Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 19, 2021

CLAIM NO. 201794806

DONALD LEITNER PETITIONER

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

DREISBACH WHOLESALE FLORISTS, INC.
and HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

STIVERS, Member. Donald Leitner ("Leitner") seeks review of the June 21, 2021, Order overruling his Motion to Reopen issued by Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ"). Leitner also appeals from the June 23, 2021, Order overruling his Petition for Reconsideration and Motion to Amend the Motion to Reopen.[1]

[1] Leitner sought to introduce Dr. Gregory Nazar's June 22, 2021, report in support of his Motion to Reopen.

On appeal, Leitner asserts he is entitled to benefits for a neck injury which he previously alleged in this claim but which was not proven and for which benefits were not awarded. Leitner also asserts the February 19, 2011, letter from miiSpine and Dr. Nazar's report attached his Motion to Amend comprise a *prima facie* basis for reopening. He contends he cannot abandon a neck injury claim which was undiagnosed or misdiagnosed. Further, he argues a *prima facie* showing of mistake justifying reopening of his claim was also established. Leitner maintains the Motion to Reopen should have been granted because the uncontroverted medical evidence he submitted establishes a greater disability and increased impairment rating. Finally, Leitner argues overruling his Motion to Amend constitutes an abuse of discretion.

BACKGROUND

On October 26, 2017, Leitner filed a Form 101 alleging February 6, 2017, injuries resulting from a head-on collision while driving a vehicle of Dreisbach Wholesale Florists, Inc. ("Dreisbach"). He alleged the multiple injuries occurred as follows: "Plaintiff was hit head-on while in a company vehicle injuring his left lower extremity, ribs, right shoulder, and neck."

Leitner testified at a December 18, 2017, deposition and at the April 23, 2018, Hearing held by Hon. Richard Neal, Administrative Law Judge ("ALJ Neal"). At his deposition, Leitner acknowledged that on May 18, 1994, he had undergone prior cervical discectomy and fusion surgery. Leitner identified the body parts injured as a result of the February 6, 2017, motor vehicle accident ("MVA"):

> Q: And what body parts are you alleging you injured as a result of the February 6, 2017 work incident?

A: I cracked – fractured a rib. I busted my kneecap.

Q: Which – okay. Which side –

A: Left.

Q: -- of your ribs?

A: Left.

Q: Left. And then your left knee as well?

A: Kneecap. And my left ankle. And my right shoulder –

Q: Okay.

A: -- and neck.

Personnel at BaptistWorx diagnosed a chest contusion, right shoulder pain, left knee pain, and a left seventh rib fracture. Leitner outlined the treatment of his neck provided by his family physician and the efforts made to obtain a neurosurgical consultation:

Q: … And then it looks like you went back to your family doctor. Was that for neck pain?

A: Yes.

Q: Okay.

A: Shoulder pain.

Q: Your right shoulder?

A: Yes.

Q: What type of treatment did he provide to you?

A: He gave me some shots to begin with, some type of a – I'm not sure.

Q: Were those – did those help your pain at all?

A: Yes, a bit.

Q: Okay.

A: And then he sent me for an MRI.

Q: Do you know what that MRI showed?

A: Nerve damage.

Q: Okay. And it looks like on September 13th, 2017, he referred you for a neurological consultation with Dr. Jonathan Hodes. Does that sound right?

A: Yes.

Q: Did you – were you ever evaluated by Dr. Hodes?

A: No. Dr. Hodes wouldn't take me.

Q: Do you know why not?

A: Well, it all has to do with workmen's comp.

Q: Okay.

A: Because they had to get the referral through workmen's comp, and I couldn't seem to get the referral through workmen's comp.

Q: Okay.

A: Dr. Noffsinger doesn't deal with workmen's comp, so –

Q: Okay. Because he's your primary care physician?

A: Yeah.

Q: And he doesn't –

A: Yes.

He identified his current symptoms as follows:

A: My knee is still sore.

Q: And that's your left knee?

A: Yes. I've still got a lot of soreness. I don't have as much mobility in it anymore. I have – I have pain – pain

down through my ankle, and the numbness in my foot has gotten really bad.

Q: Any other symptoms?

A: My shoulder pain.

Q: In your –

A: In my neck.

Q: -- right shoulder?

A: Yes.

…

Q: Okay. And what about the pain in your right shoulder? Can you describe that for me?

A: It's – it's another one of these. It's always sore, but the – it tends to – I tend to be getting shooting-like stabbing pains through my shoulder blade.

Q: In what part of your shoulder do you get the shooting pain?

A: The stabbing. I would say more stabbing pain.

Q: Stabbing?

A: Through the – down through the shoulder blade.

Q: Okay. And your pain, you said it was constant.

Is there ever a time that it gets better, gets worse? Are there certain activities that aggravate it or make it better?

A: I'm not really sure, to be honest.

Q: Okay.

A: It always seems to be there, so ….

Q: Okay. And I know – did you – you mentioned some neck pain earlier. Following the accident, did your neck pain get any better? Did it get worse?

A: For a long time, I really had any kind [sic] --- I couldn't really turn my neck much to the right. It has gotten some better, but I still have a lot of pain.

Q: Okay. And where in your neck is that pain?

A: Well, it's just turning it. It's just the mobility of it.

Regarding a neurosurgical consultation and further treatment of his shoulder, he testified as follows:

Q: … So, you were not able to get a neurosurgical opinion?

A: No.

Q: Is that something – if you could get that authorized, is that something you still want to do, is be evaluated –

A: Yes.

Q: -- by a neurosurgeon?

A: Yes.

…

Q: Your right shoulder, did you ever receive medical treatment for that from any doctor? What – did you seek treatment for your right shoulder since the accident?

A: Just the shots that he gave me.

Q: Okay. And who was that with?

A: That was Dr. Noffsinger.

At the time of the Hearing before ALJ Neal, Leitner was not employed by Dreisbach and was still having problems with his leg and shoulder. He indicated

his physical problems were primarily located in his shoulder and knee.[2] He identified the injuries resulting from the MVA as follows:

> Q: What were the nature of your injuries as a result of that accident?
>
> A: I broke my kneecap and tore my meniscus on my left.
>
> Q: On the left knee?
>
> A: On the left knee, yeah. I broke a left rib and shoulder pain, and right at the onset, back pain.
>
> Q: And when you say shoulder pain is that on the right side?
>
> A: Shoulder pain is on the right side.
>
> Leitner detailed his right shoulder treatment.
>
> Q: And for what particular reason have you sought medical care since then?
>
> A: I went to the doctor with my shoulder.
>
> Q: A specialist, orthopedic specialist?
>
> A: I went to a regular doctor first who had an MRI run and then sent me to a neurosurgeon.
>
> Q: And what became of that visit?
>
> A: The neurosurgeon gave me medicine and told me to come back in a month.
>
> Q: So are you still under the care of that?
>
> A: No. When I went back they told me workman's comp canceled them.
>
> Q: So that was for the right shoulder primarily?
>
> A: Yes.

[2] Leitner underwent left knee surgery performed by Dr. Scott Kuiper which consisted of arthroscopy with partial medial meniscectomy and arthroscopy with chondroplasty.

Leitner described his current symptoms arising from the February 6, 2017, MVA as follows:

> Q: All right. What are your current symptoms now that you relate to the accident of February 6th of '17?
>
> A: My shoulder. My shoulder and up through my neck. And at times I get shooting pains through my shoulder blade.
>
> Q: And that's on the right side?
>
> A: And that's all on the right side. Then my left knee is still sore.
>
> Q: Is the pain in your left knee, is it just confined to the knee or does it travel above or below the knee?
>
> A: Well, I have numbness down through my leg, but the main pain in my knee is just like right below the kneecap.
>
> Q: How far does your numbness travel in your lower extremity? All the way to the foot?
>
> A: Yeah.
>
> Q: All the way to the toes?
>
> A: Yeah.
>
> Q: Is that a constant or an intermittent symptom?
>
> A: Constant.
>
> Q: And is that just since the accident in February of '17?
>
> A: No. I had some problems with some numbness, but nothing like it is now.
>
> Q: And how about your right shoulder? If you had to quantify the pain that you have on that – on that extremity, how would you rate it on a zero to ten scale?
>
> A: Constantly probably a six. When I get those shooting pains it can even make me nauseous and stuff.

Leitner introduced medical records from the University of Louisville Hospital, BaptistWorx, Louisville Orthopaedic Clinic, and Physicians Medical Center concerning the treatment of his work injuries. He also introduced the December 30, 2017, report of Dr. David Waespe. Dr. Waespe conducted a physical examination of the cervical spine, right shoulder, left knee, and left ankle. Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), he assigned a 1% impairment rating for the right shoulder condition and a 4% impairment rating for the left knee injury. Dr. Waespe also assessed a 2% impairment rating because Leitner continued to have pain limiting his activities of daily living and his ability to return to his previous job. Thus, Leitner had a 7% total impairment rating pursuant to the AMA Guides.

Dreisbach introduced the February 7, 2018, Independent Medical Evaluation ("IME") report of Dr. Gregory Gleis. In relation to the subject MVA, Dr. Gleis diagnosed right neck trapezius pain greater than left trapezius pain, headaches, right shoulder pain, left knee pain, left ankle-foot numbness, tingling, and lateral ankle pain. Concerning the neck condition, Dr. Gleis concluded as follows:

> Neck-related symptoms have been a chronic problem with a 09/24/14 MRI cervical and 09/29/14 Dr. Vemuri re-evaluation of the neck, which is similar with today's exam.
>
> Therefore, there is no permanent worsening of any pre-existing active neck-related condition. (Emphasis not ours).
>
> Dr. Gleis answered the following relevant questions:
>
> 2. Do you believe Mr. Leitner's current symptoms are proximately related to the February 6, 2017 work incident?

A: Today's symptoms regarding the neck and right trapezius region are exacerbations of a pre-existing condition. There is not evidence of permanent worsening.

…

3. Do you believe that the February 6, 2017 work incident resulted in a harmful change to the human organism, as indicated by objective medical findings regarding the following:

A: Neck

i. Based upon subjective complaints and objective clinical exam, as well as the 08/16/17 MRI cervical report by Dr. Bagga:

Neck pain is an exacerbation of a pre-existing active condition.

There is not a worsening of his pre-existing neck condition.

ii. 01/17/18 Dr. John Cole did not recommend neck surgery.

Concerning an impairment rating for the cervical spine and right shoulder conditions, Dr. Gleis opined:

5. Impairment rating based upon AMA Guides 5th Edition?

A. Cervical Spine

i. Pre-existing, active impairment because of the 1994 C5-C7 ACDF by Dr. Lehman:

a) ROM method is the preferred methodology, but there is inadequate information to determine what the cervical ROM was when he reached MMI after that surgery.

b) DRE method, Table 15-5 DRE Cervical Category IV: 25%-28% WPI.

c) Mr. Leitner had had exacerbations of neck pain documented in 2004 and 2014.

> ii. Did neck impairment rating change because of the February 5, 2017 MVA?
>
> The MVA has not caused any increase in his neck impairment rating.
>
> B. Right shoulder-right trapezius pain:
>
> The right trapezius pain is part of his cervical spine-related pain.
>
> There is no 'injury' or 'harmful change' because of the 02/06/17 MVA.
>
> Right shoulder ROM today is normal and symmetric with his uninjured shoulder.
>
> Therefore, right shoulder has no impairment rating because of an injury. (Emphasis not ours).

Dr. Gleis assessed a 4% impairment rating for the left knee condition. He concluded Leitner had no restrictions concerning the use of the neck and right shoulder and needed no further treatment of either condition. Regarding the need for a referral to a neurosurgeon, Dr. Gleis concluded as follows:

> 8. Do you believe a referral to a neurosurgeon constitutes reasonable and productive medical treatment in Mr. Leitner's case as it relates to the February 6, 2017 work incident?
>
> …
>
> B. 08/09/17 Dr. Noffsinger evaluation was the first documentation of significant neck pain after the 02/06/17 MVA.
>
> Because of the delayed follow-up for any neck-related symptoms until 08/09/17 Dr. Noffsinger, the cervical spine evaluation would be consistent with his prior complaints that necessitated:
>
> 09/24/14 MRI cervical.
>
> 09/29/14 Dr. Vemuri follow-up after the 09/22/14 MRI cervical. No neck surgery was recommended.

> 08/22/17 Dr. Noffsinger referral to neurosurgery would be similar to the 2014 workup.
>
> C. February 6, 2017 MVA did not cause a 'new injury' that necessitated a referral to a neurosurgeon.

The Benefit Review Conference ("BRC") Order and Memorandum reflects the parties stipulated Leitner sustained a work injury and due and timely notice was given. The contested issues were "work-related injury/causation, permanent income benefits per KRS 342.730, TTD benefits, ability to return to work, exclusion for pre-existing impairment, credit for subrogation, and unpaid or contested medical expenses." Under Other contested issues is "TTD benefits (credit for overpayment)."

In the June 11, 2018, Opinion and Order, relying upon Dr. Waespe's findings and opinions, ALJ Neal found Leitner sustained left knee and right shoulder injuries. ALJ Neal noted all physicians agreed Leitner had normal range of motion of the left ankle with no impairment. Although Dr. Waespe diagnosed left ankle tendonitis and arthritis, ALJ Neal relied upon Dr. Gleis' opinion that there was no objective evidence of a left ankle injury in finding Leitner failed to meet his burden of proving a left ankle work injury. ALJ Neal did not address the alleged neck injury. ALJ Neal adopted the opinions of Drs. Waespe and Gleis that Leitner had a 4% impairment rating due to the left knee injury. Concerning the right shoulder injury, he concluded as follows:

> Concerning the right shoulder, Dr. Waespe has found that the Plaintiff has a 1% whole person impairment due to diminished range of motion, and Dr. Gleis has found that the Plaintiff has a 0% whole person impairment. The Plaintiff believably testified as to the continuing problems that he has with his right shoulder, the ALJ

> has previously found the right shoulder compensable, and the ALJ finds Dr. Waespe's 1% whole person impairment is more persuasive and consistent with the Plaintiff's true functioning. As such, the ALJ finds that the Plaintiff has a 1% whole person impairment for the right shoulder.

ALJ Neal also accepted Dr. Waespe's 2% impairment rating for "pain that limits his activities of daily living and his ability to return to the previous job that he held." Thus, Leitner had a combined 7% impairment rating for the work injury. ALJ Neal awarded temporary total disability benefits, permanent partial disability benefits, and medical benefits for the shoulder and left knee injuries.

Leitner did not file a Petition for Reconsideration or an appeal. Thus, ALJ Neal's opinion became final.

No further action was taken until Leitner filed his April 28, 2021, Motion to Reopen relying upon the ground of newly discovered evidence. Leitner attached numerous documents one of which is the February 19, 2021, letter of Megan Courtney[3] ("Courtney") with miiSpine which reads as follows:

> 1. The patient was first seen by me in September 2018 and reported a history of cervical fusion performed in 1994. He has been suffering from chronic neck pain which acutely worsened after his motor vehicle accident in February 2017. He also developed new radiating pain following the accident. It is therefore my conclusion that Mr. Leitner suffered an aggravation of a pre-existing neck condition in the accident.
>
> 2. His ACDF C3-C5 performed October 22, 2018 was for treatment of the symptoms exacerbated by his motor vehicle accident and was therefore causally related to the accident.

[3] Courtney is associated in some capacity with Dr. Venu Vemuri, who performed a cervical discectomy and fusion at C3-C5 on October 22, 2018.

> 3. Dysphagia following ACDF is a common adverse event. Therefore his dysphagia was a sequela of his surgery.
>
> 4. The patient reached maximum medical improvement from his ACDF in October 2019. Having had previous cervical fusion surgery is a known risk factor for progression of adjacent level disease. I do not anticipate he will need additional surgery at his operative site but my require future surgery for subsequent degenerative arthritis.

Dreisbach filed a Response and Objection to the Motion to Reopen asserting the surgery and letter do not comprise newly discovered evidence. It also asserted that at the time of ALJ Neal's 2018 decision, Leitner was aware of his cervical spine injury as evidenced by his Form 101 and deposition testimony. Consequently, it argued the doctrine of *res judicata* barred the Motion to Reopen. Dreisbach asserted since the compensability and treatment of the cervical spine condition was before ALJ Neal and benefits were not awarded, as a matter of law the doctrine of *res judicata* precludes Leitner from asserting on reopening a work-related cervical spine condition.

Pursuant to the CALJ's June 1, 2021, Order, Leitner filed a Response to Dreisbach's objection setting forth the same arguments he now asserts on appeal.

The CALJ's June 21, 2021, Order overruling the Motion to Reopen reads as follows:

> The history of the claim is important in deciding whether reopening is appropriate, and begins with Leitner's Form 101 filed on October 26, 2017. He alleged he "was hit head-on while in a company vehicle injuring his left lower extremity, ribs, right shoulder, and neck" on February 6, 2017.
>
> Leitner's medical opinion evidence came from an evaluator, Dr. David Waespe, whose work related

diagnoses were confined to the left knee, left ankle, and right shoulder. According to the "History" and "Chief Complaints" sections of the report, Leitner did not mention a neck injury. Dr. Waespe's review of medical records included an emergency room CT of the neck that revealed a prior fusion from C5-7. Dr. Waespe assigned 4% impairment to the left knee, 1% for the right shoulder, and 2% for pain associated with each, for a combined 7% impairment rating that did not include any impairment for injury to the neck. Further, Dr. Waespe did not give an opinion that Leitner had a neck injury that could require future treatment.

An administrative law judge accepted Leitner's argument in his post hearing brief, and on June 11, 2018, awarded income benefits based on 7% impairment. Further, the ALJ awarded medical benefits "…for the cure and relief from the effects of the work-related left knee and right shoulder condition." Neither party filed a petition for reconsideration or an appeal.

Now three years later, Leitner seeks to reopen the claim as a result of a cervical fusion surgery on October 22, 2018, six months after the original award. Attached to the motion is a report from Megan Courtney, a physician's assistant at miiSpine in Louisville who related the surgery to the 2017 work injury. There are no accompanying treatment records.

The Defendant objects to the motion on grounds that there is no "newly discovered evidence," and that res judicata precludes re-litigation of the neck claim.

The CALJ gave Leitner an opportunity to reply to the Defendant's response. In that reply, Leitner noted his testimony at the hearing that he did not believe he had obtained an adequate medical work-up of his neck injury, and wished to do so. (We know he did not submit the bills for surgery to the Defendant because no medical dispute was filed.) He argued that case law favored reopening.

The CALJ is not persuaded by Leitner's arguments, and overrules the motion to reopen. The prior Opinion and Order became final without any award – future medical or otherwise – for a claimed neck injury. It cannot be reopened for benefits associated

with a neck injury that was alleged, but not proven, awarded, or appealed.

One of the two bases for reopening cited by Leitner on the Form MTR is that the previous ALJ "did not address Plaintiff's neck." But that is not one of the grounds for reopening under KRS 342.125, and is not entirely accurate. The prior ALJ did not formally dismiss Leitner's neck claim in the Order section of his Opinion, but he did state earlier at page 6, "…the ALJ has found the Plaintiff sustained a work-related injury to his right shoulder and left knee only." Regardless, the lack of specific dismissal of the neck claim does not preserve a right to reopen (no more so than the right is preserved for the left ankle injury that was dismissed on page 6 but not at the end).

It was Leitner's burden to prove the work relatedness of the "left lower extremity, ribs, right shoulder, and neck" injuries alleged in the Form 101. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). But he only attempted to prove injuries to his "left lower extremity" and "right shoulder" with the report from his evaluator, Dr. Waespe. The evidence did not create an issue of fact regarding the "ribs" or "neck," and the parties did not make arguments about them to the ALJ. The ALJ was thus not presented a dispute about those body parts, and therefore did not formally dispose of them.

The prior ALJ only awarded medical benefits for the left knee and right shoulder because they were the only ones for which evidence was submitted. Although an ALJ may award future medical benefits for an injury that does not have a permanent impairment rating, the ALJ could not have made such an award to Leitner because he presented no evidence to support such an award. F.E.I. Installation, Inc., v. Williams, 214 S.W.3d 313 (Ky. 2007).

Even if medical evidence had been filed to support an award of medical benefits for the neck, Leitner's failure to request that the ALJ award future medical benefits on the neck by a petition for reconsideration is fatal. It is no different than if the ALJ had awarded medical benefits on the right shoulder but had mistakenly omitted the left knee; if Leitner had not

sought to have the ALJ remedy such an error by petition for reconsideration, he would have lost medical benefits to which he would have been entitled.

Leitner's second basis for reopening is "newly discovered evidence." Newly discovered evidence is evidence that existed at the time the original case was decided but had not been discovered and could not have been discovered with the exercise of due diligence. When "newly discovered evidence" is used in a statute, it may not be construed to include evidence that came into being after a matter was decided. Stephens v. Kentucky Utilities Company, 569 S.W.2d 155 (Ky. 1978). Newly discovered evidence within the meaning of KRS 342.125(1)(b) does not include evidence which did not come into being until after a workers compensation award was entered. Summers v. U.S. Liquids, 2005-SC-0244, 2005 WL 2679994.

The only attachment to the motion is the report of Ms. Courtney relating the surgery to the work injury. But that report is not "newly discovered evidence" since it was issued over two-and-a-half years after the original award. Further, given the circumstances, a report from a physician's assistant at "miiSpine" in February 2021 attempting to relate a surgery in October 2018 to an injury in February 2017 is not sufficient to make a prima facie case. There is no indication of a physician's endorsement of the statement; there is not even a reference to a physician's name on the letterhead or in the body of the letter.

In his reply memo, Leitner argued his reopening is supported by Messer v. Drees, 382 S.W.2d 209 (Ky. App. 1964), and Mayes v Potter & Brumfield, Inc., 427 S.W.2d 567 (Ky. App. 1968). Both cases are distinguishable.

Messer v. Drees is commonly cited for the proposition that since "compensation laws are fundamentally for the benefit of the injured workman, a just claim must not fall victim to rules of order unless it is clearly necessary in order to prevent chaos." Id. at 212. That admonition is as true today as ever, but does not apply in Leitner's case.

Messer's claim was administered through a system different from what we now have, and it is important to consider its context. Unlike its appellate function now, the Workers Compensation Board was the fact finder when Messer was injured in 1960. His claim had been submitted to the Board at the time of the motion to reopen. Messer changed attorneys sometime after the case was submitted. Coincidentally, the day before the Board ruled on his claim, his new lawyer filed a motion to reopen on grounds "that there had been a misconception with respect to the nature of his disability." Id. at 212.

Messer's new lawyer wanted to present additional evidence of a traumatic neurosis (mental injury) associated with the physical injury. Thus, his motion was not under KRS 342.125, which provides the grounds for reopening a claim that has become final; rather, it was to reopen proof before a decision had been made. This is evidenced in the Court's summary of the proceedings, in which it noted: a) that the employer had objected to the original motion on grounds that Messer "had simply failed to adduce timely proof with regard to causation"; and b) that the board and circuit court erroneously determined that the motion to reopen was a belated effort to develop evidence before the original submission of the case. Id. at 211. The Messer Court appropriately remanded his claim to allow introduction of medical evidence that had developed while his claim was under submission, but not yet decided.

The quote set out above from Messer v. Drees is bracketed by two additional statements: a) "We do not suggest that after a case has been lost or appears about to be lost counsel should be allowed to halt the proceeding and bring up reinforcements."; and b) "When subsequent events indicate than an award was substantially induced by a misconception as to the cause, nature or extent of disability at the time of the hearing, justice requires further inquiry." Id. at 212.

Leitner's claim for a neck injury was lost with the finality of the prior ALJ's decision failing to award medical benefits for a neck injury. He had the burden to prove a permanent injury (albeit one without permanent impairment) for which medical benefits could be

awarded; he failed to do that, and failed to petition the ALJ to correct any omission in the decision.

Leitner's case is also not a "misconception as to the cause, nature or extent of disability." The inference is that the cervical fusion is newly discovered evidence because its need was not apparent at the time of his award, similar to the severity of Messer's mental condition not being apparent when his claim was submitted. But Messer's traumatic neurosis did not come into focus for the medical professionals until after his claim had been submitted. Leitner complained about his neck at the emergency room immediately following his accident in 2017. He alleged a neck injury in the Form 101. He testified about it at the Hearing in 2018. It was his burden to submit evidence and seek a finding from the ALJ of, at least, a permanent injury with no impairment so that future medical benefits could have been awarded; only such an award would enable him to use KRS 342.125(1)(d) to reopen his claim to seek income benefits for an increased impairment rating to his neck following surgery.

Mayes v. Pottter & Brumfeld also involves an injury from the early 1960s with a companion claim of traumatic neurosis. Mayes received an award for an injury to her eye, but her mental claim was rejected. On reopening, she was awarded total disability based on the traumatic neurosis. The CALJ questions whether such a result would withstand appellate scrutiny today – a finding of non-work relatedness would seem to have res judicata effect on a later attempt at reopening for that same condition or injury. "(O)nce an ALJ-adjudicated award and order becomes final, the ALJ's determinations with respect to, e.g., causation, notice, apportionment, etc., cannot be readdressed under KRS 342.125 except upon an allegation of fraud, newly discovered evidence, or mistake…The doctrine of res judicata applies to the rulings of the Workmen's Compensation Board the same as it does to the decisions of a court." Garrett Mining Co. v. Nye, 122 S.W.3d 513, 522 (Ky. 2003).

Regardless, Mayes is still distinguishable in that Leitner essentially abandoned his neck claim by not presenting evidence of it, arguing for it, or attempting to petition for reconsideration of an opinion failing to

> award benefits for it, i.e., allowing it to become final without pursuing a favorable result.
>
> Abandoning a claim is equivalent to failing to present it, which raises the case of Slone v. Jason Coal Company, 902 S.W.2d 820 (Ky. 1995). Slone suffered a low back injury in 1986, and received an award in 1989. She filed a motion to reopen in 1992 based on a mental condition. The evidence showed that she was aware of her mental condition during the litigation of her claim, and so the Court held that "a motion to reopen based on KRS 342.125 may not be based on a condition known to the claimant during the pendency of his original claim but which he did not present." Id. at 822. Leitner knew about her neck claim, but failed to "present" it with any supporting evidence, and so she may not now get another bite at the apple through reopening.
>
> Finally, even if the neck claim was viable, what relief does Leitner seek through his reopening? Although grounded in "newly discovered evidence," he likely means to pursue a change of disability for the impairment rating that accompanies a cervical fusion. KRS 342.125(1)(d). But to make a prima facie case to reopen for such relief, there must be an increase in impairment, and Leitner's motion did not present any evidence of an impairment rating.

On July 5, 2021, Leitner filed a Petition for Reconsideration and a Motion to Amend the Motion to Reopen seeking to submit Dr. Nazar's report. Leitner's Petition for Reconsideration set forth the same arguments framed on appeal. The Motion to Amend asserted that in anticipation of a Hearing on the merits, Leitner underwent an IME performed by Dr. Nazar. Leitner attached Dr. Nazar's June 22, 2021 report in which he opined Leitner was misdiagnosed at the time of the original action. Instead of sustaining a work-related right shoulder impingement injury, Dr. Nazar believed Leitner had cervical radiculopathy producing right shoulder pain secondary to his February 2017 work injury. As a result, Leitner underwent cervical surgeries to treat the work injury. Dr. Nazar

assessed a 29% whole person impairment rating for his neck condition and recommended permanent restrictions. Since Dr. Nazar's report establishes grounds of mistake, newly discovered evidence, and evidence of a change in disability, Leitner maintained his medical report should be introduced. Leitner represented Dr. Nazar's report only became available on June 22, 2021.

After Dreisbach filed an objection to both pleadings, the CALJ overruled both motions reasoning, *verbatim*, as follows:

> In overruling the motion, the CALJ was required to provide sufficient findings to permit meaningful appellate review. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). The detail provided in the Order of June 21, 2021, more than satisfies Shields, and thus the CALJ declines to reiterate those reasons here.
>
> Some additional points are appropriate, however, in considering the petition alongside Leitner's companion motion to amend the motion to reopen.
>
> The day after the order overruling the motion to reopen, Leitner was seen for an evaluation by Dr. Gregory Nazar at his attorney's request. Dr. Nazar said Leitner had been "misdiagnosed" with a shoulder injury, and that his condition all along was "referred pain from the neck."
>
> From a review of records, Dr. Nazar said Leitner had undergone a two-level cervical fusion in October 2018, and then a foraminotomy at the same levels in July 2020. (Curiously, Leitner's motion to reopen only mentioned the surgery in 2018, not the one in 2020. Further, the sole attachment to the motion was a February 19, 2021, report from a physician's assistant who noted the 2018 fusion but failed to mention the surgery in 2020.)
>
> The added inquiry, then, is whether Dr. Nazar's report changes anything. The CALJ asked himself whether the result would be different if Dr. Nazar's

report had been filed in support of the original motion, and concluded that it would not.

In his motion to amend, Leitner says Dr. Nazar's report is "germane to the KRS 342.125 reopening on grounds of mistake, newly discovered evidence, and change of disability." The CALJ will take those in turn.

The CALJ rejects the notion of a "misdiagnosis," or "mistake" under KRS 342.125(1)(c). Dr. Nazar simply presents a more recent causation opinion; the grounds for that opinion have been present all along. Leitner squarely presented a claim for a neck injury in his Form 101. He complained about neck symptoms to his treating doctors and to the evaluating doctors. He complained about it at the final hearing. It was his primary complaint to Dr. Gleis, who evaluated him for the Defendant in the original litigation. A cervical MRI on August 16, 2017, reported the same stenosis that was reported on the September 28, 2018, MRI done after the ALJ's Opinion. Leitner had neck symptoms dating back to 2014, and Dr. Gleis concluded the work injury had not worsened that condition. (Gleis report, pp. 3, 33, 39) (As noted in the CALJ's previous Order, Leitner's own evaluator at the same time, Dr. Waespe, did not receive a complaint of neck pain; did not note the stenosis on the cervical MRI that the radiologist and Dr. Gleis discussed; and did not diagnose a neck injury.) In other words, Leitner failed to prove his original allegation of a neck injury – that the work injury aggravated a preexisting degenerative condition (stenosis) in his cervical spine. What he is trying to do now is re-litigate that issue because he has a doctor willing to support that theory. Had he obtained that opinion originally and convinced the ALJ to adopt it, he could have sought an award of medical benefits that would have preserved a present ability to reopen the claim. Among the unintended consequences of permitting Leitner to challenge to the finality of the claim for a neck injury is this: if he is allowed to reopen on grounds of a previous "misdiagnosis," should the Defendant also be able to reopen to set aside a portion of the PPD award since Leitner's new theory is that the shoulder injury was a mistaken diagnosis?

The report from Dr. Nazar is not "newly discovered evidence" under KRS 342.125(1)(b) because,

> as explained in the previous Order, it did not exist at the time of the original decision. This applies to both the report itself, obviously, but also the basis for it. The cervical stenosis was present (symptomatic) at the time of the Opinion in 2018; Leitner failed to obtain evidence to be able to convince the ALJ that his symptoms emanated from an arousal of that condition.
>
> Finally, the report from Dr. Nazar does not support reopening for a "change of condition" under KRS 342.125(1)(d). Leitner said he did not have to show an increase in impairment. The CALJ believes the authority of Hall v. Hospitality Resources, 276 S.W.3d 775 (Ky. 2009) and Hodges v. Sager Corporation, 182 S.W.3d 497 (Ky. 2005), states otherwise; but nevertheless, he has done that with Dr. Nazar's report of impairment for the neck surgeries. That impairment is for a condition that is not part of this case, however; the claim became final with awards of medical benefits limited to the left knee and right shoulder.
>
> Leitner's petition for reconsideration is denied, and his motion to amend the motion to reopen is overruled.

Citing Mayes v. Potter & Brumfield, Inc., 427 S.W.2d 567 (Ky. Ct. App. 1968), Leitner first contends a claim may be reopened for a condition which was not "originally proven, awarded, or appealed." Even though the ALJ questioned the viability of the ruling in Mayes, Leitner asserts it is still binding precedent. Leitner also contends Young v. Varney, 469 S.W.2d 344 (Ky. Ct. App. 1971) is equally analogous. According to Leitner, the CALJ abused his discretion by stating the lack of a specific dismissal of his cervical injury claim by ALJ Neal does not preserve a right to reopen.

Leitner insists that reopening can be appropriate in the complete "absence of initially pleading the condition at all." Leitner also takes issue with the CALJ's finding his claim is barred by the finality of ALJ Neal's decision in which no

benefits for the neck injury were awarded and also because Leitner failed to request an award of future medical benefits for the neck condition in a Petition for Reconsideration.

Leitner also argues the report of Courtney and Dr. Nazar constitute a *prima facie* basis for reopening. He notes Dr. Nazar's report buttresses his argument the claim should be reopened based upon mistake, newly discovered evidence, or change in disability. According to Leitner, the CALJ "abused his discretion by taking a deep dive into the merits."

Leitner also contends he could not abandon the neck injury claim that was either undiagnosed or misdiagnosed. Leitner represents that in attempting to prove a work-related cervical injury he secured an examination by Dr. Waespe who misdiagnosed a neck injury as right shoulder impingement.

Further, in Leitner's view, a *prima facie* showing of mistake or change of disability was demonstrated justifying the reopening of the claim because both doctors who examined him failed to diagnose a cervical injury. Leitner maintains he was misdiagnosed with right shoulder impingement and only later discovered his shoulder pathology was due to a work-related neck injury. Leitner relies upon the Kentucky Supreme Court's holding in an unpublished opinion in Kuhlman Electric Corp. v. Cunigan, 2014-SC-000189-WC, rendered December 18, 2014, Designated Not To Be Published. He observes medical evidence was not presented contradicting the report of Courtney, who he identifies as a Physician's Assistant with miiSpine, Dr. Venu Vemuri's group, and Dr. Nazar's report. Consequently, the CALJ should have deemed the uncontroverted opinion as true and permitted the reopening.

Leitner adds he has provided evidence of a greater disability and an increased impairment rating also justifying reopening pursuant to KRS 342.125(1)(d).

Finally, Leitner contends the CALJ abused his discretion in refusing to allow an amendment to his Motion to Reopen to include Dr. Nazar's report. He asserts the basis for overruling the motion because the alleged impairment is for a condition not awarded in the original proceeding is flawed. Leitner posits Kuhlman illustrates that a misdiagnosed condition constitutes a *prima facie* showing of mistake justifying reopening.

ANALYSIS

Because *res judicata* did not bar Leitner's Motion to Reopen we reverse the ALJ's decision and remand for further proceedings. Without question, the doctrine of *res judicata* applies in the context of workers' compensation awards. Keefe v. O.K. Precision Tool & Die Co., 566 S.W.2d 804, 805 (Ky. App. 1978). On the other hand, KRS 342.125 provides specific and enumerated statutory exceptions to the general rule of the finality of judgments, also known as *res judicata*. In order to qualify for reopening under the Act, facts must be alleged sufficient to establish a *prima facie* case for reopening pursuant to one of the conditions specified under 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, where the application by the parties fails to allege a condition specified under KRS 342.125 (i.e., a showing of change of disability, mistake, fraud, newly discovered evidence, challenges to medical fees, the institution

of post award temporary total disability benefits or conforming an award with the requirements of KRS 342.730(1)(c)2), the ALJ and this Board are without statutory authority to provide relief and the doctrine of *res judicata* controls. Slone v. R & S Mining, Inc., 74 S.W.3d 259 (Ky. 2002).

As an initial matter, in fairness to the CALJ, we note Leitner's Motion to Reopen alleged newly discovered evidence as the sole ground supporting his motion. In the Petition for Reconsideration, he raised for the first time, mistake as a potential ground for reopening. In fact, in the conclusion of the Petition for Reconsideration Leitner submitted he made "a *prima facie* preliminary showing of the existence of a substantial possibility of the presence of one or more of the prescribed conditions that warrant reopening." Thus, the ALJ in ruling on the Petition for Reconsideration was required to address grounds not alleged in the Motion to Reopen.

Leitner's assertion of newly discovered evidence as the grounds for reopening is without merit. In the Motion to Reopen, Leitner asserted when ALJ Neal rendered his opinion finding he sustained work-related left knee and shoulder injuries he did not address the alleged neck injury. Leitner advised that since the rendition of ALJ Neal's opinion he has undergone anterior cervical discectomy and fusion at C3-C5 on October 22, 2018, performed by Dr. Vemuri. Leitner represented Dr. Vemuri and his staff opined he suffered an aggravation of a pre-existing neck condition as a result of the February 6, 2017, MVA. The fact he underwent surgery does not constitute newly discovered evidence, as Leitner had not undergone surgery during the initial proceedings. In Turner v. Bluegrass Tire Co., Inc., 331 S.W.3d 605,

609 (Ky. 2010), the Kentucky Supreme Court defined newly discovered evidence as follows:

> A new trial request may not be granted under CR 60.02 if based on new evidence that could and should have been discovered and produced in the initial trial. [footnote omitted] Each party to a cause of action must, therefore, exercise due diligence in discovering and introducing evidence sufficient to prove its case *before* the matter is submitted for a decision.
>
> 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. [footnote omitted] 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. [footnote omitted]

Since the surgery occurred after ALJ Neal's decision, the opinions of Dr. Vemuri and his staff cannot constitute newly discovered evidence. Therefore, we affirm that portion of the CALJ's Order overruling the Motion to Reopen based on newly discovered evidence.

Certainly, a Motion to Reopen may not be based upon a condition known to the claimant during the pendency of the original claim but which he did not present. However, apparently Leitner was unaware of the extent of his cervical condition at the time ALJ Neal rendered his decision. Leitner's testimony during the proceedings before ALJ Neal establishes he desired to undergo a neurosurgical consultation, payment for which the workers' compensation carrier apparently denied. Moreover, the record is devoid of any evidence that Leitner was aware of the nature of his cervical condition at the time ALJ Neal rendered his decision.

We conclude Leitner made a *prima facie* showing of mistake pursuant to KRS 342.125(1)(c) in that all physicians offering diagnostic opinions while the claim was pending before ALJ Neal did not diagnose a compensable neck injury resulting from the MVA. Dr. Waespe diagnosed a shoulder injury and a knee injury. On the other hand, Dr. Gleis attributed Leitner's shoulder problems to his cervical problems but concluded the cervical symptoms related to pre-existing active cervical impairment. Dr. Gleis opined the shoulder problem is due to an exacerbation of the previous active cervical condition. However, he did not believe the shoulder symptoms resulting from the exacerbation rose to the level meriting "an increase in his neck impairment rating." Significantly, ALJ Neal disregarded Dr. Gleis' opinions relying instead upon Dr. Waespe's opinion in concluding Leitner sustained knee and shoulder injuries.

The rationale enunciated in Kendrick v. Bailey Vault Company, Inc., 944 S.W.2d 147 (Ky. App. 1997) is applicable. Kendrick sustained a work-related back injury and was "treated by and underwent surgery at the hands of, Dr. Richard Mortara." Id. at 148. Thereafter, Dr. Mortara assessed an 8% functional impairment, opined Kendrick was physically restricted for one year and stated Kendrick had reached maximum medical improvement ("MMI"). Kendrick and the employer's carrier agreed to settle his claim for a lump sum payment of $13,000 plus two years of medical expenses. Kendrick testified he understood that after two years following the date of approval of the settlement he would no longer be entitled to medical benefits. The settlement agreement included language that the claim against Bailey Vault Company, Inc. would be dismissed with prejudice and Kendrick waived the

right to reopen the claim. With the passage of time, Kendrick realized his condition had not improved as predicted by Dr. Mortara. Instead, additional surgery was required.

Kendrick retained counsel and filed a Motion to Set Aside the Settlement Agreement as unconscionable. Id. at 148. The motion was granted to the extent the claim was reopened for the taking of proof. Bailey Vault Co. Inc. asserted the reopening was barred by *res judicata*. The ALJ ruled the dismissal with prejudice and the waiver of reopening were not enforceable, and the Board concluded the ALJ ruled this way because he determined both parties were under a mutual mistake with respect to Kendrick's ability to return to work as predicted by Dr. Mortara. Id. at 149. The Court of Appeals affirmed the Board's holding as to mutual mistake.[4] The Court of Appeals ultimately determined it was undisputed both sides relied upon Dr. Mortara's opinion Kendrick had reached MMI, was 8% functionally impaired, and would have restrictions for only one year. In fact, Dr. Mortara was incorrect. Id. at 150. The Court of Appeals held as follows:

> Clearly, this scenario amounts either to constructive fraud or mutual mistake. In either case, Kendrick has presented a compelling case for setting aside the settlement agreement.

Id.

The same rationale applies in the case *sub judice*. Neither physician diagnosed a permanent work-related cervical injury. As previously noted, Dr. Waespe diagnosed a shoulder injury and Dr. Gleis diagnosed an aggravation of a

[4] The Court of Appeals affirmed in part and reversed in part.

pre-existing cervical condition as the cause of the shoulder symptoms. However, Dr. Gleis concluded Leitner's symptoms were not sufficient to merit an impairment rating pursuant to the AMA Guides for a work-related cervical condition. After rendition of ALJ Neal's award, Courtney offered an opinion that as a result of the MVA, Leitner suffered an aggravation of a pre-existing neck condition. Consequently, surgery was performed for treatment of the symptoms exacerbated by the MVA. As noted by Courtney, "dysphagia following ACDF is a common adverse event. Therefore, his dysphagia was a sequela of his surgery." Courtney clearly linked the need for the October 22, 2018, ACDF C3-C5 surgery to the February 6, 2017, MVA. Thus, only when Leitner was treated by a neurosurgeon was the opinion formulated that the February 6, 2017, MVA caused an aggravation of his pre-existing neck condition resulting in surgery on October 22, 2018. Further, as noted by Dr. Nazar, Leitner underwent a subsequent cervical surgery.[5] Therefore, Leitner unequivocally demonstrated a possible mistake committed by the physicians in assessing the nature of his neck condition at the time of ALJ Neal's decision.

We emphasize Leitner's cervical condition resulting from the MVA and the fact Leitner underwent surgery is not evidence of a change of disability as shown by objective evidence of a worsening of the impairment. During the proceeding before ALJ Neal, Leitner expressed the desire to undergo a neurological

[5] In an addendum, Dr. Nazar stated:

The final record from Dr. Vemuri's office has arrived, which indicates that he had a posterior foraminotomy at C3-C4 and C4-C5 performed as his third surgery and Dr. Vemuri's notes agree that this completely alleviated the patient's right-sided pain going into the shoulder blade described as a stabbing pain, thus indicating that this pain was of radicular origin and that the surgical interventions for doing the anterior approach and then later a posterior decompression were entirely appropriate and medically needed pertaining to his work injury.

consultation to reveal the extent of his neck problems. The report of Courtney and Dr. Nazar establish KRS 342.121(d) is not applicable. Rather, the fact he underwent surgery to rectify the cervical condition is evidence of the potential true nature of Leitner's condition caused by the work injury. It is not evidence of a worsened condition. The reports of Courtney and Dr. Nazar address the true nature of the cervical injury caused by the MVA which as characterized by Courtney is an exacerbation of a pre-existing cervical condition and not a worsened condition. Similarly, Leitner testimony throughout the proceedings is that his shoulder condition had remained constant rather than worsened. Notably, Dr. Nazar's report reflects Leitner's shoulder symptoms were alleviated by the subsequent cervical surgeries.

Although not necessarily directly on point, we believe the principles enunciated in Messer v. Drees, 382 S.W.2d 209 (Ky. 1964), mandate reversal of the CALJ's orders. Messer, while operating a backhoe, sustained a substantial injury. He filed a claim in December 1960 resulting in an award of total disability for forty weeks and a 10% partial permanent disability. The full Board award was entered on September 19, 1961, based on testimony taken in March, April, and May of that year. However, on September 18, 1961, while the matter was pending on review, Messer, through new counsel, sought reopening for the purpose of introducing further medical testimony. A supporting affidavit of counsel stated it had been discovered from a competent psychiatrist Messer was suffering from traumatic neurosis that had been unknown to both present and previous counsel. Counsel also avowed that further proof would establish a change of conditions and the existence

of mistake in the referee's estimate of Messer's condition. Id. at 211. The Board overruled the motion commenting "there was also evidence indicating that [Messer] may be suffering from a traumatic neurosis. However, the evidence provided by [Messer] was highly insufficient to sustain this proposition, particularly as to causation." Id. Messer did not appeal.

A year later, on September 18, 1962, Messer again moved to reopen on the same grounds as before, attaching a report by another psychiatrist indicating he was suffering from organic brain disease in the form of post-traumatic encephalopathy manifested by blackout spells, severe memory loss, impairment of his thinking, and concentration. Id. The psychiatrist stated from a psychiatric standpoint Messer was probably permanently and totally disabled due to the accident in regards to adequate work or social adjustment. Id. The Board sustained the motion for the limited purpose of hearing evidence to determine the existence, *vel non*, of grounds for reopening. Id. Drees, the employer, introduced equivocal testimony from another psychiatrist. On the basis of the testimony of the psychiatrists, the Board issued an opinion and order overruling the motion to reopen because there had been no change in Messer's condition or a mistake made in granting the original award. The Board relied on a comment in the previous opinion of September 19, 1961, stating there was evidence at that time indicating traumatic neurosis, buttressed by the new psychiatrist's more recent testimony in which he expressed the opinion Messer had been totally disabled from the date of the accident. Id. In reversing, the Supreme Court stated as follows:

> To make a long story short, we do not agree. We think the case should have been opened for further testimony

in September of 1961, pursuant to the first motion, [footnote omitted] and that certainly it should be reopened now.

There is a rule in the game of chess that once the player with the move has touched a man he must move that man. He cannot change his mind and move another. Here the attorney who represented Messer until after the case had been submitted and passed on by a referee pitched his claim on the theory that the compensable injury was confined to aggravation or 'lighting up' of a pre-existing degenerative arthritic condition of the cervical spine. In the beginning it was not at all obvious that a psychiatric disturbance was involved. For example, the attending physician, a general practitioner, did not send him to a psychiatrist; he sent him, rather, to a neurosurgeon surgeon and then to an orthopedic surgeon, [footnote omitted] each of whom detected the presence of a psychological complication but refrained from an attempt to diagnose its cause or extent. Somewhere along the line, in April of 1961, Messer was seen by Dr. Thomas A. Weldon, the psychiatrist whose report dated September 14, 1961, was later used in support of the first motion to reopen. Whether counsel had a prompt report of this first examination by a psychiatrist and, if so, what it disclosed are not shown by the record. As we have suggested, however, Messer's present counsel did not know of it until immediately before they moved for permission to develop the matter further.

We do not know the reason for the failure of original counsel to pursue the question of what relationship, if any, exists between Messer's mental disturbance and the accidental injury he sustained on August 4, 1960. As of now, however, it is abundantly clear from a mere reading of the record that the outward and visible manifestations of his disability have progressed to the degree that what may not have been readily apparent in the spring of 1961 is now clear. [footnote omitted] Somewhere during the course of this transition it was incumbent on Messer's counsel in the exercise of their professional responsibility to shift the course and theory of his claim. Their timing in this respect cannot fairly be judged according to the standards of medical skill; they are lawyers. And a workmen's compensation case is not

> a game in which a player may not reconsider his move once he has begun it. The first motion for reopening, in September of 1961, which stated in substance that there had been a misconception with respect to the nature of the disability, and thus in the way the case had been practiced, was in our opinion a timely and proper application under the particular circumstances at hand.

Id. at 212.

The Supreme Court held as follows:

> We do not suggest that after a case has been lost or appears about to be lost counsel should be allowed to halt the proceedings and bring up reinforcements. But bearing in mind that compensation laws are fundamentally for the benefit of the injured workman, a just claim must not fall victim to rules of order unless it is clearly necessary in order to prevent chaos. Time often tells more about medical cases than the greatest of experts are able to judge in advance. In *Clear Fork Coal Company v. Gaylor*, Ky., 286 S.W.2d 519, 522 (1956), this court recognized, for example, that even the permanence of a disability theretofore thought to be temporary 'is of itself in the nature of a change.' When subsequent events indicate that an award was substantially induced by a misconception as to the cause, nature or extent of disability at the time of the hearing, justice requires further inquiry. Whether it be called a 'mistake' or a 'change in conditions' is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it. Cf. *Blue Diamond Coal Co. v. Meade*, Ky., 289 S.W.2d 503 (1956).
>
> *Wells v. Fox Ridge Mining Co.*, Ky., 243 S.W.2d 676 (1951), is distinguishable in that there was no change, actual or ostensible, in the claimant's condition, whereas in this case, though Messer's actual malady and consequent 100% permanent disability may actually have existed from the time of the accident, the observable symptoms necessary to an accurate and reliable diagnosis became more manifest over a period of time extending beyond the original hearing. [footnote omitted]

Id. at 212-213.

The above language is applicable in the case *sub judice*. After filing his Form 101 alleging a shoulder injury, Leitner continued to seek a neurosurgical consultation to address potential neck problems. Unfortunately, he was unable to obtain the consultation during the proceedings.

In summary, KRS 342.125(1) and (2) and the pertinent case law direct that the defense of *res judicata* to a Motion to Reopen is not applicable upon a *prima facie* showing of mistake. Thus, *res judicata* does not bar reopening of Leitner's claim upon a *prima facie* showing of mistake.

Kuhlman Electric Corp. v. Cunigan, 2014-SC-000189-WC, rendered December 18, 2014, Designated Not To Be Published, is applicable here. The facts in Kuhlman as framed by the Supreme Court are as follows:

> Cunigan worked for Kuhlman as a janitor who performed preventive maintenance. On April 24, 2008, he fell and suffered a work-related injury. He reported the injury to his supervisor but did not seek medical treatment at that time. However, Cunigan later began to suffer from pain in his buttocks and left leg.
>
> On April 22, 2009, Cunigan filed a Form 101 as a *pro se* claimant seeking benefits for an alleged left leg injury. Cunigan attached to the Form 101 a statement indicating that his treating physician, Dr. J. Rick Lyon, wanted him to undergo an MRI to determine the cause of his pain. However, Kuhlman filed a Form 112 medical fee dispute arguing that the MRI was unnecessary based on the opinion of Dr. Michael Best who did not find any evidence of radiculopathy or myelopathy in his examination of Cunigan. Prior to the final hearing, Cunigan did not undergo an MRI. The majority of the medical evidence introduced before the final hearing indicated that Cunigan suffered from a hamstring tear.

ALJ Joseph W. Justice was assigned to the matter. He ordered a university evaluation to be performed to determine the cause of Cunigan's pain, but this was set aside on Kuhlman's petition for reconsideration. At the final hearing, held on May 21, 2010, Cunigan, still representing himself *pro se,* testified that, "All I want is to get the MRI, find out why a little old hamstring tear, I'm still hurting in the center, not in my, right below my belt, my butt, my leg swells. I stay up on it all day long. All I want is the MRI."

In an opinion, award, and order, ALJ Justice found that Cunigan had a work-related injury to his hamstring but that it healed and caused no permanent impairment. In regards to the requested MRI, ALJ Justice stated:

> [Kuhlman] filed a medical fee dispute contesting a proposed MRI by Dr. Lyon. The ALJ has already discussed the matter herein. Under the medical evidence filed herein, with [Cunigan] having no objective medical evidence of radiculopathy, and the EMG being negative for disc injury, and with the hamstring diagnosis, the ALJ was persuaded by Drs. Best and Goldman that an MRI was not reasonable or necessary.

ALJ Justice awarded Cunigan temporary total disability benefits from April 25, 2008, through October 1, 2008, and dismissed his claim for permanent partial disability benefits. ALJ Justice also found that Cunigan was not entitled to any future medical treatments.

On October 28, 2010, Cunigan, now through counsel, filed a motion to reopen pursuant to KRS 342.125. The motion to reopen was based upon an MRI performed by Dr. Richard Lingreen on August 23, 2010, which indicated that Cunigan had a large central disc herniation at L5–S1. Cunigan also filed a report by Dr. Gregory Wheeler, who connected the disc herniation to his work-related fall. Kuhlman objected, arguing that the ALJ's findings regarding any lumbar injury was the law of the case per *res judicata* and that Cunigan failed to preserve the issue. Kuhlman also filed a new report from Dr. Best in which he opined that any disc herniation was unrelated to Cunigan's work-related fall.

Slip Op. at 1.

The matter was assigned to Hon. Chris Davis, Administrative Law Judge ("ALJ Davis"), who entered an order dismissing the Motion to Reopen. ALJ Davis found Cunigan was precluded from arguing he had a work-related low back injury based on the doctrine of *res judicata*. This Board reversed finding Cunigan established the requisite showing to reopen on two grounds, newly discovered evidence, and mistake. The Court of Appeals affirmed this Board. The Supreme Court found the ground of newly discovered evidence unavailing ruling as follows:

> In *Russellville Warehousing v. Bassham,* 237 S.W.3d 197, 201 (Ky. 2007), we stated:
>
> ...*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.

Slip Op. at 3

However, the Supreme Court also held Cunigan's Motion to Reopen based on mistake was not barred by the doctrine of *res judicata* reasoning as follows:

> Kuhlman's first argument is that Cunigan's motion to reopen his claim, based on a lumbar disc herniation, is barred by *res judicata.* It contends that the doctrine of *res judicata* applies because Cunigan was required to include

> all of his alleged injuries, including his newly alleged lumbar disc herniation, in his original claim. Additionally, Kuhlman believes since the ALJ found there was no evidence to support ordering an MRI to be performed, it was conclusively decided that any lower back injury was not work-related.
>
> "The doctrine of *res judicata* (also known as the doctrine of the 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." *Slone v. R & S Mining, Inc.*, 74 S.W.3d 259, 261 (Ky. 2002). However, KRS 342.125 provides that a final judgment in a workers' compensation proceeding can be reopened if one of four grounds is met "(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." *See AAA Mine Services v. Wooten,* 959 S.W.2d 440, 441 (Ky. 1998) ("Although the concept of finality applies to workers' compensation awards, KRS 342.125 provides some relief from the principles of *res judicata* under certain specified conditions.")
>
> While ALJ Justice failed to order the requested MRI be performed, that does not preclude Cunigan from asking to reopen his claim. Thus, *Res judicata* does not prevent the reopening of this claim. We now look to see if Cunigan presented evidence of at least one of the grounds in KRS 342.125 which allows for the reopening of a claim. We focus on the two grounds which the Board found Cunigan satisfied: newly discovered evidence and mistake.

Slip Op. at 3.

In concluding Cunigan's claim could be opened based on mistake, the Supreme Court explained:

> Instead Kuhlman contends that "mistake" in that statute refers to a mutual mistake by the parties. We disagree.
>
> As written by then Judge Palmore regarding mistake:
>
> > [w]hen subsequent events indicate that an award was substantially induced by a misconception as to the cause, nature or extent of disability at the time of the hearing, justice requires further inquiry. Whether it be called a 'mistake' or 'change in conditions' is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it.
>
> *Messer v. Drees,* 382 S.W.2d 209, 213 (Ky. 1964). Here Cunigan has presented evidence which potentially indicates that the doctors who examined him misdiagnosed his injury. If an expert witness or physician makes an erroneous diagnosis, which causes the claimant to not receive proper relief, there must be a mechanism for the claimant to be able to reopen his claim so he may receive redress. It would be patently unfair for Cunigan to be unable to reopen his claim because of a potential misdiagnosis. Additionally Cunigan was a *pro se* claimant throughout the original proceeding and as such had limited knowledge of how to obtain the MRI via the workers' compensation system. The purpose of workers' compensation is to compensate a worker who was injured on the job and allowing the reopening of this claim to determine if the lumbar injury is compensable is within the spirit of that doctrine. While the ALJ might review the new evidence presented and ultimately decide against adjusting Cunigan's award, Cunigan has presented sufficient evidence, in the form of the MRI and Dr. Wheeler's report, to allow his motion to reopen be granted due to mistake.

Slip Op. at 4.

The above language establishes Leitner demonstrated the distinct possibility of a mistake justifying his Motion to Reopen. Consequently, the CALJ

erred in not sustaining Leitner's Motion to Reopen on the basis of mistake and in concluding *res judicata* bars the Motion to Reopen.

We acknowledge Leitner did not initially allege mistake as a ground for reopening the claim but first made the assertion in his Petition for Reconsideration. However, Leitner's failure to allege a mistake in his Motion to Reopen did not mandate overruling the motion. In Department of Finance v. Wright, 425 S.W.2d 740, 742 (Ky. 1968), the Kentucky Supreme Court's predecessor, the Kentucky Court of Appeals, adopted the following rule:

> In Felix Coal Company, the court pointed out that the strict rules of pleading are inapplicable in proceedings before the Workmen's Compensation Board. In *Messer v. Drees, Ky., 382 S.W.2d 209,* it was noted that:
>
> 'When subsequent events indicate that an award was substantially induced by a misconception as to the cause, nature or extent of disability at the time of the hearing, justice requires further inquiry. Whether it be called a 'mistake' or a 'change in condition' is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it. Cf. *Blue Diamond Coal Company v. Meade, Ky., 289 S.W.2d 503 (1956).*'
>
> …
>
> We do not consider that Wright's failure to denominate his basis for relief as 'mistake' rather than 'change of condition' is of significance. Indeed, we are unable to agree with the Board's legal conclusion that there was no showing of change of condition.

The former Court of Appeals, in Young v. Charles F. Trivette Coal Co., 459 S.W.2d 776, 777-778 (Ky. 1970), again held that upon filing a Motion to Reopen the ALJ may determine whether any of the grounds set forth in KRS 342.125(1) exist. The Court of Appeals explained:

> Although the evidence heard did not establish any change of condition, it is claimed by appellee that the evidence at the hearing sufficiently established a mistake in the award.
>
> The first question is whether or not an award may be reopened and changed where the evidence heard sustains one ground for reopening but the motion seeking the reopening alleged a different ground.
>
> Our cases show no indication to be stringently technical in this respect. In some cases the dividing line between change of condition and mistake is indeed thin and if the evidence justifies relief, it will not be denied simply because the pleader alleged one ground rather than the other. Cf. *Blue Diamond Coal v. Meade, Ky., 289 S.W.2d 503 (1956).*
>
> We hold that a reopening of the award on the ground of mistake is not barred by the fact that the motion to reopen was based upon change of condition.

We find further support for our holding in Whitworth v. Big Lots, et. al., 2014-SC-000283-WC, rendered September 24, 2015, Designated Not To Be Published, in which the Kentucky Supreme Court reinforced its holding in Cunigan. The Supreme Court summarized the original litigation as follows:

> On July 23, 2009, Whitworth filed an Application for Resolution of Injury Claim ("Form 101") alleging an April 25, 2008 injury when a boxed recliner fell on her. Although the Form 101 describes the body part injured as "left upper extremity," Whitworth attached an August 7, 2008 cervical MRI report that reflects a history of left shoulder pain following an injury and that now she was having cervical pain. [footnote omitted] On August 25, 2009, Big Lots filed a Notice of Claim Denial or Acceptance ("Form 111") and denied the claim on grounds of work-relatedness and notice.
>
> Whitworth submitted records of Elizabethtown Orthopaedic Associates (Dr. Nash and Dr. Craig) as evidence. On July 24, 2008, she related left shoulder pain, numbness and tingling in the left hand. Dr. Nash's impression was tendinitis/impingement of left shoulder

and possible cervical radiculitis. He ordered a cervical MRI and EMG/NCS, left arm. On August 20, 2008, Whitworth returned. Chief complaint was left shoulder and neck pain. The MRI showed degenerative disease, no true herniation. EMG/NCS were essentially normal. On October 7, 2008, Dr. Craig performed a left shoulder arthroscopy, arthroscopic subacromial decompression and open distal clavicle resection. On November 3, 2008, Whitworth still had "pain radiating from her shoulder up into her neck." On January 15, 2009, Dr. Craig stated that he was "going to try and calm down her neck with a Medrol Dose Pack, continue with physical therapy and have them work with her neck as well." Dr. Craig's impression was status-post left shoulder scope and neck strain.

On February 11, 2009, Whitworth saw Dr. Nazar in consult. [footnote omitted] History reflects a work-related injury on April 25, 2008. Whitworth had difficulty with a recliner while stacking furniture and felt she had pulled a muscle in the lateral lower neck and medial shoulder. She had had shoulder surgery, but continued to have pain. Whitworth described occasional left hand numbness and related that her arm feels weak. Lateral neck flexion and left rotation aggravated her symptoms. Dr. Nazar reviewed the cervical MRI. He did not believe surgery (discectomy or fusion) would be of benefit. Dr. Nazar opined that trigger point injections might be beneficial, as would a rehabilitative medicine consult, if orthopedics did not feel there was anything further they could do.

A March 6, 2009 KORT PT Discharge Summary reflects that Whitworth's reported symptoms included the cervical paraspinals. Exam revealed limitation in active cervical range of motion. Prognosis was poor.

On April 21, 2009, Whitworth saw Dr. Bilkey for an IME. She filed his report as evidence. It reflects that Whitworth related pain in the left shoulder and at the base of her neck, pins and needles in her left hand. Dr. Bilkey could not assess cervical facet range of motion due to guarding. He explained that Whitworth had sustained a lift injury, that "[s]he is a small person who lifted a boxed recliner and injured her left shoulder. She was found to have impingement syndrome and underwent surgical repair. There is significant residual

shoulder pain, neck pain and headache." Dr. Bilkey attributed his diagnoses to the work injury, and opined that all prior evaluation and treatment appear to have been reasonable, necessary and work-related. He assigned 11% ppi, body as a whole, 5th Ed. AMA, based upon loss of shoulder motion and distal clavicle resection.

Defense counsel subsequently deposed Dr. Bilkey. Dr. Bilkey explained that the mechanism of Whitworth's injury was two-fold, "one being a lift component and the other … direct trauma. Asked why Whitworth's surgeon had performed a distal clavicle resection, Dr. Bilkey testified, "for all I know is, they're thinking that the AC joint is the cause of the pain." Dr. Bilkey explained that the patient should be better after the surgery, "[i]f that's the entire source of their pain." Defense counsel also asked, "If after this surgery, and at the present time she's saying that her condition is the same as before the surgery, would that indicate to you that perhaps her problem is not in her shoulder?" Dr. Bilkey testified, "That indicates to me either the problem that the surgeon operated on was not the cause of her ongoing symptoms or that she acquired some complication related to the surgery." [footnote omitted]

On August 9, 2009, Whitworth underwent a second cervical MRI for a clinical indication of neck pain.

On October 21, 2009, Whitworth testified by deposition. Asked what body part she injured on the subject injury date, Whitworth testified her "left shoulder and neck area." Whitworth explained that the store was in "inventory prep mode." She "had a recliner already stacked ... on a pallet, and the second recliner was to go on top of that box...." Whitworth had requested help two or three times, did not receive it, and figured she would do it herself. She "went back there and had the box tilted ... then continued to push it up, [and] the box came back at [her]." Defense counsel asked Whitworth how her *shoulder* felt. Her response is telling:

Q. Now, what's your status today, we're sitting here at this table, how does your shoulder feel?

A. I would like to stand up and stretch my neck a little, it's very sore, almost to the point of burning from here, at this very moment, from here down into here, all the way around my back.

Q. You're indicating up by your ear?

A. This area right here.

Q. Or your neck?

A. It's my neck.

...

Q. Now, you know that the medical doctors haven't found anything wrong with your neck, isn't that right.

A. According to the papers, yes.

Q. Did the shoulder surgery help any?

A. I'm not a physician, but in my opinion—I can't say that it did or didn't because I wouldn't know if they had not done it, I wouldn't know what to compare it to.

Q Okay.

A. However, I really don't see a lot of relief from it, no.

Defense counsel also questioned Whitworth about her medical treatment:

Q. Now, what about Dr. William Nash, what has he—what has he done for you?

A. He is an associate in Dr. Craig's office.

Q. Now, he requested an MRI of the neck and an EMG nerve conduction study of the left arm for the neck and it seems like just from looking at his notes that he ... evaluated you for your neck, is that your understanding?

A. Probably.

> Q. And Dr. Craig also ordered another cervical MRI for further evaluation of the neck, is that your understanding?
>
> A. I know that Dr. Craig ordered something, but as far as the terminology—I'm not familiar with that.
>
> Q. Okay. So Dr. Craig was also treating you for your neck.
>
> A. I don't know that treating me is a good word. Nothing has ever been [done]—they may have taken their pictures of my neck, but—
>
> On November 6, 2009, Dr. Moskal performed an IME at Big Lots' request. He asked Whitworth where her pain was immediately after the injury. She stated she had a lot of pain and that it was in her neck. Dr. Moskal reviewed medical records documenting Whitworth's complaints of neck pain, as well as the 2008 and 2009 cervical MRIs, which he concluded "have no relationship to vocation."

Slip Op. at 1-4.

The Supreme Court noted that, when the ALJ conducted a BRC followed by a formal hearing, the parties stipulated an alleged April 25, 2008, injury. Work-relatedness was preserved as a contested issue. Big Lots did not raise the failure to plead the neck injury on the Form 101 as an issue. At the hearing, Whitworth testified she still had a lot of pain and described the pain as starting at the upper part of her neck. She also testified the shoulder surgery did not change her pain level. The ALJ relied upon Dr. Warren Bilkey's impairment rating and Whitworth's credible description of her limitations in awarding permanent partial disability benefits enhanced by the three multiplier. The award and order section included the standard language including an award of medical benefits reasonably required for the cure and relief from the effects of the left shoulder injury. The Supreme Court also

noted the effects of the shoulder injury included Whitworth's cervical complaints when the ALJ decided the case.

In 2011, Whitworth filed a Motion to Reopen due to a change of condition. Upon seeing Dr. Doyle, she related a history of the subject work injury, that she had undergone left shoulder surgery which did not help, and that she was having worsening pain in her neck, shoulder, and arms. Dr. Doyle performed a C4-C6 anterior cervical discectomy and fusion. He opined Whitworth's work injury aroused a previously dormant non-disabling disease or condition. The ALJ entered the following findings:

> KRS 342.270(1) states in relevant part:
>
> > When the application is filed by the employee or during the pendency of that claim, he ... shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him.... Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.
>
> 15 [sic]. The Plaintiff ... began treating for the injury to her shoulder in June of 2008 ... and as early as July 2008, the notes from her treatment reference complaints of neck pain. The Plaintiffs Form 101 was filed in July of 2009 and referenced the left upper extremity.
>
> 15. The Plaintiff is not a physician and the evidence demonstrates early on that she voiced complaints regarding neck pain. It is understandable that Plaintiff intended that the left upper extremity encompass neck pain that she had clearly been experiencing for at least a year prior to the filing of the Form 101. It is certainly clear that she had communicated that pain to her treating physician. The ALJ finds that the term left upper extremity in this context is sufficient to encompass a cervical spine injury.

> 16. The Defendant has had access to the Plaintiffs medical treatment records and ... has not been prejudiced by any confusion ... in referencing the upper extremity.... The Plaintiff clearly gave notice of an injury as noted by the ALJ in the original Opinion and Award.
>
> 17. Finally, the Plaintiff is not bringing a new cause of action that is now waived because it was not brought along with the initial filing. This claim has been reopened because of an alleged worsening of the same injury and thus the reopening refers to the same cause of action ... and as such the Motion to Reopen was timely filed.

Slip Op. at 5.

The ALJ found Whitworth had a 25% impairment rating for the cervical spine and a previous 11% impairment rating for the shoulder. He found Whitworth is permanently totally disabled on reopening. Big Lots appealed and the Board vacated the ALJ's decision concluding that the ALJ initially deciding the claim determined Whitworth sustained only a left shoulder injury, and that determination is the law of the case. Consequently, the sole body part injured is Whitworth's left shoulder.

The Court of Appeals affirmed. In reversing this Board and the Court of Appeals, the Supreme Court held:

> The proper inquiry is whether ALJ's Gott's decision—if, in fact, he did determine that Whitworth sustained only a left shoulder injury—is *res judicata* or whether, as ALJ Weatherby concluded, Whitworth's injury encompassed her cervical complaints and her claim was properly reopened. "[R]es judicata ... precludes further litigation of issues ... decided on the merits in a final judgment.... KRS 342.125 grants some relief from ... the finality of judgments by permitting a reopening in instances of fraud, mistake, newly-discovered evidence, or a change of condition that causes a change of occupational disability." *Slone v. R & S Mining, Inc.,* 74 S.W.3d 259, 261 (Ky. 2002).

Whitworth contends that the Court of Appeals "missed the point," in concluding that ALJ Gott clearly identified her original injury as a left shoulder injury which could not be expanded on reopening to include the cervical spine. We agree. ALJ Gott did not determine that Whitworth had sustained only a left shoulder injury. Nor did he determine that the neck was not work-related. ALJ Gott determined that Whitworth had sustained her burden of proving a work-related injury. "[T]he term 'injury' refers to the traumatic event or series of events that causes a harmful change rather than to the harmful change, itself." *Coleman v. Emily Enterprises, Inc.,* 58 S.W.3d 459, 462 (Ky. 2001). "[KRS] Chapter 342 holds an employer liable for. all of the injurious consequences of a work-related injury that are not attributable to an independent, intervening cause." *Arnold v. Toyota Motor Mfg.,* 375 S.W.3d 56, 61 (Ky. 2012) (citation omitted).

Big Lots argues that *Slone v. Jason Coal*, 902 S.W.2d 820 (Ky. 1995) and KRS 342.270(1) [footnote omitted] preclude Whitworth from reopening based upon a cervical condition. We disagree. *Slone* is readily distinguishable on its facts. There, the claimant sought to reopen pursuant to KRS 342.125(1) based upon a mental condition. Although the condition was known when the claimant litigated his original claim, he failed to introduce any evidence about it. This Court held that "a motion to reopen pursuant to KRS 342.125 may not be based on a condition known to the claimant during the pendency of his original claim but which he did not present." *Id.* at 822. The holding in *Slone* was subsequently codified in KRS 342.270(1), which "requires all known causes of action to be joined to the claim or waived." *Ramsey v. Sayre Christian Village Nursing Home,* 239 S.W.3d 56, 59 (Ky. 2007). The purpose of the KRS 342.270(1) is to prevent piecemeal litigation.

Such is not the case here. Although Whitworth did not specifically list the neck on the Form 101, she filed the cervical MRI report as an attachment, and introduced medical evidence documenting her ongoing neck pain. Big Lots did not object.

In fact, Big Lots questioned Whitworth about her neck in her deposition and filed the IME report of Dr. Moskal who reviewed the medical records, as well as the cervical MRIs which he opined were not "vocationally related."

In *Kroger v. Jones,* 125 S.W.3d 241 (Ky. 2004), the defendant argued that KRS 342.270(1) barred a claim for a left arm injury which the claimant failed to plead on the Form 101; however, the attached medical history clearly referred to it, as did treatment notes which were introduced into evidence. The defendant's IME physician was aware of the medical records and addressed the left arm in his report. This Court concluded that the claimant's right to claim an injury to her left arm was not barred by KRS 342.270(1).

> In *Nucor Corp. v. General Electric Co.,* Ky., 812 S.W.2d 136, 145–46 (1991), the Court determined that CR 15.02 [footnote omitted] is a tool for deciding cases on their merits rather than on the basis of gamesmanship.... [I]f issues that are not raised in the pleadings are tried with the express or implied consent of the parties, they are treated as if they had been raised. A party's failure to object to the introduction of evidence on an unpleaded issue implies consent to the trial of the issue.... We are convinced that the principles that were expressed in *Nucor* apply equally to workers' compensation proceedings.

Id. at 246.

The case is similar to *Kuhlman Elec, Corp. v. Cunigan,* No.2014–SC–000189–WC, 2014 WL 7238612 (Ky. Dec. 18, 2014). There, the claimant filed a Form 101 for a leg injury; he attached a statement from his treating physician recommending a lumbar MRI. The medical evidence indicated a torn hamstring. The claimant testified that he had pain "right below my belt, my butt." The MRI was contested. ALJ Justice denied the MRI, because there was no evidence of radiculopathy and an EMG was normal. ALJ Justice concluded that the claimant had a healed hamstring

injury, awarded TTD benefits, dismissed the claim for PPD benefits and determined that the claimant was not entitled to an award of future medicals.

The claimant subsequently obtained the lumbar MRI which showed a herniated disc at L5–S1, and filed a motion to reopen. [footnote omitted] On reopening, the claim was assigned to ALJ Davis who determined that *res judicata* precluded the claimant from arguing that he had a work-related low back injury.

The claimant appealed. The Board held that the claimant had made a *prima facie* showing under KRS 342.125 on grounds of newly-discovered evidence and mistake, and reversed. The Court of Appeals affirmed the Board.

Citing *Messer v. Drees,* 382 S.W.2d 209 (Ky. 1964), this Court concluded that the claimant had presented sufficient evidence to reopen on ground of mistake [footnote omitted] and explained:

> If an expert witness or physician makes an erroneous diagnosis, which causes the claimant to not receive proper relief, there must be a mechanism for the claimant to be able to reopen his claim so he may receive redress.... It would be patently unfair ... to be unable to reopen ... because of a potential misdiagnosis.... The purpose of workers' compensation is to compensate a worker who was injured on the job....

Kuhlman, at 4.

As Judge Palmore observed in *Messer.*

> Time often tells more about medical cases than the greatest of experts are able to judge in advance.... [E]ven the permanence of a disability theretofore thought to be temporary 'is of itself in the nature of a change.' When subsequent events indicate that an award was substantially induced by a misconception as to the cause, nature or extent of

> disability at the time of the hearing, justice requires further inquiry. Whether it be called a 'mistake' or a 'change in conditions' is a matter of mere semantic taste. The important question is whether the man got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it.

Id. at 212–13 (citation omitted).

> *Res judicata* does not bar Whitworth's claim. Whether her physicians initially misconceived the cause of her complaints or whether she had a worsening of impairment due to a condition caused by the injury—a condition which perhaps became more apparent as it progressed—matters not. The "important question" remains the same. Did Whitworth get the relief to which the law entitles her?
>
> Unquestionably, at the time of ALJ Gott's decision, Whitworth's injury included her complaints of neck pain. Dr. Bilkey testified that Whitworth underwent surgical repair for impingement syndrome, and had significant residual shoulder and neck pain. Whitworth testified by deposition that she injured her neck and shoulder on April 25, 2008. At hearing, she testified that her pain starts at the upper part of her neck.
>
> "[T]he ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." *Miller v. E. Kentucky Beverage/Pepsico, Inc.,* 951 S.W.2d 329, 331 (Ky. 1997) (citation omitted). Given that ALJ Gott relied upon Dr. Bilkey's opinion and Whitworth's "credible testimony" in concluding that her injury was work-related, ALJ Weatherby did not err in concluding that Whitworth's left upper extremity injury' encompassed her cervical complaints. We reverse the Court of Appeals' May 23, 2014 Opinion and reinstate ALJ Weatherby's February 11, 2013 Opinion and Award on Reopening.

Slip Op. at 6-8

The facts in Whitworth are almost identical to the case *sub judice*. Consequently, the CALJ erred in overruling Leitner's Motion to Reopen.

We also conclude the CALJ erred in finding Courtney's February 19, 2021, report is insufficient "to make a *prima facie* case" because she is not a physician. Arguably, Courtney is not a physician as defined by the KRS 342.0011(32). However, the applicable regulations pertaining to the reopening of a claim do not require a physician's report be attached to the Motion to Reopen. 803 KAR 25:010 §6(5)(a) requires the following:

> A motion to reopen shall be accompanied by as many of the following items as may be applicable:
>
> 1. A current medical release Form 106 executed by the plaintiff;
>
> 2. An affidavit evidencing the grounds to support reopening;
>
> 3. A current medical report showing a change in disability established by objective medical findings;
>
> 4. A copy of the opinion and award, settlement, voluntary agreed order, or agreed resolution sought to be reopened;
>
> 5. An affidavit certifying that a previous motion to reopen has not been made by the moving party, or if one (1) has previously been made, the date on which the previous motion was filed; or
>
> 6. A designation of evidence from the original record specifically identifying the relevant items of proof that are to be considered as part of the record during reopening.

803 KAR 25:010 §6(5)(a)(3) only requires a current medical report showing a change in disability established by objective medical findings. It does not require a report from a physician. Thus, Courtney's report constituted the requisite current medical report. Although the report does not establish a change in disability, it does establish a potential mistake.

That being the case, the CALJ also erred in not sustaining the Motion to Amend the Motion to Reopen to include the report of Dr. Nazar as it further buttresses Courtney's opinions expressed in the February 19, 2021, report. Dr. Nazar's report was cumulative in effect. Notably, in responding to the Motion to Reopen and the Motion to Amend, Dreisbach did not contradict the opinions of Courtney and Dr. Nazar. In Stambaugh v. Cedar Creek Mining, Co., supra, the Court of Appeals provided the following instructions in resolving a Motion to Reopen:

> The party who seeks to change the Workmen's Compensation Board's decision in favor of his adversary on an application to reopen should be required to make a reasonable prima facie preliminary showing of the existence of a substantial possibility of the presence of one or more of the prescribed conditions that warrant a change in the Board's decision before his adversary is put to the additional expense of relitigation. The Board should formulate reasonable standards for the form and content of such a preliminary showing. Whether Stambaugh's showing is sufficient to cause a re-examination of the Board's previous decision and the taking of evidence we leave to the Board's reasonable discretion as it applies the policy decisions necessary to establish the standards required.

Id. at 682.

In Ratliff v. Harris Bros. Const. Co., 444 S.W.2d 127, 129 (Ky. 1969), the former Kentucky Court of Appeals noted:

> In this state of case the motion to reopen is supported by uncontroverted medical evidentiary material reflecting a change of condition. The Board must regard these uncontroverted allegations as true. *Blue Diamond Coal Co. v. Meade, Ky., 289 S.W.2d 503, 504.*

As the reports of Courtney and Dr. Nazar are uncontradicted, Leitner made a preliminary *prima facie* showing of a substantial possibility of mistake

pursuant to KRS 342.125(1) sufficient to warrant a change in ALJ Neal's decision. Consequently, the Motion to Reopen should have been sustained. We emphasize that in considering the Motion to Reopen, the ALJ is not tasked with determining whether the movant will prevail upon reopening. Rather, the ALJ is only tasked with determining whether the moving party has made a *prima facie* showing as defined by the applicable case law. That is the first step in the proceeding. Whether Leitner is successful after the motion is sustained is a different issue altogether. We express no opinion as to the outcome to be reached by the ALJ assigned to resolve whether mistake, as contemplated by the statute, is present.

Accordingly, for the reasons stated herein, the June 21, 2021, Order overruling Leitner's Motion to Reopen and the June 23, 2021, Order overruling Leitner's Petition for Reconsideration and Motion to Amend the Motion to Reopen are **REVERSED**. However, those portions of the Orders overruling the Motion to Reopen based on newly discovered evidence is **AFFIRMED**. This claim is **REMANDED** for entry of an Order sustaining Leitner's Motion to Reopen and Motion to Amend the Motion to Reopen. The CALJ shall assign the claim to an ALJ, for a determination of whether Leitner sustained a work-related cervical injury on February 6, 2017, and, if appropriate, an award of income and medical benefits.

ALVEY, CHAIRMAN, CONCURS.

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