OPINION ENTERED: October 19, 2012

CLAIM NO. 200768685

JAMES MCGUIRE PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

JOHNNY MCGUIRE D/B/A
MCJOLIN TRUCKING
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. James McGuire ("McGuire") appeals from the order entered June 7, 2012 by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), overruling the motion to reopen his claim from an injury allegedly sustained on August 31, 2007. No petition for reconsideration was filed.

On appeal, McGuire argues the CALJ erred in overruling the motion to reopen as a matter of law. We affirm.

McGuire filed a Form 101, Application for Resolution of Injury Claim, on April 16, 2008, alleging he sustained an injury on August 31, 2007, from a tractor-trailer accident during the course and scope of his work for his employer, Johnny McGuire d/b/a McJolin Trucking ("McJolin").

An opinion was rendered by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ Justice"), on May 6, 2011, finding McGuire sustained neither cervical nor lumbar injuries resulting from the work accident, and he dismissed the claim. Specifically, ALJ Justice found as follows:

> Dr. Henry Tutt performed an IME for Country Carriers on July 23, 2008. Dr. Tutt found there was no objective evidence of either a cervical or lumbar spine injury, and that Plaintiff did not sustain any alteration of the spine as a result of the Truck accident of August 21, 2007. The ALJ was persuaded by the reports and opinions of Dr. Tutt, and he finds that Plaintiff did not sustain a cervical or lumbar spine injury resulting from the truck accident.

McGuire did not file a petition for reconsideration, and no appeal was filed.

On May 3, 2012, McGuire filed a motion to reopen alleging his condition had worsened. McJolin filed a response asserting *res judicata* prevents the claim from being reopened because ALJ Justice determined McGuire did not sustain an injury. Specifically, McJolin argued, "[o]ne cannot reopen based on KRS 342.125(1)(d) without a finding in the prior claim that there was an injury. The statute, by its explicit terms, requires the same."

In an order entered June 7, 2012, the CALJ found as follows:

> This matter is before the undersigned on the Plaintiff's Motion to Reopen. Having read the Response of the Defendant, the Motion is OVERRULED. The Plaintiff seeks to reopen a claim that was previously dismissed on May 6, 2011. The claim cannot be reopened under KRS 342.125(1)(d) as the prior ALJ specifically found that there was no work injury. A finding of a work injury is required to reopen under KRS 342.125(1)(d) ("condition caused by the injury"). Thus, in order to make a prima facie showing the Plaintiff would have to now establish that there was a work injury. Res judicata bars the same. The prior ALJ made his findings of fact, they are final.
>
> KRS 342.125 (1)(d) states as follows:
>
> (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 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.
>
> (2) No claim which has been previously dismissed or denied on the merits shall be reopened except upon the grounds set forth in this section.

ALJ Justice previously dismissed McGuire's claim finding he did not sustain an injury to either the cervical or lumbar spine. No appeal was taken from that decision. The question now before this Board is whether McGuire may reopen his claim for a worsening of condition, or whether this claim is controlled by the law of the case or *res judicata*. We conclude he may not.

In reaching this determination, we must define the law of the case doctrine. The case most commonly cited regarding the law of the case is Inman v. Inman, 648 S.W. 2d 847 (Ky. 1982). There the Kentucky Supreme Court said:

> The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions and law and not questions of fact. "As the term 'law of the case' is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court." 5 Am. Jur.2d, Appeal and Error, Sec. 744.

McGuire did not allege the claim should be reopened based upon fraud, mistake, or newly discovered evidence. He merely argues he has sustained a worsening of his condition. ALJ Justice determined McGuire did not sustain a work-related injury to either the cervical or lumbar spine. Therefore, fundamental logic dictates he

could not have sustained a worsening of a condition which has been determined to be non-existent. We believe the CALJ correctly concluded that the law of the case or *res judicata* applied thus mandating he overrule the motion by McGuire seeking to reopen his claim for an alleged worsening of condition.

We believe the case of Slone v. R & S Mining, Inc., 74 S.W 3d 259 (Ky. 2002) supports this conclusion. There the ALJ dismissed the claimant's pneumoconiosis claim and no appeal was taken. The claimant subsequently moved to reopen the claim. The ALJ denied the motion to reopen. The Kentucky Supreme Court concluded that the ALJ correctly denied the motion to reopen on the basis of *res judicata*. The Kentucky Supreme Court said:

> The doctrine of *res judicata* (also known as the doctrine of finality of judgments) is basic to our legal system and stands for the principle that once the rights of the parties have been finally determined, litigation should end. Thus, where there is an identity of parties and an identity of causes of action, the doctrine precludes further litigation of issues that were decided on the merits in a final judgment. The application of these principles to final workers' compensation decisions is grounded in the fact that because there is an extensive procedure for taking appeals, a final decision should not be disturbed absent fraud, mistake, or other very persuasive reason that would warrant reopening.

The Kentucky Supreme Court pointed out KRS 342.125 grants some relief from the principles of *res judicata* by permitting a reopening, provided the individual can show fraud, mistake, newly discovered evidence or a change in condition that causes a change of occupational disability.

The Supreme Court also discussed the appropriateness of a reopening when there is additional exposure. As noted previously, none of the exceptions discussed in Slone were alleged by McGuire and thus are not applicable to the case before us now. The Kentucky Supreme Court concluded under the circumstances presented in Slone, dismissal of the claim on the merits precluded further litigation as to whether the claimant suffered from pneumoconiosis and the ALJ did not err in denying the motion to reopen. We believe the same situation, as in Slone, is presented to us in this case.

We agree with McJolin the principle of *res judicata* is central to our legal system. Although some relief to *res judicata* is permitted in limited circumstances outlined in KRS 342.125, none of those criteria exists in the claim *sub judice*. Bolin v. T & T Mining, 231 S.W.3d 130 (Ky. 2007). We further agree with McJolin that pursuant to Stambaugh v. Cedar Creek Mining, Co., 488 S.W.2d 681 (Ky.

1972), McGuire failed to make a *prima facie* showing of any possibility he could prevail on reopening.

ALJ Justice's opinion rendered May 6, 2011, is clear and unambiguous. That opinion is now *res judicata* as to McGuire's claim for cervical and lumbar injuries and the CALJ correctly concluded McGuire is precluded from reopening his claim for an alleged worsening of condition. For the foregoing reasons, we **AFFIRM** the decision of the Chief Administrative Law Judge.

ALL CONCUR.

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