Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 19, 2021

CLAIM NO. 201698428

FRANCISCO RODARTE PETITIONER

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

BLUELINX CORPORATION and
HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

BORDERS, Member.* Francisco Rodarte ("Rodarte") appeals from the July 1, 2021 Order on motion to reopen and the July 27, 2021 Order on Petition for

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* This opinion was finalized but not yet published at the time of Board Member Borders' death.

Reconsideration rendered by Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ"). The CALJ overruled Rodarte's Motion to Reopen upon finding Rodarte failed to make a *prima facie* showing justifying reopening. On appeal, Rodarte argues the CALJ erred in denying the request to set aside or amend a settlement agreement that failed to include language preserving a claim for a subsequent injury known to Rodarte at the time of the settlement. We affirm.

Rodarte filed his claim on March 11, 2019, alleging injuries to multiple body parts in a January 5, 2016 fall. The parties resolved the claim by settlement agreement approved by Hon. R. Roland Case, Administrative Law Judge ("ALJ Case") on October 7, 2019. The agreement listed the right knee and left ankle as the body parts affected with diagnoses of resolved left ankle sprain and right medial meniscal tear.

Rodarte filed his motion to reopen on June 8, 2021 on grounds of a mistake and newly discovered evidence. Rodarte stated he had an open and active claim for an August 13, 2018 shoulder injury at the time of the settlement. He also filed a Motion to Correct Error and Omission Nunc Pro Tunc of the Form 110 and/or Alternatively Motion to Amend Form 110. Rodarte identified the mistake as an omission in the Form 110 of a sentence excluding his claim for the second injury (Claim No. 2018-64352). Rodarte noted BlueLinx Corporation ("BlueLinx") continued to pay benefits subsequent to the approval of the settlement, and it paid for shoulder surgery on November 8, 2019. Temporary total disability ("TTD") benefits and other medical benefits were paid after both surgeries and TTD benefits were not terminated until August 2020. A Form 101 for the 2018 injury was filed on

December 4, 2020. Rodarte contended there was a clerical error by the parties in neglecting to exclude the pending claim concerning the 2018 injury. In the alternative, Rodarte moved to amend the Form 110 to include language excluding the 2018 claim. Pursuant to Kentucky Civil Rule 60.01, Rodarte contended this was clearly a clerical mistake in the final Order arising from oversight or omission and was correctable by the ALJ at any time on motion of any party.

On June 11, 2021, Rodarte filed a Motion to Void Form 110 for mutual mistake of fact.

The CALJ's findings relevant to this appeal are as follows *verbatim*:

> Plaintiff Francisco Rodarte filed a Form 101 alleging right knee and left ankle injuries from falling off a flatbed truck while working for Defendant BlueLinx on January 5, 2016. The parties settled the claim by a Form 110 Agreement as to Compensation that was approved on October 7, 2019.
>
> Rodarte filed a separate Form 101 on December 4, 2020. (2018-64352) That Application alleged a shoulder injury while working for BlueLinx on August 13, 2018. BlueLinx is denying that claim, in part, on grounds that Rodarte failed to join the 2018 injury claim to the 2016 injury claim before it settled, relying on KRS 342.270(1). A review of that claim on LMS shows that a Hearing was held on June 16, 2021, and is presently submitted for decision.
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> Eight days before that Hearing, Rodarte filed a motion to reopen this claim under KRS 342.125, specifically on grounds of "mistake" and "newly discovered evidence." He acknowledges on the Form MTR: "At the time of the settlement of this claim Plaintiff had an open and active claim from 08/13/2018."
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> Attached to the motion to reopen was "Motion to Correct Error and Omission Nunc Pro Tunc of Form 110 dated 10/07/2019 and/or alternatively motion to amend Form 101." The requested relief is "to correct the

omission in the Form 110 of a sentence excluding Mr. Rodarte's claim of August 13, 2018." In other words, absent joinder, Rodarte wants the previous settlement agreement amended to say it would have no impact on the resolution of his second claim.

Three days after the motion to reopen was filed Rodarte filed a "Motion to Void Form 110 for Mutual Mistake In Fact and Supplemental Authority to Original Nunc Pro Tunc Motion." The CALJ accepts that pleading as further argument for reopening on grounds of mistake rather than a prohibited stand-alone motion unaccompanied by an initiating document such as a motion to reopen. Beginning with the nunc pro tunc motion, the CALJ had to look that up; it is Latin for "now for then," or making an order effective as of a date in the past rather than on the date it is issued. Applied to this case, Rodarte wants the CALJ to issue an order to retroactively say that the settlement of the 2016 claim in 2019 had no effect on the separate 2018 injury claim pending between the same parties.

The CALJ finds no basis for this argument. Rodarte says, "It is clear there was no intent by either party to settle the 2018 claim" in the settlement of the 2016 injury. (pleading attached to MTR, p. 2). But that's not the point. BlueLinx's defense in the 2018 claim is that Rodarte failed to join that claim to the 2016 claim before the Form 110 was approved, and therefore the 2018 claim is barred. It is up to the ALJ in the 2018 claim to decide whether the joinder defense applies. Rodarte cites no authority to allow this CALJ to reopen a claim to add language to a settlement agreement in order to protect the viability of a separate claim.

Rodarte's alternative motion to amend the prior Form 110 is denied for these same reasons. Further, he cites CR 60.01, which is not applicable in this administrative proceeding.

Rodarte's subsequent pleading grounding his motion to reopen in mutual mistake is also without merit. The basis for this argument is the "Restatement of Contracts" and "Kentucky Contract Law." Interestingly, Rodarte does not claim any mistake on his part, but says "The Defendant was clearly mistaken" in

> not preserving his 2018 shoulder claim in the 2019 settlement agreement. The Defendant concedes no such thing, so there cannot be a mutual mistake. The fact that the Defendant continued to pay benefits under the 2018 shoulder claim is immaterial. Further, the Defendant had to weigh the consequences of terminating benefits if the joinder defense is unsuccessful.
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> While Rodarte did not argue "newly discovered evidence," he did check that box on the Form MTR. However, 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 2018 shoulder injury is not newly discovered evidence because Rodarte admits to its knowledge at the time he entered into the 2019 settlement agreement over the 2016 work injury.
>
> Finally, as BlueLinx notes, Rodarte does not seek reopening of the 2016 claim to modify the benefits he received from that settlement; he only seeks to change the effect of the closed 2016 claim on the pending 2018 claim. That is not a basis for reopening under KRS 342.125.
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> Rodarte has failed to make a prima facie case, and thus the motion to reopen is overruled.

Rodarte filed a Petition for Reconsideration making essentially the same arguments he raises on appeal. The CALJ provided *verbatim* as follows in denying Rodarte's Petition for Reconsideration:

> Plaintiff Rodarte has filed a "motion"/petition for reconsideration under KRS 342.281. He has not

identified a patent error in the Order of July 1, 2021, and so the petition is denied.

Rodarte continues to emphasize an alleged mutual mistake. There was none. The settlement agreement in this claim stands on its own. It contains no statement that the parties agree that the 2018 claim is preserved despite settlement of another pending injury claim. Rodarte has no evidence that such a statement was intended to be included in the agreement, but, in hindsight, was discovered to have been inadvertently omitted. There is the separate issue about the failure of a motion to join, but, as stated in the prior Order, any consequence of that is pending before the ALJ presently assigned to the 2018 claim.

As stated in the prior Order, the Defendant's payment of benefits in the 2018 claim after it might have denied them based on lack of joinder is immaterial. The Defendant's payment of benefits in the 2018 claim until the agreement in this claim was approved has no statutory relevance. KRS 342.270 does not exept from joinder any claims for which benefits are being paid. Nothing required the Defendant to assist with preserving Rodarte's 2018 claim while settling his 2016 claim. Rodarte's statement that, "Neither party intended to close the 2018 injury when the contract of settlement was completed on the 2016 claim," has no evidentiary support.

Rodarte's petition conflates two cases that are separate claims; for example, he says, "It is clear the Defendant was mistaken that this claim was still open and not subject to any limitations under the joinder statute." This claim (2016-98428) is still open in the sense that all future rights were preserved in the settlement, e.g., medical benefits and the right to reopen. Rodarte is mixing this claim with his 2018 claim, where the Defendant has apparently taken the position that no benefits are owed under it because Rodarte did not abide by the joinder rule of KRS 342.270.

The Defendant's payment of benefits in the 2018 claim, or failure to do so, has nothing to do with the finality of the settlement agreement in this claim that speaks solely to an injury on January 5, 2016. Rodarte says, "At no

> point was the 2018 claim even discussed in settlement negotiations" of this claim. It was Rodarte's decision to settle the 2016 claim before his 2018 claim was ready for negotiations. The two injuries involved separate body parts, the 2018 injury was not at MMI when the 2016 claim was settled, and so there is no reason for the 2016 settlement agreement to mention the 2018 claim, unless it was to say that the settlement would have no impact on the pending 2018 claim. The joinder rule is statutory, and in the absence of an express agreement of the parties to preserve the 2018 claim, the CALJ has no discretion to reopen this claim.

On appeal, Rodarte argues the CALJ erred in denying the request to set aside the settlement agreement. Rodarte argues the parties were mistaken as to a material fact in settlement of the 2016 claim. Rodarte alleges he was mistaken in not including joinder language in the settlement when it was completed. He asserts BlueLinx was also mistaken after the Form 110 was completed and approved. The Form 110 approved by ALJ Case on October 7, 2019 closed the 2016 claim. BlueLinx continued to pay TTD and medical benefits in the 2018 claim for over 11 months post-settlement until he reached maximum medical improvement. It is clear BlueLinx was mistaken that the 2018 claim was still open and not subject to any limitations under the joinder statute and believed it had a legal duty to make these payments. Rodarte argues the CALJ erred in denying the *nunc pro tunc* motion to amend the contract to express the intent of the parties.

We begin by noting Rodarte identifies no mistake regarding the settlement agreement as it applies to the 2016 injury claim. There is nothing to indicate a mistake as to the amount, duration, or scope of the 2016 compensation. His alleged mistake concerns only the 2018 injury claim. The joinder provision in KRS 342.270 possibly acts as a bar to the 2018 claim, an issue to be addressed by the

ALJ assigned to that case. The joinder provision has no effect on the 2016 claim. As such, there is no basis to reopen the 2016 injury claim.

Assuming *arguendo,* the joinder issue was properly before the ALJ in the 2016 claim. Rodarte filed no correspondence indicating the parties intended that the agreement contain language preserving the claim for the subsequent injury. To the contrary, he acknowledged, "At no point was the 2018 claim even discussed in settlement negotiations." If the parties never discussed the 2018 claim in the negotiations, there clearly was no meeting of the minds as to inclusion of language to preserve the 2018 claim in the settlement agreement for the 2016 claim. There is simply no evidence that prior to the settlement the parties agreed to preserve the 2018 injury claim. Additionally, we note payment of benefits in the 2018 claim after the settlement has no bearing on the 2016 claim.

The facts in the case *sub judice* are indistinguishable from Ridge v. VMV Enterprises, Inc., 114 S.W.3d 845 (Ky. 2003). There, the claimant, Ridge, sustained a work-related knee injury in 1998 and a work-related back injury in 1999. Ridge filed an application for benefits with respect to his knee injury on April 19, 2000. In August 2000, the parties agreed to settle the claim and the ALJ approved the settlement. The agreement made no reference to the back injury. On February 26, 2001, Ridge filed an application with respect to the back injury. The employer denied the claim and filed a special answer asserting the claim was barred by KRS 342.270(1). The ALJ agreed and dismissed the claim. In affirming the ALJ, the Supreme Court stated as follows:

> The language of KRS 342.270(1) is clear, unequivocal, and mandatory, both with respect to a worker's

> obligation to join "all causes of action" against the employer during the pendency of a claim and with respect to the penalty for failing to do so. Under KRS 342.270(1), it is immaterial that the claimant's knee and back injuries arose at different times, involved separate claims, and were treated by the parties as separate matters. Once he filed a claim for the knee injury, KRS 342.270(1) required him to file and join the claim for the back injury before the knee injury claim was settled.

The CALJ properly determined reopening and/or the various motions filed by Rodarte were an improper attempt to use the 2016 injury claim to cure any perceived failure regarding the 2018 claim, and that any issues regarding joinder were properly before the ALJ in the 2018 claim. We conclude the CALJ correctly determined the proper forum for the litigation of the joinder question is in the 2018 injury claim.

Accordingly, the July 1, 2021 Order on motion to reopen and the July 27, 2021 Order on Petition for Reconsideration rendered by Hon. Douglas W. Gott, Chief Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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