dr. Granacher assigned a 30% impairment rating to the condition, attributing a 25% rating to preexisting active impairment and a 5% rating to an aggravation of the disorder due to the work-related neck and shoulder injury. When deposed, he explained that pain from the injury led to the claimant's inability to work and, as a consequence, to the loss of structure in his life that caused his ADHD to worsen from mild to severe. Responding to a question concerning the role that the injury played in causing ADHD, he explained that ADHD was a genetic condition that the injury did not cause and stated, "There's no proximate causation."

---

[8] As used in KRS 342.0011(1), the term "physical injury" refers to a physically traumatic event. Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564, 566-67 (Ky. 2001).

[9] Coleman v. Emily Enterprises, Inc., 58 S.W.3d 459, 462 (Ky. 2001); Dunn v. Central State Hospital, 197 Ky. 807, 813, 248 S.W. 216, 218 (Ky. App. 1923) (A proximate cause probably would lead to the event that happened; whereas, a remote cause probably would not.)

[10] See Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003).

Chapter 342 holds an employer liable for all of the injurious consequences of a work-related injury that are not attributable to an independent, intervening cause.[11] Thus, the ALJ erred in relying on Dr. Granacher's statement concerning the absence of proximate causation with respect to ADHD as a basis to find that the alleged psychological condition was not work-related. The ALJ relied properly on Dr. Granacher's medical opinions, which provided substantial evidence that the claimant suffers from severe ADHD; that his ADHD was not work-related; but that the lack of structured activities in his life after he stopped working aggravated the ADHD and produced a 5% impairment rating. Having done so, the ALJ must determine on remand whether the claimant stopped working due to the effects of the neck and shoulder injury, in which case the aggravation of his ADHD is work-related, or whether he stopped working due to some non-work-related cause, in which case it is not.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

[11] Beech Creek Coal Co. v. Cox, 314 Ky. 743, 744, 237 S.W.2d 56, 57 (1951).

COUNSEL FOR APPELLANT,
BRUNSWICK BOWLING LEAGUE:

Thomas Michael Edelen
Kathleen Elizabeth Savatiel
Ward, Hocker & Thornton, PLLC
716 West Main Street
Suite 201
Louisville, KY 40202

COUNSEL FOR APPELLEE,
JOHN SIMS:

Wayne C. Daub
600 West Main Street
Suite 300
Louisville, KY 40202