Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 15, 2016

CLAIM NO. 201091591

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER,**
CHIEF ADMINISTRATIVE LAW JUDGE

CHARLES R. ARFLACK
and HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Commonwealth of Kentucky, Transportation Cabinet, Department of Highways ("Transportation Cabinet") appeals from the August 4, 2015, Order and the September 4, 2015, Order overruling the Transportation Cabinet's petition for reconsideration of Hon. Robert L. Swisher, Chief Administrative Law Judge ("CALJ"). In the August 4,

2015, Order, the CALJ overruled the Transportation Cabinet's Motion to Reopen.

On appeal, the Transportation Cabinet put forth two arguments. In its first argument, the Transportation Cabinet argues the ALJ erred when he determined the absence of a decrease in the functional impairment rating equates to failing to make a *prima facie* case for reopening to rescind enhancement by the three multiplier previously awarded. In its second argument, the Transportation Cabinet argues a *prima facie* case for reopening is established when an employee who has been awarded benefits enhanced by the three multiplier is released by his treating physician to return to the type of work he was performing at the time of the injury.

The Form 101 (Claim #2010-91591) alleges Charles Arflack ("Arflack") injured his left arm and neck on March 29, 2010, in the following manner: "I was emptying a bag of cement into a mixer. The mixer paddles caught the bag and my left arm was pulled." The Form 101 indicates Arflack underwent neck surgery.

By Motion to Amend dated November 28, 2011, Arflack moved to amend his Form 101 to include work-related bilateral carpal tunnel syndrome. By order dated December

20, 2011, Hon. Joseph Justice, Administrative Law Judge ("ALJ Justice") sustained Arflack's motion.

The January 10, 2012, Benefit Review Conference Order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation [handwritten: "as to C/T"]; notice [handwritten: "as to C/T"]; injury as defined by the ACT [handwritten: "as to C/T"]; TTD [handwritten: "as to C/T"].

In the April 18, 2012, Opinion, Award, and Order, ALJ Justice awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, based on a 25% impairment rating assessed by Dr. Theodore Davies, enhanced by the three multiplier, and medical benefits "for the care and relief from the effects of the work-related cervical injury and fusion at C5-6 and C6-7." Significantly, ALJ Justice summarized Arflack's restrictions as follows:

> The ALJ was persuaded that Plaintiff did not retain the physical capacity to return to the same type of work that he performed prior to the injury, although he retained the same job classification of Equipment Operator III and the same hourly rate. Even Defendant's IME physician, Dr. Weiss, restricted Plaintiff to overhead lifting of items more than 30 pounds. Dr. Davies restricted him to occasionally lifting 50 pounds. Plaintiff was injured lifting 90 pound bags of cement, and

> much of his work was of a very physical nature such as operating jack hammers on the bridge crew. He detailed the problems he would have in returning to his former job requirements.

As revealed in pleadings filed in the proceedings before the ALJ, Arflack returned to work at the Transportation Cabinet and subsequently sustained a second work injury. He filed a Form 101 (Claim #: 2014-83359) on January 30, 2015, alleging he sustained a neck injury on May 5, 2014, in the following manner: "I was loading concrete bags on a trailer. While picking up one of the bags, I had pain in my neck, my left arm went numb and I had tingling in my left hand."

In Claim No. 2014-83359, Hon. R. Roland Case, ALJ ("ALJ Case") rendered an Opinion, Award, and Order dated August 20, 2015, awarding TTD benefits, PPD benefits based on a 25% impairment rating assessed by Dr. Clint Hill, and medical benefits.

On July 2, 2015, the Transportation Cabinet filed a Motion to Reopen in Claim No. 201091591 alleging newly discovered evidence and a change of disability. The Transportation Cabinet argued, in part, as follows:

> The Plaintiff, Charles R. Arflack, filed an Application for Resolution of Injury Claim (Form 101) on August 29, 2011, alleging disability and entitlement to disability benefits

based on a work related injury that occurred on March 29, 2010, while in the employ of the Defendant/Employer. An Opinion, Award and Order was issued in this claim by Administrative Law Judge Joseph W. Justice, dated April 18, 2012. Petitions for Reconsideration were timely filed and Orders on the Petitions for Reconsideration were issued by the Administrative Law Judge on May 18, 2012.

...

Following his return to work for the same employer, and on May 5, 2014, the Plaintiff sustained another injury while doing essentially the same type of activity as he was doing at the time of the earlier injury and involving the same part of his body. An Application for Resolution of Injury Claim (Form 101) was filed on January 30, 2015 and designated Claim No. 2014-83359. The medical evidence developed in that claim revealed that the Plaintiff underwent additional neck surgery by Dr. Clint P. Hill on December 11, 2014. The Plaintiff was released to return to work by Dr. Hill on January 28, 2015 with no physical restrictions.

The Defendant attests that the Plaintiff has returned to the same job performed before the 2010 injury at a wage equal to or greater than that earned before the injury, with no physical restrictions or limitations.

...

Wherefore, the Defendant-Employer moves that this matter be reopened and assigned to the Frankfort Motion docket to be summarily decided or to an Administrative Law Judge for further proceedings and resolution.

Attached to its Motion to Reopen is an April 21, 2015, medical report by Dr. James E. Goris who opined, in relevant part, as follows:

> He is status post disc replacement C3-4 and fusion C4-7 of the cervical spine, possible carpal tunnel syndrome bilateral upper extremity versus continued radicular symptoms. I do believe he is at MMI at this time with regards to the neck. I do not believe he requires any restrictions as he has not had any placed by his operative surgeon. His impairment for the cervical spine is 25% whole person, according to Table 15-5, Page 392, Fifth Edition of the Guides, DRE Cervical Category 4. Rationale for this impairment is loss of motion and motion segment due to successful surgical arthrodesis. As he had a previous cervical fusion I believe 50% of his impairment is secondary to his previous fusion and 50% due to the more recent surgery and extension of fusion. I do not believe that any further treatment would be indicated other than continuing his Neurontin as his symptoms require.

Also attached is a January 28, 2015, note of Dr. Clint P. Hill returning Arflack to work without restrictions.

In the August 4, 2015, Order, the ALJ determined as follows:

> This matter comes before the undersigned Chief Administrative Law Judge (CALJ) upon the Frankfort Motion Docket for consideration of a motion by

the defendant/employer to reopen the above-styled claim alleging improvement of impairment due to a condition caused by the injury since the date of the award or order. Specifically, the defendant/employer contends that although plaintiff was awarded permanent partial disability benefits based on a 25% impairment rating and enhanced by the triple multiplier of KRS 342.730(1)(c)(1), plaintiff has now been released to return to work without restrictions and that, therefore, benefits are no longer subject to the application of the triple multiplier. Plaintiff has filed a response indicating that subsequent to the entry of the Opinion and Award herein, he sustained a new cervical spine injury on May 5, 2014, which resulted in additional fusion surgery and, ultimately, the assignment of a 28% whole person impairment rating. While the treating physician for the new injury has released plaintiff to return to work without restrictions, plaintiff contends that any such release does not constitute "newly discovered" evidence but merely new evidence which is not grounds for reopening under KRS 342.125 and that, in any event, there is no evidence that plaintiff's original treating surgeon ever lifted the restrictions from his first surgery or changed them in any way. Plaintiff contends, therefore, that the defendant/employer has failed to make a *prima facie* case justifying a reopening of the 2012 award and that the motion to reopen should be denied.

Some history is in order. In an Opinion, Award and Order rendered April 18, 2012, ALJ Joseph W. Justice found that plaintiff sustained a work-related injury to his cervical spine on March 29, 2010. The ALJ awarded permanent

partial disability benefits based on a 25% whole person impairment rating assigned by Dr. Davies, the treating physician, and based on restrictions assigned by Dr. Davies as well as plaintiff's testimony regarding problems he would have in returning to his former job requirements, the ALJ found "plaintiff is entitled to the 3 multiplier." Accordingly, plaintiff was awarded permanent partial disability benefits at the weekly rate of $358.58 payable for 425 weeks. The defendant/employer alleges that following plaintiff's return to work he sustained another injury on May 5, 2014, "while doing essentially the same type of activity he was doing at the time of the earlier injury and injuring the same party of his body." A new application for resolution of injury claim (Form 101) was filed on January 30, 2015 under claim number 2014-83359. According to the defendant/employer and as confirmed by plaintiff, plaintiff underwent additional cervical surgery performed by Dr. Clint Hill on December 11, 2014. The defendant/employer contends that plaintiff was released to return to work by Dr. Hill on January 28, 2015 with no physical restrictions. The defendant/employer further contends that plaintiff has returned to the same job performed before the 2010 injury at a wage equal to or greater than that earned before the injury with no physical restrictions or limitations. The defendant/employer concludes, therefore, that plaintiff's condition has improved since the award of April 18, 2012, and it requests that this matter be reopened. In conjunction with its motion to reopen the defendant/employer has submitted an affidavit from its counsel essentially confirming the assertions set forth in the motion to reopen as well as an

April 21, 2015 office note from James E. Goris, M.D., who performed an IME on that date. Dr. Goris believes that plaintiff does not need any restrictions and he assigned a 25% whole person impairment rating. The defendant/employer also submitted a return to work statement issued by the treating physician, Dr. Hill, on January 28, 2015, indicating that plaintiff can return to work without restrictions on February 23, 2015.

Having carefully reviewed the motion to reopen and attachments submitted therewith along with plaintiff's response thereto, the CALJ finds that the defendant/employer has failed to set forth a *prima facie* case for reopening pursuant to KRS 342.125. *Stambaugh v. Cedar Creek Mining,* 488 S.W.2d 681 (Ky. 1972).

KRS 342.125 provides, in pertinent part,

(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:

(a) fraud;

(b) newly-discovered evidence which could not have been discovered with the exercise of due diligence;

(c) mistake; and

(d) change of disability shown by objective medical evidence or worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

Although the defendant/employer contends that the documents which it

has submitted constitute "new evidence", that is not the appropriate standard for evaluating the propriety of reopening. Clearly, the statute refers to "newly-discovered evidence which could not have been discovered with the exercise of due diligence." In other words, the "newly-discovered evidence" must have existed at the time of the rendition of the original Opinion and Award. In this case, however, the defendant/employer points to no such newly discovered evidence but, instead, points to evidence in the form of medical reports generated subsequent to the entry of the Opinion and Award herein. Accordingly, the defendant/employer has not established a *prima facie* case for reopening based on "newly-discovered evidence."

Likewise, the defendant/employer has not submitted any evidence indicating that plaintiff's impairment rating has decreased from the 25% initially found by ALJ Justice. Therefore, the only basis on which the defendant/employer could argue that there has been an improvement in plaintiff's condition is the fact that plaintiff has been released to return to work without restrictions. As plaintiff points out, however, that release was made by the physician who has treated him with respect to his 2014 injury. There is no evidence that plaintiff's restrictions with respect to the underlying 2010 injury have ever been altered, amended or lifted. Even assuming, *arguendo,* that a current release to return to work "covers" both of plaintiff's injuries, the fact remains that the defendant/employer has not demonstrated an "improvement of impairment." Plaintiff's impairment rating has not changed. It has been consistently held that in the absence

> of an increase in impairment rating, a claimant is not entitled to reopen his or her award solely for the application of the triple multiplier. *Rock Drilling, Inc. v. Howell,* Claim No. 2006-86699 citing *Phillips Tree Experts, Inc. v. Travis*, 2006-SC-000633-WC (Ky. April 19, 2007); *Patricia L. Shaw v. Jane Todd Crawford Hospital,* 2007-CA-000981-WC (Ky. App. November 2, 2007); and *Pepsi Cola General Bottlers, Inc. v. Murrell,* 2009-CA-002044 (Ky. App. May 7, 2008). The same principle should apply whether it is the claimant or the employer raising the issue; namely, in the absence of a change in impairment rating, neither side may reopen a claim solely for the purpose of either obtaining or removing the application of the triple multiplier of KRS 342.730(1)(c)(1). Accordingly, the defendant/employer's motion to reopen is **OVERRULED.**

The Transportation Cabinet filed a petition for reconsideration asserting a *prima facie* case for reopening had been made, which the ALJ overruled by order dated September 9, 2015.

The Transportation Cabinet's first argument on appeal is the ALJ erred by finding that because of the absence of a decrease in impairment rating it had failed to make a *prima facie* case for reopening to remove the three multiplier.

The record reveals Arflack's impairment rating adjudged in the April 18, 2012, Opinion, Award, and Order,

is 25%. The record further reveals the impairment rating adjudged in the August 20, 2015, Opinion, Award, and Order is also 25%. Importantly, the medical report by Dr. Goris filed with the Transportation Cabinet's Motion to Reopen sets forth a 25% impairment rating. As correctly held by the ALJ in the August 4, 2015, Order without a change in impairment rating, neither party is entitled to reopen an award for reassessment of multipliers. Phillips Tree Experts, Inc. v. Travis, 2006-SC-000633-WC (Ky. April 19, 2007); Patricia L. Shaw v. Jane Todd Crawford Hospital, 2007-CA-000981-WC (Ky. App., November 2, 2007); and Pepsi Cola General Bottlers, Inc. v. Murrell, 2009-CA-002044 (Ky. App., May 7, 2010). *As there is no demonstrated decrease in impairment rating*, the Transportation Cabinet failed to make a *prima facie* case for reopening to reassess application of the three multiplier.

The Transportation Cabinet's second argument on appeal is a *prima facie* case for reopening was made by virtue of medical evidence submitted in support of its motion to reopen allegedly demonstrating Arflack, at the time of reopening, retains the physical capacity to return to the type of work that he performed at the time of the original injury. It asserts, in part, as follows: "Had the original claim been decided at that time and based on the

current medical evidence, the enhanced benefits would not have been awarded." The Transportation Cabinet characterizes this evidence as "newly discovered evidence which could not have been discovered with the exercise of due diligence."

KRS 342.125 allows an ALJ to reopen a claim upon the grounds of a) fraud; b) newly discovered evidence which could not 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. As correctly determined by the ALJ in the August 4, 2015, Order, the medical evidence submitted with the Transportation Cabinet's Motion to Reopen is not *newly discovered evidence* appropriate for a motion to reopen. It is, however, *new evidence* generated as a part of Arflack's separate and subsequent claim (Claim #: 2014-83359) filed after the resolution of the litigation at issue here (Claim #2010-91591). Additionally, assuming, *arguendo*, that a release to work without restrictions is sufficient grounds for reopening to reassess application of the three multiplier, as correctly noted by the ALJ, "that release was made by the physician who has treated him with respect to his 2014 injury." The Transportation Cabinet has

offered no evidence that the restrictions relevant to the 2010 injury, the injury subject to this litigation, have been modified in any way. The August 4, 2015, Order will not be disturbed.

Accordingly, the August 4, 2015, Order and the September 4, 2015, Order overruling the Transportation Cabinet's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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