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Supreme Court of Kentucky

2012-SC-000099-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-000272-WC
WORKERS' COMPENSATION NO. 03-80366

CHRISTOPHER ALLEN, SAM AN TONIO'S;
TMG STAFFING SERVICES;
CRAWFORD AND COMPANY;
HONORABLE LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION OF THE COURT

AFFIRMING

Appellant, Commonwealth of Kentucky, Uninsured Employers' Fund ("UEF"), appeals from a decision of the Court of Appeals which upheld the reopening of Christopher Allen's claim for workers' compensation. The UEF argues that Allen did not present sufficient evidence to warrant reopening his claim, that it was improperly joined as a party, and that prior to this appeal Allen voluntarily dismissed several of the claims he is now pursuing. For the reasons set forth below, we affirm the Court of Appeals.

Due to the quality of the fact pattern presented in Judge VanMeter's opinion, we adopt it as a part of our decision.

> Allen filed an application for resolution of injury claim on March 20, 2003, alleging that he sustained injuries lifting a kettle off a stove while working for Sam An Tonio's, a former restaurant located in Prestonsburg, Kentucky. Allen gained employment with Sam An Tonio's via TMG Staffing Services ("TMG"), a staff leasing company. In correspondence with the ALJ, the custodian of the records of the Office of Workers' Claims certified that neither Sam An Tonio's nor TMG had workers' compensation coverage on the date of Allen's injury. Consequently, the UEF was joined as a party to this action.
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> Sam An Tonio's filed a notice of claim denial, contesting that Allen suffered a permanent injury or impairment. The notice lists Crawford and Company ("Crawford") as Sam An Tonio's insurance carrier, and indicates that $5,299.77 in voluntary income benefits was paid to Allen to cover a period from March 22, 2003 through August 31, 2003.
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> The UEF moved the ALJ to dismiss it as a party on the basis that TMG and Sam An Tonio's were insured at the time of Allen's injury. In support of its motion, the UEF filed a report with the ALJ which included two certificates of insurance allegedly covering TMG and Sam An Tonio's: one covering a period from August 1, 2002 through July 31, 2003, listing Trans Pacific Insurance Company ("Trans Pacific") as the date of injury insurance carrier; the second covering a period from February 10, 2003 through February 10, 2004, issued by Providence Property & Casualty Insurance Company ("Providence"). Both certificates indicate TMG was the insured party, and Sam An Tonio's was the certificate holder. Based on the production of the certificates, the ALJ dismissed the UEF as a party.
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> Allen provided the medical records of an examination conducted by Dr. Ira Potter, who diagnosed Allen with a disc bulge with central spinal canal stenosis, degenerative disc disease, chronic lumbosacral strain/sprain, and chronic bilater radiculitis and assessed a 12% whole person impairment. Dr. Potter indicated that Allen could return to work as a cook, if he observed restrictions of not lifting more than 25 pounds occasionally and 15 pounds frequently; did not continuously sit, stand, or walk for more than 60 minutes; and did not repeatedly stoop, bend, crouch, or squat.
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> Allen was also examined by Dr. Gregory Snider, who diagnosed Allen with chronic thoracic strain and chronic lumbar strain. Dr. Snider assessed a 10% whole person impairment, 5%

for his thoracic spine and 5% for his lumbar spine. Due to Allen's condition, Dr. Snider recommended work restrictions of lifting no more than 40 pounds. Additionally, the medical records were introduced of Dr. William Lester, who also conducted an independent medical evaluation ("IME") of Allen and diagnosed a lumbar sprain, but assigned no impairment.

Thereafter, Allen agreed to a settlement of his claim with Crawford. The agreement provided for a lump sum payment of $10,000 to Allen, listing the diagnoses as a 'low back strain,' and stating that Crawford was the insurer. TMG issued a $10,000 check, and Crawford delivered it to Allen.

In 2006, Allen moved to re-open the workers' compensation award, alleging that his condition had worsened and, as a result, he was unable to find suitable employment. In support of his motion, Allen submitted the medical records of Dr. Laura Hazeltine, Allen's treating physician since February 2006. The records indicated Allen complained of increased pain that began radiating to his legs. An MRI dated February 3, 2006, showed Allen had muscle spasms and a loss of some lordosis. Dr. Hazeltine opined that Allen's condition had worsened since 2005, assessed a 12% whole person impairment, and stated that Allen was now 100% occupationally disabled. She advised Allen to not lift more than ten pounds, sit or stand in [the] same position for more than an hour, or repeatedly bend or stoop. Based on a review of this evidence, the ALJ re-opened the award.

Subsequently, Allen moved to join the UEF as a party, asserting that Sam An Tonio's and TMG were no longer available to pay for his continuing medical expenses. The Department of Workers' Claims ("Department") issued a notice of citation and penalty against TMG, in which it stated that TMG misrepresented facts regarding its insurance coverage, and then failed to pay medical bills submitted by Allen. Providence filed a notice of contest in response, denying that it issued any certificates of insurance for TMG or Sam An Tonio's. Crawford argued that it was a third-party adjustor for TMG, it ended its contractual relationship with TMG in 2008, and was led to believe that TMG was insured by Trans Pacific. The ALJ dismissed Providence as a party, and found Crawford to be the insurer of TMG and liable for payment of Allen's medical bills.

Crawford filed a motion for an extension of time to provide further proof regarding the insurance coverage issue, which the ALJ granted. William Bradley Thomas, a service center manager at Crawford, was deposed and testified that Crawford is a claim solution company that investigates claims on behalf of insurance companies and is not an insurance company. Crawford also presented a copy of the $10,000 settlement check issued by TMG

to Allen. The ALJ entered an order rejoining the UEF on the basis that Crawford conclusively established it was not an insurer of TMG. The UEF filed a petition for reconsideration, which the ALJ denied.

Additional medical records were introduced regarding Allen's condition since the time of the injury. Dr. Frederic Huffnagle evaluated Allen for a social security disability assessment and diagnosed him with low back pain with sciatica. Dr. Huffnagle further observed that Allen walked with a right limp and was unable to stand on his toes or heels. Dr. William Lester performed an IME of Allen in 2009 and opined that his condition had not deteriorated since his initial injury.

In an opinion, order and award, the ALJ found Allen's condition to have changed so that he was now totally disabled and that the UEF was responsible for all benefits for which Allen was entitled. The UEF appealed to the Board, which affirmed the ALJ's opinion in part, and vacated the portion of the opinion regarding the amount of benefits Allen would receive each week.

The Court of Appeals affirmed the Board's decision and this appeal followed.

I. ALLEN'S CLAIM WAS PROPERLY REOPENED AND THE UEF JOINED AS A PARTY

The UEF's first argument is that Allen's claim was improperly reopened under KRS 342.125. A workers' compensation claim which was settled may be reopened if the movant can make a preliminary *prima facie* showing that he has a substantial probability of proving one of more of the following grounds exist under KRS 342.125: (a) fraud; (b) newly-discovered evidence which could have been discovered with the exercise of due diligence; (c) mistake; and (d) change in 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. *Hall v. Hospitality Res., Inc.*, 276 S.W.3d 775, 779-780 (Ky. 2008).

Allen filed the motion to reopen his claim based on the deterioration of his medical condition in the years following the settlement he reached with Sam An Tonio's. The UEF contends that Allen failed to make a *prima facie* case of the worsening of his condition because he did not present evidence which compared his medical condition immediately after his injury to his condition at the time he moved to reopen his claim. However, Allen attached to his motion to reopen the following items: an affidavit in which he described his increased physical pain; several medical reports from his treating physician, Dr. Hazeltine verifying Allen's condition had worsened; and an MRI report indicating further disc degeneration. Due to this evidence, we cannot find that the ALJ abused his discretion by finding Allen presented a *prima facie* case that his conditioned worsened since the final award. Accordingly, Allen's claim was properly reopened.

The UEF alternatively argues that if the reopening of Allen's claim was found to be proper, it was improperly joined as a party, because it had been previously dismissed from the action. Allen's motion to join the UEF to the action stated that "both the defendant/employer and its insurance carrier [Crawford] have disappeared." The UEF contends that Crawford did not disappear as an entity, but instead has improperly refused to pay Allen's benefits. The UEF believes that instead of it being joined to this suit, Allen should use KRS 342.305 to force Crawford to accept responsibility for paying his award.

However, there is sufficient evidence to support the ALJ's conclusion that Crawford was not the insurer for Sam An Tonio's or TMG. KRS 342.780 states:

> [a] claimant may, in the original application for benefits, or any party may, by motion accompanied by proper allegations while the case is still pending, and the [ALJ] shall, upon his own motion at any time before the rendition of the final award, cause the uninsured employers' fund to be made a party to the proceedings if it should appear that the named defendant has failed to secure the payment of compensation as required by KRS 342.340.

Based on the plain language of KRS 342.780, the ALJ was within his discretion to rejoin the UEF to this action when it became clear that Crawford was not an insurer and that Sam An Tonio's and TMG were in fact uninsured. Prior case law has held that even if there was no basis to join the Special Fund (the precursor to the UEF) to an initial workers' compensation claim, it may be joined as a party if the claim is reopened. *See Brown & Williamson Tobacco Corp. v. Harper*, 717 S.W.2d 502 (Ky. App. 1986).

The UEF cites to *Uninsured Employers' Fund v. Turner*, 981 S.W.2d 544 (Ky. 1998) to argue that it could only be joined as a party to this action prior to the settlement between Allen and Sam An Tonio's becoming the final award. Yet, while *Turner* did hold that the joinder of an additional party after the settlement became final was improper, we note that several differences distinguish that case from the present matter – most notably no motion to reopen was filed in *Turner* and no party asserted the statutory grounds of KRS 342.125(1) to the ALJ. The ALJ did not err by rejoining the UEF as a party to this matter.

II. SUFFICIENT EVIDENCE WAS PRESENTED TO SHOW THAT ALLEN'S CONDITION HAS WORSENED

The UEF's next argument is that Allen failed to present sufficient evidence to indicate that his condition worsened since the entry of his original workers' compensation award. To make this argument, the UEF compares Allen's original IME from Dr. Potter, dated March 20, 2004, with Dr. Hazeltine's reports from 2006. Both doctors found that Allen had a 12% whole body impairment and therefore the UEF comes to the conclusion that Allen's condition has not worsened.

But the UEF's argument overlooks some important evidence. On reopening, the ALJ found that based on Dr. Potter, Dr. Snider, and Dr. Lester's reports from 2003 that, at the time of his original workers' compensation award Allen had a permanent impairment of 10%. The ALJ then relied on Dr. Hazeltine's 2006 assessment to find that Allen's permanent impairment is now 12%, showing a worsening of condition. Dr. Hazeltine also found that Allen is now 100% occupationally disabled, and that his medical condition has continually worsened while in her care. Further, an MRI taken in 2006 does indicate that Allen is suffering from muscle spasms and loss of some lordosis. The ALJ's conclusions are supported by the record, and there are no grounds to reverse his ruling.

III. ALLEN IS NOT BARRED FROM RAISING A CLAIM FOR HIS THORACIC SPINE INJURY ON REOPENING

Finally, the UEF argues that Allen waived any claim regarding his thoracic spine injury because his original settlement agreement only listed his

lower back injury as compensable. However, KRS 342.125(7) states that, "[t]he parties may raise any issue upon reopening and review of this type of award which could have been considered upon an original application for benefits." Stated another way, the application of *res judicata* and collateral estoppel is prohibited on a motion to re-open a workers' compensation award. *Beale v. Faultless Hardware*, 837 S.W.2d 893, 896 (Ky. 1992). Accordingly, there is no merit to the UEF's argument that Allen waived his right to address his thoracic spine injury claim. We note that in his original application for workers' compensation benefits, Allen stated he suffered an injury to his thoracic spine and provided medical evidence to support the claim.

CONCLUSION

For the above stated reasons, the decision of the Court of Appeals is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Keller, J., not sitting.

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