Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 21, 2019

CLAIM NO. 201699633

CITY OF SALYERSVILLE PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, CHIEF ADMINISTRATIVE LAW JUDGE**

MIKE NICKELS
and HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. The City of Salyersville ("Salyersville") appeals from the February 26, 2019, Order denying its motion to reopen and the March 27, 2019, Order denying its petition for reconsideration of Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ").

On appeal, Salyersville asserts the CALJ's denial of its motion to reopen is contrary to the plain language of KRS 342.125 which permits a reopening in the

case of "newly discovered evidence" and "conforming the award to employee's work status for injuries after 12-12-96." Salyersville also asserts that, because Mike Nickels ("Nickels") has returned to his job as a police officer earning equal or greater wages and sustained a subsequent injury on April 23, 2018, the ALJ should have sustained its Motion to Reopen "for additional evidentiary considerations."

The Form 101 alleges Nickels sustained injuries to his neck and back, as well as pain and numbness in his legs and arms and headaches, on January 1, 2016, in the following manner: "I was patroling [sic] the City of Salyersville in a police cruiser. I was turning left, had my turn signal on and was T-boned by another constable."

The record indicates Nickels did not return to work following the accident. At the time of his November 11, 2016, deposition, Nickels was on medical leave. Concerning his work status at that time, he testified:

> Q: … Are you currently employed?
>
> A: I am still with the police department. I am on medical leave.
>
> Q: Are you still receiving workmen's comp benefits?
>
> A: Nope, they took them.
>
> Q: Okay. When is the last time you received those if you recall?
>
> A: September 23rd, I think was the last check I got.
>
> Q: And what are you on now?
>
> A: I just get – I am on my last, I get my last check Tuesday for my sick leave, and I ain't got nothing.
>
> Q: Okay. So you are using up your sick leave?

A: I have to, I ain't got no other income.

Q: Do they have short term or long term disability policies that they offer that you have taken out or anything?

A: No.

Q: What is the last day you actually worked?

A: January 1, 2016.

At the time of the March 21, 2017, hearing, Nickels was not working.

He testified regarding his ability to return to his previous work as a police officer:

Q: With the neck pain that you're having, the back pain that you're having, can you do any of the police work that you used to do?

A: I'll be honest with you, I don't think I can. This use – This attorney here, Mr. James, you know, he's…he's a pretty good size fellow. If he was to try to buck against me, I'll do my best, but eventually he'll be able to overpower me, because if my back gives out, I'm gone. I'm history. All I am is dead weight, you know. And that's with anybody. Most people our size, our age, you know, regardless – You deal with somebody, if they're on this dope and this alcohol and because of his mental state, you don't know who you're dealing with.

Q: Now, could you actively engage in trying to chase someone, run after someone?

A: No, I – The bad part is I'd have to let them go. If I was working right now, even…no matter who it is, if they took off, I'd just have to let them go, 'cause I…I mean, I can't catch them. I can't run after them, unless – And like I said at the beginning, there's only one police officer per shift. There is no backup. The closest backup is maybe a trooper a county or two counties away. You know, and the sheriff's department, they've got their own thing going on. So you just pray that God don't put you in a position–

In the May 19, 2017, Opinion, Order, and Award, Hon. Christina Hajjar, Administrative Law Judge ("ALJ Hajjar"), awarded Nickels temporary total disability benefits, permanent partial disability ("PPD") benefits enhanced by the three multiplier, and medical benefits for permanent injuries to his cervical and lumbar spine and a temporary injury to his thoracic spine. Regarding application of the three multiplier, ALJ Hajjar found as follows:

> Having found that Plaintiff is entitled to the permanent partial disability benefits, the next issue is whether or not Plaintiff is entitled to the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ finds that Plaintiff cannot return to the work he was performing at the time of the injury and that Plaintiff is entitled to the 3x multiplier to his award of benefits. The ALJ relies upon the opinions of Dr. Stephens, Dr. Gilbert, and Plaintiff, all of whom have at least indicated that Plaintiff would have difficulty with physical confrontation and apprehending suspects, which would prevent him from returning to the work he performed at the time of the injury.

On January 23, 2019, Salyersville filed a Motion to Reopen relying upon the following grounds: change of disability shown by objective medical evidence, newly discovered evidence, and conforming the award to employee's work status for injuries after December 12, 1996. In its motion to reopen, Salyersville asserted Nickels returned to work as a police officer "as early as July 2017…most likely earning equal or greater wages." It further asserted Nickels sustained a new injury on April 23, 2018, also involving a motor vehicle accident. Among the documents attached to Salyersville's Motion to Reopen are the police report from Nickels' April 23, 2018, motor vehicle accident, a wage report indicating Nickels' earnings with Salyersville from July 25, 2017, through April 24, 2018, and a Job Analysis Form, dated May 9, 2018, which details the physical requirements of a Salyersville police officer and

indicates Nickels' current position could not be modified to accommodate any restrictions should Nickels be released to return to work. Salyersville asserted the claim should be reopened, "as it appears that he has both returned to the type of work performed at the time of injury and has also returned to work earning equal or greater wages from the January 1, 2016 stipulated date of injury average weekly wage."

In the February 26, 2019, Order, the CALJ overruled Salyersville's motion to reopen, holding as follows:

> . . .
>
> On May 19, 2017, an administrative law judge awarded benefits to Plaintiff Nickels based on findings of 10% impairment and lack of physical capacity to return to his job as a police officer, the latter of which compelled the three-multiplier under KRS 342.730(1)(c)1. Based on the unverified motion, Nickels has returned to work as a police officer.
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> On the MTR form, the Defendant checked three boxes as bases for its entitlement to reopen the claim – change of disability; newly discovered evidence; and conforming an award to present work status.
>
> The claim cannot be reopened for a change of disability because there is no evidence of improvement of impairment, as required by KRS 342.125(1)(d). And the change in Nickels work status may be "new evidence," but is not "newly discovered evidence" under KRS 342.125(1)(b), which is evidence that existed at the time of the original decision but could have been discovered with exercise of due diligence.
>
> The question is whether the KRS 342.125 allows an employer to reopen a claim to conform an award with relief from the three-multiplier because of a return to pre-injury work. There is no reported decision addressing that issue, but the Workers Compensation Board has provided guidance for answering that question in the negative in Michael Watts v. Competitive Auto Ramp Services [sic], 2004-91678.

> In the Watts [sic] case, the Board reversed an ALJ's decision to remove the three-multiplier from a prior award. A different ALJ had found that Watts could not return to work as a rail loader. Later, Watts returned to his preinjury work as a rail loader. An ALJ allowed reopening and relieved the Defendant for its liability for the enhanced award, but the Board reversed, holding that the prior finding was res judicata and could not be set aside. The Board noted that KRS 342.730(3) limited conformity of an award to circumstances involving the two-factor under KRS 342.730(1)(c)2. That limitation is reiterated in KRS 342.730(1)(c)4., which states:
>
> > "Notwithstanding the provisions of KRS 342.125, a claim may be reopened at any time…to conform the award payments with the requirements of subparagraph 2. of this paragraph."
>
> The Board in the Watts [sic] case concluded: "KRS 342.125…does not enumerate conforming an original award to the requirements of KRS 342.730(1)(c)1 as a ground for reopening under the Act. The doctrine of res judicata [sic], therefore, controls (the ALJ's) application of the 3-multiplier at the time of the original 2005 opinion and award, and (the subsequent ALJ) and this Board are without authority to provide the relief sought by (the Employer) on reopening."
>
> The motion to reopen is overruled.

In its petition for reconsideration, Salyersville asserted its motion to reopen should have been sustained under the doctrine of newly discovered evidence because Nickels' return to work could not have been discovered at the time of ALJ Hajjar's original order and award because he had not yet returned to work at that time. Salyersville asserted overruling its motion to reopen creates the possibility of unjust enrichment to Nickels.

In denying the petition for reconsideration, the CALJ stated as follows in the March 27, 2019, Order:

> The Defendant has petitioned for reconsideration of the CALJ's Order overruling its motion to reopen a 2017 award to be relieved of the three multiplier enhancement of KRS 342.730(1)(c)1.
>
> The motion clarifies that the grounds under which reopening is sought is newly discovered evidence. KRS 342.125(1)(b). The unverified allegation is that Plaintiff Nickels returned to his pre-injury job as a police officer after the May 19, 2017, Opinion and Award. The Defendant argues that because it could not have discovered a fact that did not yet exist at the time of the award, the change in circumstance is newly discovered evidence.
>
> As stated in the February 26, 2019, Order overruling the motion, "newly discovered evidence" under the reopening statute is not "new evidence" – such as a subsequent change in job status like Nickels has had – but evidence that existed at the time of the original decision but could not have been discovered with exercise of due diligence. Russellville Warehousing v. Basham, 237 S.W.3d 197 (Ky. 2007). In Basham, a post-award autopsy disputed the causation finding of an ALJ, but such was not newly discovered evidence to support reopening because it did not exist at the time of the award. In Summers v. U.S. Liquids [sic], No. 2005-SC-244, 2005 WL 2679994, (Ky. App. 2005), a post-award termination was held not to be newly discovered evidence, and the related argument of "manifest injustice" did not support reopening an award.
>
> The Defendant's petition is denied.

On appeal, Salyersville contends the CALJ's order overruling the motion to reopen is contrary to the plain language of KRS 342.125 which permits a reopening on the grounds of "newly discovered evidence" and "conforming the award to employee's work status for injuries after 12-12-96." It further contends that, "[t]o the extent the Respondent did return to work as a police officer, only a couple months after the Opinion and Award, and arguably at equal or greater wages, reopening with

an assignment to an ALJ should have been permitted for additional evidentiary considerations."[1] We affirm on all issues.

As correctly determined by the CALJ in both the February 26, 2019, Order denying the motion to reopen and the March 27, 2019, Order, for evidence to be considered "newly discovered," it must have been in existence before entry of the judgment. Regarding what comprises "newly discovered evidence," the Kentucky Supreme Court in Russellville Warehousing v. Bassham, 237 S.W.3d 197, 201 (Ky. 2007) opined as follows:

> 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).

(emphasis added.)

In other words, as explained by the CALJ, "newly discovered evidence" is not new evidence. It does not refer to evidence that comes into being after a matter has been decided, such as Nickels' return to employment as a police officer for Salyersville *after* the May 19, 2017, Opinion, Order, and Award. In its petition for reconsideration, Salyersville contended Nickels' return to work is new evidence stating as follows:

[1] It appears Salyersville is not pursuing the ground of "change of disability by objective medical evidence" on appeal, despite alleging it in its Motion to Reopen.

> That reopening should have been permitted in the above referenced claim based upon the doctrine of newly discovered evidence as the Defendant and Defendant's counsel could not have discovered at the time of the initial Opinion and Award of ALJ Christina D. Hajjar that the Plaintiff had, in fact, returned to employment in his preinjury job as a police officer since he had not done so at the time of the initial Opinion and Award.

Salyersville, in its appeal brief, also acknowledges Nickels' return to employment as a police officer took place after the May 19, 2017, Opinion, Order, and Award, stating as follows:

> To the extent the Respondent did return to work as a police officer, only a couple months after the Opinion and Award, and arguably at equal or greater wages, reopening with an assignment to an ALJ should have been permitted for additional evidentiary considerations.

In order to qualify for reopening under the Act, there must be facts alleged sufficient to make a *prima facie* case for reopening pursuant to one of the conditions specified in KRS 342.125. Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681 (Ky. 1972). Where the Act expressly provides for the reopening of a prior decision on specified conditions, the rule of *res judicata* has no application when the prescribed conditions are present. Id. at 682. However, when a party fails to make a *prima facie* showing of the conditions for reopening specified under KRS 342.125, the ALJ and this Board are without jurisdiction to provide relief and the doctrine of *res judicata* controls. As Nickels' return to employment as a police officer took place after the May 19, 2017, Opinion, Order, and Award, it does not qualify as "newly discovered evidence" pursuant to KRS 342.125(1)(b). Therefore, application of the three multiplier in the original order and award is *res judicata* and cannot be disturbed under the theory of "newly discovered evidence."

Salyersville also asserts its Motion to Reopen should have been sustained on the ground of "conforming the award to employee's work status for injuries after 12-12-96." Concerning this ground, neither Salyersville's Motion to Reopen, its petition for reconsideration, nor its appeal brief clarifies the nature of this specific ground for reopening. We also note that, in its petition for reconsideration, Salyersville only asserted one ground for reopening – "newly discovered evidence." Indeed, this prompted the ALJ to state as follows in his March 27, 2019, Order: "The motion clarifies that the grounds under which reopening is sought is newly discovered evidence. KRS 342.125(1)(b)." Thus, we are unable to respond to this part of Salyersville's argument in any meaningful manner.

Finally, Salyersville asserts that since Nickels has returned to work as a police officer earning equal or greater wages than what he was earning at the time of the January 1, 2016, injury and was involved in a subsequent motor vehicle accident on April 23, 2018, "reopening with an assignment to an ALJ should have been permitted for additional evidentiary considerations."

This Board addressed a similar issue in Phillips Tree Experts, Inc. v. Gene Travis, Claim No. 2002-95660 (December 9, 2005), which was affirmed by the Kentucky Supreme Court in the unpublished decision, Phillips Tree Experts, Inc. v. Gene Travis, 2006-SC-000633-WC (April 19, 2007). In Travis, supra, the CALJ denied a motion to reopen by the employer to alter the settlement agreement in which the three multiplier had been awarded. At the time of the motion to reopen, Travis had returned to work performing the same type of work he was performing at the time of the injury and was earning a greater weekly wage. In its motion to reopen, the

employer did not assert any of the grounds for reopening under KRS 342.125(1), and on appeal, it cited three statutory provisions: KRS 342.730(1)(c)4, KRS 342.125(3), and KRS 342.265(4).

In the case *sub judice*, while Salyersville did not directly implicate KRS 342.730(1)(c)4 as a ground for reopening in order to consider the applicability of the two multiplier, the language used by the Board and the Supreme Court in Travis is, nonetheless, instructive.

In Travis, this Board, in affirming the CALJ's denial of the employer's motion to reopen, stated, in relevant part, as follows:

> The rules of statutory construction provide that, as a reviewing body, we are to ascertain the intent of a statute from its wording. KRS §446.080; Kentucky Association of Chiropractors, v. Jefferson City Medical Society, 549 S.W.2d 817 (Ky. 1977); Overnite Transportation Co. v. Gaddis, 793 S.W.2d 129 (Ky. App. 1990). Unless the statute contains some ambiguity, it is not open to construction. Id. Moreover, the words must be accorded their common and approved usage. KRS 446.080; AK Steel Corp. v. Commonwealth, Revenue Cabinet, 87 S.W.3d 15, 17 (Ky. App. 2002). We may not interpret a statute at variance with its stated language. Commonwealth v. Allen, 980 S.W.2d 278, 280 (Ky. 1998). These principles being understood, we turn now to the statutory provisions on which PTE relies on appeal.
>
> PTE's reliance on KRS 342.730(1)(c)4 and KRS 342.125(3) is predicated on the applicability of KRS 342.730(1)(c)2. Application of the latter statute is the ultimate relief sought by PTE in its motion to reopen. KRS 342.730(1)(c)2 states as follows:
>
> > If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each

> week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.
>
> In turn, KRS 342.730(1)(c)4 provides:
>
> Notwithstanding the provisions of KRS 342.125, a claim may be reopened at any time during the period of permanent partial disability *in order to conform the award payments with the requirements of subparagraph 2*. of this paragraph. (Emphasis added)

We believe the wording of subparagraph 4 plainly evidences a legislative intent to permit either party to reopen an award calculated under subparagraph 2 for the purpose of increasing or decreasing weekly benefits according to the claimant's employment status, even though reopening would not otherwise be available under KRS 342.125. The italicized language is significant, in our view, because it removes any ambiguity that might otherwise allow for the statutory construction proposed by PTE herein. Stated simply, it would be incongruous on its face to provide for the reopening of an award calculated under subparagraph 1 of KRS 342.730(1)(c) "in order to conform the award payments with the requirements of subparagraph 2." An award calculated under subparagraph 1 need not conform to the requirements of subparagraph 2. Indeed, the two are incompatible. **The provisions of subparagraph 2 may reasonably be construed as "requirements" only if the award is calculated under that subparagraph from the outset.** (emphasis added).

In affirming the Board, the Supreme Court held as follows:

> Although KRS 342.730(1)(c)4 provides an additional ground for reopening, it mentions only subparagraph 2. It evinces a legislative intent to permit an award made under subparagraph 2 to be reopened and amended to reflect the cessation or resumption of employment at the same or a greater wage, regardless of whether KRS 342.125 would permit reopening. **Nothing in subparagraph 4 evinces the intent to affect awards made under subparagraph 1.**

Slip Op. at 3. (emphasis added).

Consequently, in the case *sub judice*, regardless of the fact Nickels returned to work as a police officer and was subsequently injured in another motor vehicle accident in April 2018, as the original order and award enhanced Nickels' award of PPD benefits by the three multiplier and not the two, the case cannot be reopened for the ALJ to consider applicability of the two multiplier.[2]

Accordingly, on all issues on appeal, the February 26, 2019, Order denying its Motion to Reopen and the March 27, 2019, Order are **AFFIRMED**.

ALL CONCUR.

[2] While it is unclear whether Nickels ceased working after the April 23, 2018, accident and, if so, for how long, this Board will assume, based upon the Job Analysis Form attached to Salyersville's Motion to Reopen, that he indeed has ceased working after the April 2018 accident. Nonetheless, the case cannot be reopened for the ALJ to consider applicability of the two multiplier.

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