

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 9, 2021

CLAIM NO. 201473573

LAKSHMI NARAYAN HOSPITALITY
GROUP LOUISVILLE

PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE**

MARIA JIMENEZ AND
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
REVERSING & REMANDING**

* * * * *

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

BORDERS, Member. Lakshmi Narayan Hospitality Group Louisville (“Holiday Inn”) appeals from the December 10, 2020 Opinion and Order and the January 6, 2021 Order on Petition for Reconsideration rendered by Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”). For reasons to be set forth herein, we reverse and remand to dismiss this reopening as barred by *res judicata*.

Maria Jimenez (“Jimenez”) was employed by Holiday Inn as a housekeeper on June 24, 2014, when she slipped while cleaning a bathroom floor. She alleged injuries to her neck, head, left shoulder, and back. In a May 1, 2017 Opinion and Order rendered by Hon. Douglass Gott, Chief Administrative Law Judge, (“CALJ”), Jimenez was awarded temporary total disability (“TTD”) benefits. Her claim for permanent partial disability (“PPD”) benefits and future medical benefits were dismissed. Jimenez did not appeal that determination.

On July 25, 2019, Jimenez filed a motion to reopen asserting a change of disability attributable to the 2014 work injury and seeking an award of PPD benefits. Holiday Inn objected citing *res judicata* as a bar to reopening. The CALJ sustained the Motion to Reopen to the extent Jimenez had presented a *prima facie* case for reopening, and the case was assigned to the ALJ for further proceedings. However, the CALJ had reservations regarding reopening this claim as indicated in his Order sustaining the motion, set out *verbatim*:

Plaintiff Maria Jimenez alleged various injuries from a fall she sustained while working at the Defendant’s hotel as a housekeeper on June 6, 2014. Her claim went to a Hearing on July 25, 2016, at which time the CALJ noted:

“The issue going forward is plaintiff’s claim for temporary total disability benefits. There’s no evidence of or claim for permanency.” (HT, p. 3)

In an Opinion issued on May 1, 2017, the CALJ awarded a period of TTD benefits, and, with neither being sought, dismissed the claims for permanent income and future medical benefits.

Currently pending is Jimenez’s motion to reopen her claim for a change of disability under KRS 342.125(1)(d). She claims a permanent injury to her

cervical spine and the onset of depression from the work injury. Jimenez supported her motion with the report of an evaluator, Dr. Robert Byrd, who rated Jimenez's cervical spine with 7% impairment, and (arguably) diagnosed work related depression. The Defendant objects to reopening, arguing that the prior findings of no permanency are res judicata and preclude reopening.

The CALJ recognizes the Defendant's res judicata argument, but, mindful of Newberg v. Cash, 854 S.W.2d 791 (Ky. 1993), will allow the parties to argue before an ALJ whether or not Plaintiff can seek benefits for a permanent injury on reopening after having claims for permanent income and future medical benefits dismissed in the original action. Plaintiff is entitled to pursue her claim of the subsequent development of work related depression, and that is further reason to permit her accompanying attempt to prove she can maintain a claim for worsening of her physical injuries.

Plaintiff's motion to reopen, as to a prima facie case to proceed with assignment to an administrative law judge for decision on the merits, is sustained.

(As an incidental matter, the CALJ recognizes an error in his 2017 Opinion. The last paragraph of page one should read "...evidence to support the need for future medical benefits..." instead of "...evidence to support the need for permanent income benefits..."

Jimenez testified by deposition on October 28, 2019, and at the hearing held October 12, 2020. While cleaning a bathroom on June 24, 2014, Jimenez slipped and fell, striking her head and losing consciousness. Jimenez has not worked since her injury in 2014. She testified her pain has worsened since 2017. She recalled that she fell and injured her neck across her shoulders and had pain down her left arm. Jimenez denied any accidents following the CALJ's 2017 decision. Jimenez testified she has significant difficulty with her activities of daily living. She stated her sons assist her by cooking and performing her shopping. She

continues to have pain from her waist up her back. Dusting causes cramps in her arms. She cannot comb her hair and has difficulty lifting anything.

Jimenez presented to Family Health Centers on December 20, 2017, with complaints of neck pain and headaches. She reported it hurt to turn her head since a fall at work three years ago. Jimenez reported numbness in her fingertips at times. Jimenez was diagnosed with cervicalgia. On June 18, 2019, Jimenez was referred to Norton Leatherman Spine in October 2018 for cervical stenosis. Jimenez presented on July 18, 2019 with a lump on her right arm, and Dr. Umama Sadia found she had a rupture of the proximal bicipital tendon.

Jimenez presented at Norton Leatherman Spine on April 24, 2018 for an evaluation of neck pain. Jimenez gave a history of a sudden onset of neck pain after a fall in 2014. Her pain radiated into her shoulders with numbness in the left hand and subjective weakness in both hands. On examination, Jimenez had limited range of motion of the cervical spine secondary to pain and stiffness. X-rays revealed mild cervical degenerative changes at C5-6. Jimenez was diagnosed with cervical degenerative disc disease and possible myelopathy. A May 17, 2018 cervical MRI revealed abnormally high grade acquired canal stenosis at C3-4, superimposed on the congenital condition. The acquired stenosis was noted to be due to a combination of chronic bulging disc and facet joint arthritis with an age indeterminate posterior midline disc protrusion compressing the cord to a further degree; and additional multilevel acquired superimposed on congenital canal stenosis involving the neural foramina at C4-5, left neural foramen at C5-6 and C6-7. Jimenez was diagnosed with cervicalgia and cervical spinal stenosis. She returned on January 29, 2020 for

cervical and arm pain. She reported having issues with falls, walking, and fine motor skills. The note indicates her symptoms had drastically changed over the past two years. Her diagnosis was cervical stenosis, cervical myelopathy, and cervical radiculopathy.

Jimenez presented to Norton Orthopaedic Institute on November 21, 2019 for bilateral shoulder pain of six years duration. She reported a fall at work with resulting persistent pain. Dr. Chad Smith diagnosed left shoulder pain and cervical radiculopathy.

Dr. Michael Best performed an evaluation on August 10, 2015 and on November 25, 2019. Upon performing the 2015 evaluation, Dr. Best diagnosed post-concussive headache, resolved, musculoligamentous neck pain, and musculoligamentous left shoulder pain. He stated Jimenez had no cervical impairment and did not require additional diagnostic testing or prescription medication. He concluded she had no permanent injury as a result of the work incident.

After conducting his 2019 evaluation, Dr. Best concluded there had been no worsening of her condition attributable to the long-term effects of the 2014 injury. Dr. Best noted a second MRI revealed degenerative disc disease, which was normal for her age. There was no evidence of disc herniation, no nerve root impingement, and no significant neuroforaminal or canal stenosis. He noted that she was not a surgical candidate and requires no further treatment. Dr. Best found the care and treatment at Norton Leatherman Spine was due to pre-existing degenerative disc disease of the cervical spine, unrelated to the June 24, 2014 work incident. He

found Jimenez requires no restrictions to her work activities or activities of daily living. Dr. Best stated the only new finding is the bicep rupture of the right arm that is unrelated to the work injury. He observed Jimenez had clearly been able to perform normal activities of daily living to the extent it caused this new injury.

Dr. Gregory Nazar evaluated Jimenez on February 11, 2020. Dr. Nazar diagnosed chronic cervical strain radiating into the left shoulder and intermittently into the left arm with associated non-verifiable radicular pain, numbness, and tingling with muscle guarding, secondary to the work accident in June, 2014, without pre-existing impairment related to her cervical spine; biceps tendon rupture, non-traumatic, right arm; and cervical stenosis C3-4 based on recent MRI imaging and being considered for a prophylactic C3-4 decompressive surgery (non-work-related). He stated Jimenez has a chronic injury, sustained in June 2014, which has prevented her from going back to work. Her pain prevents her from doing the twisting, bending, pushing, and pulling activities of a housekeeper working in a hotel. Dr. Nazar assigned restrictions of no lifting, carrying, pushing, or pulling greater than 25 pounds, avoiding repetitive movements with the neck, and no repetitive neck extension activities. Dr. Nazar assigned a 7% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, (“AMA Guides”). Dr. Nazar apportioned 50% to pre-existing conditions and attributed 50% to the work injury. He assessed a 4% impairment rating for the work injury and determined Jimenez had reached maximum medical improvement (“MMI”) in June of 2015. Dr. Nazar opined Jimenez needs no further treatment neck treatment, and her upcoming surgery for

C3-4 stenosis would be unrelated to the work injury of June 2014. Thus, Dr. Nazar did not consider the surgery in his impairment rating or assessment. During his deposition, Dr. Nazar testified he found the impairment rating had not changed since May 1, 2017. Dr. Nazar opined her neck pain is not caused by stenosis. He noted stenosis causes spinal cord compression and Jimenez has never been diagnosed with that condition.

After considering the evidence, the ALJ determined Jimenez had proven a worsening of her condition to the extent she was awarded PPD benefits and future medical treatment for her cervical spine injuries.

On December 20, 2020, the ALJ made the following findings regarding this appeal:

Res Judicata/Objection to Reopening/Joinder

9. Chief ALJ Gott awarded temporary total disability benefits in an opinion issued on May 1, 2017, and noted that the Plaintiff presented no evidence to support an award of permanent partial disability benefits or medical expenses and therefore dismissed claims for each.

10. The Defendant Employer has argued that the failure of Judge Gott to award benefits based upon a finding of permanent injury, operates as res judicata to bar a subsequent claim for a worsening of condition. As Judge Gott noted in the Order on reopening however the Supreme Court of Kentucky has recognized that KRS 342.125 may operate to provide relief from the principles of res judicata. *See Jeep Trucking, Inc. v. Howard* (Ky. 1995) 891 S.W.2d 78.

11. The Plaintiff has argued that the statute contemplates a scenario such as this one when the passing of time allows for a greater understanding of the Plaintiff's condition. The Plaintiff cited *Messer v. Drees*

382 S.W.2d 209 (Ky. 1964), for the proposition that a misconception regarding the nature, extent, or cause of an injury may be grounds for reopening per the statute.

12. The ALJ finds that KRS 342.125 renders the doctrine of *res judicata* inapplicable in this instance. The ALJ finds that the same principle applies to the requirement for compulsory joinder and that as such this matter was properly reopened.

Holiday Inn filed a Petition for Reconsideration seeking additional findings. Additional findings were made, but the Petition was otherwise denied. On appeal, Holiday Inn argues the ALJ erred in finding Jimenez's reopening is not barred by the doctrine of *res judicata* and in finding she met her burden of proving a change of disability. It also argues the ALJ failed to correct the errors raised in the Petition for Reconsideration.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

KRS 342.125 provides, in pertinent part, as follows:

- (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:

- (a) Fraud;
 - (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;
 - (c) Mistake; and
 - (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.
- (2) No claim which has been previously dismissed or denied on the merits shall be reopened except upon the grounds set forth in this section.

We find the express and unambiguous language of KRS 342.125(2) controls. Jimenez's original claim was previously dismissed on the merits as the ALJ found no evidence of a permanent injury. In addition, the ALJ considered the issue of entitlement to future medicals pursuant to FEI Installations v. Williams 214 S.W.3d 313 (Ky. 2007) and determined an award of future medicals were not appropriate. Therefore the award was only for a limited period of TTD only and no permanent benefits of any type were awarded. The award was for a specific closed period of time. Therefore, this claim is not subject to a reopening based upon a "Change of disability as shown by objective medical evidence of worsening . . . of impairment due to a condition caused by the injury since the date of the award or order."

We find Jimenez's arguments are flawed. Considering the ALJ's determination as to permanency in the May 17, 2017 Opinion and Order dismissing Jimenez's claim, the fact that more recent medical evidence may support a

conclusion that the her neck condition has deteriorated since that time, does not constitute sufficient grounds for reopening. Neither is the fact her condition allegedly has become “medically viable” or that a physician is now apparently willing to provide favorable testimony regarding permanency.

In 2017, the injuries to Jimenez’s neck as alleged in the original application for benefits were determined by the CALJ to not have caused a permanent condition. Rather, the CALJ held Jimenez’s injuries and any residuals were only temporary. The CALJ’s original decision was supported by substantial evidence. That determination was not appealed. Accordingly, as argued by Holiday Inn, the CALJ’s decision, with regard to permanency of any cervical condition, now long since final, is subject to the doctrine of *res judicata*.

In this instance, we treat the doctrine of *res judicata* as a legal concept involving issue preclusion. Except as otherwise authorized under KRS 342.125, when an issue is fully and extensively litigated and a decision is reached upon the merits by the ALJ, and not challenged via an appeal, the issue becomes *res judicata* and law of the case. E.F. Prichard Co. v. Heidelberg Brewing Co., 314 Ky. 100, 234 S.W.2d 486 (1950); Stewart v. Sizemore, Ky., 332 S.W.2d 281 (1960). In order for *res judicata* to be applicable, there must be identity of the parties, identity of the facts, and identity of the issues leading to a final decision on the merits. BTC Leasing, Inc. v. Martin, Ky. App., 685 S.W.2d 191 (1984). That is exactly what we face here. As a matter of law, therefore, relitigation of the underlying issue of permanency under the auspices of KRS 342.125 is precluded.

We also find no merit in Jimenez's argument that she is entitled to reopen on grounds of mistake. Jimenez points to the well-worn passage from the landmark decision by the Kentucky Supreme Court in Messer v. Drees, 382 S.W.2d 209 (Ky. 1964), wherein the Court stated as follows:

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.

Messer, supra, at 212-213.

However, unlike the instant claim, Messer, supra, involved a reopening by the claimant to submit psychiatric testimony a year after the "old Board" had rendered an award of permanent partial disability benefits. The "old Board," and the circuit court on review, took the position that the motion to reopen was a belated effort to develop evidence that could and should have been produced prior to the original submission of the case for decision in June 1961. Based on the nature of the evidence submitted at the time of reopening by the claimant, however,

the Kentucky Supreme Court disagreed, stating with regard to the timing of the presentation of the psychological component of the claimant's case as follows:

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.

Messer, supra, at 212.

Commenting on its prior holding in Messer, supra, the Supreme Court later explained in Reynolds v. Justice Coal Co., 425 S.W.2d 750, 751 (Ky. 1968), "It was held in Messer, supra, that a reopening is justified when events subsequent to the hearing on which an award was made reveal that it was substantially induced by a misconception as to the cause, nature or extent of disability." Again in Young v. Harris, 467 S.W.2d 588 (Ky. 1971), the Court reiterated that it is the accumulation of information from "subsequent events" that may allow for reopening, and elaborated on the doctrine of finality as follows:

Dealing first with the substantive question before us we have held several times that the Board has wide discretion in determining whether an award shall be reopened. Clear Fork Coal Co. v. Gaylor, Ky., 286 S.W.2d 519. However, it had always been the burden of the party moving for reopening to establish either a clear mistake by the Board or a change of condition. W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453. We have also recognized the fact that an award may be reopened where subsequent events indicate that the award was substantially induced by a misconception as to the cause, nature or extent of disability at the time of the hearing, and justice requires its reexamination. Messer v. Drees, Ky., 382 S.W.2d 209.

These principles are all sound; however, each case must ultimately pass the test of judicial review based on its facts and here we can find nothing in the

record that convinces us in any way that the Board's original opinion would have been any different had Dr. Meyers' evidence been before it at the time it was rendered. We find nothing in Dr. Meyers' testimony that indicates there has been a change in claimant's condition nor is it in any way so persuasive as to convince us that the Board made a mistake in its original award. The controversy actually before the Board in the original award was the percentage of disability. The testimony of each doctor was considered on the subject and a figure arrived at. To permit a party under this set of facts to bring in another doctor within two months after the mandate is issued from this court stating only that the award is wrong in the percentage arrived at would give a party the right to a complete second judicial proceeding merely because the result of the first is not to his liking. If this be permitted there could never be an end to litigation.

Young v. Harris, at 589-90.

Later, in Slone v. R & S Mining, Inc., 74 S.W.3d 259 (Ky. 2002), a case that involved an attempt to reopen under the mistake provision of KRS 342.125, the Supreme Court further expounded, "The application of these principles to final workers' compensation decisions is grounded in the fact that because there is an extensive procedure for taking appeals, a final decision should not be disturbed absent fraud, mistake, or other very persuasive reason that would warrant reopening." The Court went on to offer the following caution, pertinent to the appeal now before us: "As we explained in Messer v. Drees, the purpose of the 'mistake' provision is not to give the losing party an opportunity to 'bring up reinforcements' and relitigate the claim but rather to correct a decision that was the product of a misconception concerning the worker's actual condition. Id. at 213." Slone, *supra*, at 262.

This is precisely the opportunity to which Jimenez now claims entitlement. Having failed to successfully prosecute her original claim before the ALJ, she now seeks to introduce additional evidence verifying the permanency of her cervical spine condition, thereby relitigating her claim. To allow reopening under such circumstances would open the floodgates to subsequent investigations by the losing party and undermine the doctrine of finality that is fundamental to an orderly system of administrative justice. Nothing within the prior record or Jimenez's motion to reopen convinces us the CALJ's original determination as to permanency was substantially induced by a misconception. The evidence pertaining to permanency did not exist and the CALJ, as fact-finder, based his dismissal on substantial evidence of record. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). That finding is now *res judicata*. Hence, we find no error.

Accordingly, the December 19, 2020 Opinion and Order and the January 6, 2021 Order on Petition for Reconsideration rendered by the Hon. Jonathan Weatherby, Administrative Law Judge are **REVERSED**. This matter is **REMANDED** to the ALJ for entry of an opinion overruling the motion to reopen as barred by the doctrine of *res judicata*.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON E SHANE BRANHAM
2452 SIR BARTON WAY, STE 101
LEXINGTON, KY 40509

COUNSEL FOR RESPONDENT:

LMS

HON PHILLIPE RICH
1001 TREVILIAN WAY
LOUISVILLE, KY 40213

ADMINISTRATIVE LAW JUDGE:

LMS

HON JONATHAN R WEATHERBY
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601