

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: July 1, 2015

CLAIM NO. 201379306

NETT GONZALEZ (DEC)  
VERONICA GONZALEZ (SPOUSE & CHILDREN) PETITIONER

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

SPARTAN CONTRACTING, LLC  
HON. ROBERT L. SWISHER,  
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Nett Gonzalez ("Gonzalez") died as a result of work-related injuries he sustained on May 21, 2013 while working on a bridge in Owensboro, Kentucky. His wife, Veronica Gonzales, and children (collectively "Gonzalez Survivors"), appeal from the February 11, 2015 order denying

their motion to reopen rendered by Hon. Robert L. Swisher, Chief Administrative Law Judge ("CALJ").

The CALJ rendered a decision in the original proceeding on November 10, 2014, finding Gonzalez died as a result of work-related injuries, and additionally finding Spartan Contracting, LLC ("Spartan") was not liable for a 30% safety penalty pursuant to KRS 342.165(1). The Gonzalez Survivors filed a petition for reconsideration on November 24, 2014 which was denied by order of the CALJ on December 30, 2014. The Gonzalez Survivors filed a motion to reopen the claim based upon "new evidence" on January 22, 2015. The CALJ denied the motion to reopen by order entered February 11, 2015.

On March 9, 2015, the Gonzalez Survivors filed an appeal of the November 10, 2014 decision; the December 30, 2014 order denying their petition for reconsideration; and the February 11, 2015 order denying the motion to reopen. Spartan filed a motion to dismiss the appeal of the CALJ's November 10, 2014 decision and the December 30, 2014 order denying the petition for reconsideration as untimely. This Board entered an order on April 23, 2015 dismissing the appeal from the November 10, 2014 decision, and the December 30, 2014 order denying the petition for reconsideration because they were not timely appealed. It was noted the

Gonzalez Survivors had timely appealed from the February 11, 2015 order denying the motion to reopen, and the appeal from that order was allowed to proceed. Therefore, we may only consider the appeal from the order denying the motion to reopen.

On appeal, the Gonzalez Survivors argue the CALJ refused to reopen the claim because he misunderstood the safety regulations regarding operational electrical systems in a construction work environment. The Gonzalez Survivors next argue the motion to reopen was not barred by *res judicata*. Finally, the Gonzalez Survivors argue they correctly filed a motion to reopen with the required supporting information, and to deny the motion constitutes a great injustice. Despite these arguments, the real issue on appeal is whether the CALJ erred and abused his discretion in denying the motion to reopen. Because we determine the CALJ properly considered the motion to reopen and acted within the scope of his discretion, we affirm.

As noted above, Gonzalez died as a result of work-related injuries he sustained on May 21, 2013 while working within the course and scope of his duties for Spartan. Because this appeal only concerns the CALJ's February 10, 2015 order denying the motion to reopen, we will not review all of the evidence of record.

A Form 101 was filed on October 17, 2013 which listed the plaintiff as "Nezahualcoyolt (Nett) Gonzalez, Deceased; Surviving Spouse Veronica Gonzalez, and Surviving Children listed under dependents." In Section 19 of the Form 101, a safety penalty pursuant to KRS 342.165 was asserted against Spartan. A scheduling order was issued by the Kentucky Department of Workers' Claims on October 15, 2013, setting a Benefit Review Conference ("BRC") for February 11, 2014. The BRC was held on February 11, 2014, and the contested issues were listed as work-relatedness/causation and whether there was a safety violation pursuant to KRS 342.165.

During the pendency of the claim, numerous OSHA reports and regulations were filed. Likewise, multiple documents regarding the bridge where the accident occurred, Spartan's daily work reports, project documents, and documentation from the Kentucky Transportation Cabinet were filed. Additionally, the September 19, 2013 notice of penalty KOSHA recommended to be assessed against Spartan was filed, along with the September 30, 2013 notice of contest of the recommended penalty.

The Gonzalez Survivors filed multiple motions for extension of time, and the hearing originally scheduled for February 25, 2014 was canceled. After a telephonic

conference was held on August 22, 2014, which was attended by counsel for the Gonzalez Survivors and Spartan, the CALJ issued an order scheduling the final hearing for September 16, 2014. There is no documentation of any attempt to cancel or continue the hearing despite the assertion by counsel for the Gonzalez Survivors, in her affidavit, of her being aware in July 2014 of the city of Owensboro undertaking an additional inspection of the bridge.

Numerous depositions were taken regarding whether there was a safety violation pursuant to KRS 342.165(1). The Gonzalez Survivors deposed C. Anthony Morley, an OSHA Compliance Officer. At the hearing held September 16, 2014, Mr. John Pfeiffer ("Pfeiffer"), an electrical engineer, testified on behalf of the Gonzalez Survivors. Pfeiffer conducted an inspection of the worksite. William Campbell, an industrial hygienist and quality control specialist testified on Spartan's behalf at the hearing.

After reviewing the voluminous evidence of record, the CALJ rendered a very detailed 54 page decision. He noted the issues preserved were work-relatedness/causation; KRS 342.165 violation; entitlement to survivor benefits pursuant to KRS 342.750; whether Gonzalez intentionally injured himself; and credit against the death benefit for voluntary benefits paid. The CALJ determined Gonzalez died

from electrocution which arose out of, and in the course and scope of his employment. He determined the death was accidental, not intentional. After performing a thorough legal analysis, the CALJ declined to assess a safety penalty against Spartan pursuant to KRS 342.165(1). He noted KOSHA had proposed a penalty for a safety violation, which had been contested and not finally adjudicated. The CALJ additionally awarded benefits pursuant to KRS 342.750, and granted Spartan a credit of \$15,000.00 for the amount it voluntarily advanced to assist with payment of Gonzalez's funeral.

The Gonzalez Survivors filed a petition for reconsideration requesting additional findings of fact on multiple issues, including the legal significance of the various provisions of 29 CFR which had been filed during the pendency of the claim. The Gonzalez Survivors additionally noted the CALJ only summarized Pfeiffer's testimony, omitting reference to important details to which he testified. The Gonzalez Survivors additionally requested the CALJ reconsider the credit provided for the \$15,000.00 paid to Ms. Gonzalez to help defray the cost of the funeral, classifying it as a gift for which no credit should be afforded.

In his order on reconsideration rendered December 30, 2014, the CALJ noted he discussed and analyzed the safety violation issue, and the various regulations contained in the CFR in his 54 page opinion with respect to both the regulatory requirements and the general duty clause. The CALJ stated he had committed no error in his analysis, and the decision adequately set forth his findings. Likewise, the CALJ determined there was no error in providing credit to Spartan for the \$15,000.00 sent to Gonzalez's widow. The CALJ denied the petition for reconsideration as an attempt to re-argue the merits of the claim. As noted above, neither the ALJ's decision nor the order on reconsideration were timely appealed.

On January 22, 2015, the Gonzalez Survivors filed a motion to reopen alleging, "This motion arises from plaintiff's counsel's discovery of new evidence that Spartan took few steps to reduce Nett Gonzalez's exposure to the live electrical circuits on the Owensboro bridge." In the same motion, the "evidence" was characterized as "newly discovered".

The Gonzales Survivors acknowledged the following:

**"Newly discovered evidence"** is a legal term of art, which refers to evidence that existed but had not been discovered and with the exercise of due diligence could not have been discovered at the

time a matter was decided. *Stephens v. Kentucky Utilities Company*, 569 S.W.2d 155 (Ky. 1978), explains that when this term is used in a statute it may not be construed to include evidence that came into being after a matter was decided. The decisive effect of evidence does not arise unless it is properly viewed as being "newly discovered."  
(Emphasis original)

The motion to reopen also states, "Kentucky courts have warned that a party motioning for a reopening should show that the potential newly discovered evidence will likely change the outcome of the ALJ's opinion." The motion further asserts the "newly discovered evidence" raises an issue as to how other similarly situated employees were not also electrocuted.

Attached to the motion to reopen is an affidavit of the attorney for the Gonzalez Survivors which stated the city of Owensboro contracted with URS, a third party vendor, to inspect the bridge. She asserted she became aware of the hiring in July 2014. She noted URS took photographs and video in August 2014. Although she alleged a draft report was prepared and tendered to the city of Owensboro in September 2014, the only report attached was the final draft dated January 13, 2015. It is noted no additional extensions of time were sought by the Gonzalez Survivors after their attorney became aware another inspection was to

be performed. Likewise, there was no attempt to delay or cancel the September 16, 2014 hearing.

The CALJ entered an order on February 11, 2015, denying the motion to reopen, which order states as follows:

The crux of plaintiffs' argument is contained in the last sentence of their motion, i.e., "The wiring insulation on the entire bridge was not just defective in one small spot but defective and missing throughout the bridge." The defendant/employer has filed a response in which it argues that the additional documents tendered by plaintiffs are not "new evidence" and in any event, that material is "not likely to change the outcome of the ALJ's opinion." Further, while plaintiffs contend that the defendant/employer's post-hearing payment of the OSHA fine constitutes newly discovered evidence, the affidavit of Nick Hazimihalis, member/manager of Spartan Contracting, LLC, explains that the fine was paid simply as a matter of economic convenience and expediency as opposed to an admission of wrongdoing.

As an initial matter, the CALJ notes that the sufficiency or insufficiency of the insulation of the wiring of the decorative lighting system on the Owensboro bridge generally is not the determining factor with respect to whether a safety violation penalty could be imposed pursuant to KRS 342.165. Nett Gonzalez was not electrocuted because he was exposed generally to what plaintiffs contend was an improperly insulated wiring system. Instead, Nett Gonzalez was electrocuted, as set forth in the Opinion, Award and Order, because he used an uninsulated metallic cutting/gripping tool to attempt to move what otherwise appeared to be an insulated

wire. He was not electrocuted because he came into contact with bare, uncovered, uninsulated live cooper wire. The sufficiency or insufficiency of the entire wiring system, therefore, is at best of tangential consequence and consideration.

That said, the additional documents submitted by plaintiffs do not constitute newly discovered evidence. The Formal Hearing in this matter was held on September 16, 2014. The final draft of the URS report to the City of Owensboro is dated January 13, 2015. To be considered "newly considered evidence" the evidence must have existed at the time, in this case, of the Formal Hearing. *Stephens v. Kentucky Utilities Company*, 569 S.W.2d 155 (Ky. 1978). The final report clearly did not exist at the time of the Formal Hearing which was conducted four months prior. Moreover, although plaintiffs have tendered a draft report of the final report, it cannot be determined by review of that document when it was prepared. Plaintiffs have failed to demonstrate that the URS report constitutes newly discovered evidence.

Moreover, it is clear to the undersigned that the URS report is nothing more than cumulative to the testimony of plaintiffs' retained expert witness, John Pfeiffer, who concluded that the insulation on the decorative lighting system was insufficient and not up to code. In addition, the CALJ is not persuaded that the evidence discovered upon inspection by URS was not equally discoverable by Mr. Pfeiffer had he chosen to inspect the bridge closer at hand than simply standing on the ground and observing from a distance. While plaintiffs' counsel, in her affidavit, implies that it would have been

difficult for a private party to gain access to the bridge to make an arm's length inspection, it is not clear that such an inspection could not have occurred or that it was attempted. That the Kentucky Transportation Cabinet may have required a permit application and approval to inspect the bridge does not establish the fact that an inspection could not have been performed. Likewise, the fact there is litigation pending in Federal Court and that a more detailed inspection of the bridge would have required notification and approval of all of the parties to that litigation is not sufficient to demonstrate that the inspection could not have been performed in the exercise of due diligence prior to the Formal Hearing.

In addition, plaintiffs contend this matter should be reopened to consider newly discovered evidence of the defendant/employer's withdrawal of its contest of the OSHA citation and payment of a penalty in the amount of \$4,900 with respect thereto. Plaintiffs' motion, and the defendant/employer's response, both establish that the defendant/employer's withdrawal of the contest and agreement to pay the proposed fine occurred after the Formal Hearing. That evidence, therefore, did not exist at the time of the Formal Hearing and cannot be considered "newly discovered evidence" or as to provide a basis for reopening. *Stephens, supra*. Moreover, the CALJ is satisfied and persuaded from the affidavit of Nick Hazimihalis that the ultimate decision to pay the OSHA fine was economically-based and not a concession on the part of the Spartan Contracting, LLC that any such violation had, in fact, occurred. Under the circumstances this "evidence" would not necessarily have resulted in any different result regarding

plaintiffs' request for enhancement by the imposition of the safety violation penalty.

Plaintiffs further contend that the undersigned's failure to enhance income benefits by virtue of the 30% safety violation penalty of KRS 342.165 is the product of a "mistake" in light of subsequent revelations in the URS report. Simply put, the URS report does not provide any additional insight or retrospective evidence which could not otherwise have been discovered by plaintiffs and/or their retained expert prior to the date of the Formal Hearing. Moreover, the evidence from URS is simply cumulative to the opinion testimony offered by Mr. Pfeiffer and offers no more than contrary evidence to that coffered[sic] by the defendant/employer's evaluating expert, William Campbell. In the context of this claim, plaintiffs contend that the "mistake" was occasioned by the employer "failing to apprise the ALJ and other parties of facts within its knowledge." Here, however, the additional "evidence" was obtained by a third party, and not by the defendant/employer. Cases cited by plaintiffs in their motion are factually distinguishable from the present claim and do not provide authority in support of plaintiffs' position. Keeping in mind that the evidence with respect to the general state of repair of the decorative lighting electrical system is not dispositive of whether Nett Gonzalez's injury was the result of an intentional violation by the defendant/employer of a known safety rule or regulation, the evidence submitted in the form of the URS report does not establish that the original Opinion, Award and Order was a product of either misconception or misapprehension of the facts as they existed at the time of

rendition. Likewise, that KOSHA may have failed to fully investigate, research or test the insulation properties of the wiring system generally is not a circumstance on which plaintiffs can rely to support their theory that a "mistake" was made in the determination of the safety violation penalty issue. Simply put, if the OSHA investigator made a mistake in failing to conduct a full and proper investigation, it was plaintiffs' obligation to discover that mistake in a timely manner and act accordingly. Plaintiffs' contention that "KOSH's [sic] botched investigation left plaintiffs, the moving party, without a fair opportunity to present his (sic) claim" is unfounded. Plaintiffs had a full and fair opportunity to present their claim regardless of any shortcomings with the state's investigation.

Having carefully considered plaintiffs' motion to reopen and the defendant/ employer's response thereto, and being otherwise sufficiently informed and advised, the CALJ finds that plaintiffs' [sic] have failed to establish a *prima facie* case for reopening this claim. Therefore, **IT IS HEREBY ORDERED** that the motion to reopen is **OVERRULED**.

No petition for reconsideration of the CALJ's order denying the motion to reopen was filed.

KRS 342.125(1)(b) states as follows regarding the reopening of a claim:

(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:

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

(c) Mistake;

. . .

Despite the multiple issues raised by the Gonzalez Survivors on appeal, the only one which can be considered by this Board is whether the CALJ erred and abused his discretion in declining to reopen the claim. We reiterate our previous holding the appeals from both the ALJ's November 10, 2014 decision and the order on reconsideration were not timely filed, and therefore cannot be considered.

As noted by the CALJ, in order for evidence to be newly considered, or discovered, it must have existed at the time of the Formal Hearing. Stephens v. Kentucky Utilities Company, 569 S.W.2d 155 (Ky. 1978). We find instructive the holding in Russellville Warehousing v. Bassham, 237 S.W.3d 197 (Ky. 2007). There the employer attempted to reopen the case based upon an autopsy report which it asserted was newly discovered evidence and/or mistake. The Kentucky Supreme Court provided the following analysis regarding reopening in these grounds:

The employer argued that the autopsy evidence could not have been discovered with the exercise of due diligence in the initial proceeding and, in the

alternative, that Slone v. R & S Mining, Inc., 74 S.W.3d 259 (Ky. 2002); Durham v. Copley, 818 S.W.2d 610 (Ky. 1991); and Messer v. Drees, 382 S.W.2d 209 (Ky. 1964), supported a reopening on the ground of mistake. However, the ALJ concluded that the employer failed to make a *prima facie* showing under either ground.

As the ALJ noted, Black's Law Dictionary 579 (7th ed. 1999) explains that "newly discovered evidence" is a legal term of art. It refers to evidence that existed but that had not been discovered and with the exercise of due diligence could not have been discovered at the time a matter was decided. Stephens v. Kentucky Utilities Company, 569 S.W.2d 155 (Ky. 1978), explains further that when the term is used in a statute, it may not be construed to include evidence that came into being after a matter was decided. The decisive effect of evidence does not arise unless it is properly viewed as being "newly discovered." See Walker v. Farmer, 428 S.W.2d 26 (Ky. 1968). Bassham's autopsy report was not newly discovered evidence for the purposes of KRS 342.125 because it did not exist when Bassham's award was rendered; therefore, its decisive effect was immaterial unless another ground existed for reopening. The employer argues that mistake was such a ground.

Messer v. Drees, *supra*, concerned a motion to reopen the claim for a 1960 injury. Messer sustained a work-related blow to the head and alleged that the injury aggravated a degenerative cervical spine condition, causing it to be disabling. The referee awarded a permanent partial disability. While review by the full Board was pending, Messer sought to reopen in order to introduce recently-obtained medical

evidence, which indicated that he also suffered from a traumatic neurosis. Attached was a psychiatrist's report and counsel's affidavit that further proof would enable Messer to show a change of conditions and the existence of a mistake in the referee's disability estimate. The employer objected based on medical evidence that Messer's inability to work did not result from an organic cause. The Board found Messer's evidence to be inadequate and dismissed the motion.

Messer filed a subsequent motion to reopen, again based on change of conditions and mistake. He attached another psychiatrist's affidavit, which indicated that he was permanently and totally disabled due to post-traumatic encephalopathy, an organic brain disease that caused blackouts, severe memory loss, and impaired thinking and concentration. The employer's expert conceded that head trauma could precipitate or aggravate that type of disability. Although the Board found no change of condition or mistake in the initial award and viewed the motion as a belated attempt to submit evidence that should have been produced in the initial proceeding, the court disagreed. It acknowledged that Messer's actual malady and total disability might have existed since his accident but emphasized that the symptoms necessary to diagnose it did not become apparent until after the hearing. Thus, the court found the distinction between mistake and change of conditions to be insignificant in such circumstances and distinguished authority in which there was no change in the worker's condition. It concluded that both of the motions were proper and remanded the claim for further proof on the nature, cause, and extent of disability.

In Fayette County Board of Education v. Phillips, 439 S.W.2d 319 (Ky. 1969), the parties did not dispute that the defendant-employer had knowledge of Phillips' concurrent employment. Phillips failed to introduce any direct evidence of that fact, and the defendant-employer neglected to include the concurrent earnings when submitting average weekly wage information. On that basis, the "old" Board held that the defendant-employer did not know of the concurrent employment and refused to consider the concurrent wages when calculating Phillips' award.

Phillips filed a motion to reopen based on "mistake" and submitted evidence that the defendant-employer knew of the concurrent employment. But the Board dismissed it, reasoning that the "mistake" was Phillips' inadvertent failure to prove employer knowledge, which was not the type of mistake the statute contemplated. The court pointed out, however, that a "mistake" also occurred when the defendant-employer failed to apprise the Board that the wage it submitted did not include Phillips' concurrent earnings. It held that such a mistake warranted reopening and reversed.

Consistent with the principle of *res judicata*, subsequent decisions make it clear that the "mistake" provision is not an invitation to retry a litigated claim and that litigation must end when a decision becomes final unless extraordinary circumstances exist. Where the parties present conflicting evidence on a question of fact in the initial proceeding and a decision on the matter is final, subsequent evidence that the finding was mistaken does not show a "mistake" within the meaning of KRS

342.125. See Darnall v. Ziffrin Truck Lines, 484 S.W.2d 868 (Ky. 1972); Young v. Harris, 467 S.W.2d 588 (Ky. 1971). Nor is such evidence the type of "very persuasive reason" to which the court referred in Slone v. R & S Mining, Inc., supra at 261.

In Durham v. Copley, supra, the insurance carrier obtained evidence before the claim was decided, which indicated that the work-related incident caused an injury of which Durham was unaware. Noting that the carrier failed to reveal the injury to opposing counsel until seven weeks after the claim was dismissed, the court permitted a reopening on the ground of mistake in order to prevent what it considered to be a manifest injustice. This is not such a case. This is also not a case such as Wheatley v. Bryant Auto Service, 860 S.W.2d 767 (Ky. 1993), which involved an obvious mistake of law in awarding total disability benefits for 425 weeks rather than life. Likewise, this is not a case such as Messer v. Drees, supra, or Fayette County Board of Education v. Phillips, supra.

Causation was hotly contested in the initial claim. The parties offered conflicting evidence regarding the cause of Bassham's symptoms, including extensive evidence that a prion disease or some other non-work-related condition was the cause. Based on the evidence, the ALJ found that Bassham suffered from a work-related occupational disease. Under such circumstances, post-award evidence that the finding was mistaken did not show a "mistake" within the meaning of KRS 342.125. Thus, the ALJ did not err in concluding that the employer failed to make a *prima facie* case for reopening and reviewing the award.

Id. at 201-203.

We also find instructive the holding in Turner v. Bluegrass Tire Co., 331 S.W.3d 605 (Ky. 2010), where the Kentucky Supreme Court stated as follows:

As used in KRS 342.125(1), "newly-discovered evidence" refers to evidence existing at the time of the initial proceeding that the moving party did not discover until recently and with the exercise of due diligence could not have discovered during the pendency of the initial proceeding. Moreover, the evidence must not be merely cumulative or impeaching but must be material and, if introduced at reopening, probably result in a different outcome.

. . . .

Even if we were to assume for the purpose of discussion that Breeze's statement came within the legal concept of newly-discovered evidence, we are not convinced that it warranted reopening. The ALJ denied the claimant's motion based solely on the lack of a *prima facie* showing of fraud. The decision was not an abuse of discretion because Breeze's statement contradicted Richards' testimony but failed to show that Richards intentionally misrepresented the facts concerning notice. Thus, the statement failed to show a substantial possibility that the claimant could prevail on the merits. Id. at 609-610

Kuhlman Electric Corp. v. Rex Cunigan, 2014-SC-000189 (Ky. 2014)(not to be published)(cited for guidance not authority), was referenced by both the Gonzalez

Survivors and Spartan in their briefs. There, the Kentucky Supreme Court held an MRI which was not in existence when Cunigan's claim was decided, was new, not newly discovered, and therefore did not constitute a basis for reopening pursuant to KRS 342.125(1)(b). Id. at 3-4.

The imposition of a safety penalty pursuant to KRS 342.165(1) was a hotly contested issue in the original proceeding. As noted by the CALJ, voluminous evidence was introduced regarding that issue. The CALJ clearly reviewed the evidence, performed an appropriate analysis, and made a thorough determination. As noted above, since the CALJ's decision and order on reconsideration were not timely appealed, his determinations on those issues are final.

The CALJ determined the documentation attached to the motion to reopen is new, not newly discovered evidence, which does not constitute a ground pursuant to KRS 342.125(1)(b) for which this claim may be reopened. He noted the report submitted did not exist at the time of the final hearing, and did not come into existence until after his decision was rendered. Although the Gonzalez Survivors assert the draft report and photographs existed prior to the CALJ's decision, it is not indicated on the documentation submitted. We also note, despite the assertions in their attorney's affidavit of her awareness of an additional

inspection and photographs, the Gonzalez Survivors made no attempt to delay the hearing which was not scheduled until after she stated she was aware a new inspection was to be undertaken.

The decision to reopen a claim, or to set aside an opinion based upon newly discovered evidence, rests within the sound discretion of an ALJ. When seeking to reopen, or to set aside a decision, it is imperative the "newly discovered evidence" be tendered for review. Here, the Gonzalez Survivors tendered the "evidence" upon which it relied in moving to reopen the claim. This was considered by the CALJ as outlined in his order, and based upon this review he declined to reopen the claim. He adequately explained his reasoning for doing so, and a contrary result is not compelled. Therefore, even if the documentation were to be considered "newly discovered", there has been no demonstration due diligence was exercised to place it before the CALJ for consideration.

The CALJ also determined the documentation does not establish a mistake was made for which KRS 342.125(1)(c) would permit a reopening. The CALJ noted the report tendered with the motion to reopen provided no additional insight. He also noted the inspection by URS was requested by a third party vendor at the request of the city of

Owensboro, not by Spartan. The CALJ clearly articulated the basis for his decision. The CALJ further noted the fact Spartan later paid the recommended fine on a basis of no contest, did not establish liability. He stated the tendered "evidence" clearly establishes this payment was an economic decision to mitigate the cost associated with further proceedings, and was not an admission of liability.

We additionally note the CALJ stated the additional "evidence" tendered by the Gonzalez Survivors was nothing more than "cumulative" to the evidence previously considered in the original proceeding, and, "does not establish that the original Opinion, Award and Order was a product of misconception or misapprehension of the facts as they existed at the time of rendition." Based upon the foregoing, we find the CALJ did not abuse his discretion in denying the motion to reopen.

Accordingly, the January 11, 2015 order denying the motion to reopen rendered by Hon. Robert L. Swisher, Chief Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON M MICHELE CECIL  
3201 WEST ALVEY PARK DRIVE  
OWENSBORO, KY 42303

**COUNSEL FOR RESPONDENT:**

HON R BRENT VASSEUR  
PO BOX 1265  
PADUCAH, KY 42002

**CHIEF ADMINISTRATIVE LAW JUDGE:**

HON ROBERT L SWISHER  
PREVENTION PARK  
657 CHAMBERLIN AVENUE  
FRANKFORT, KY 40601