

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 28, 2021

CLAIM NO. 202001063

VINCENT ABATE

PETITIONER

VS.

APPEAL FROM HON. PETER J. NAAKE,
ADMINISTRATIVE LAW JUDGE

W.W. GRAINGER, INC. AND
PETER J. NAAKE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

BORDERS, Member. Vincent Abate (“Abate”) appeals from the January 27, 2021 Opinion and Order and the February 26, 2021 Order denying his Petition for Reconsideration in Claim No. 2020-01063, rendered by Hon. Peter J. Naake, Administrative Law Judge (“ALJ”). The ALJ determined Abate had previously prosecuted a workers’ compensation claim against W.W. Grainger, Inc.

(“Grainger”) for benefits resulting from an October 15, 2018 left shoulder injury, which was ultimately settled. The ALJ determined Claim No. 2020-01063 was barred by the settlement agreement previously entered into in Claim No. 2019-96474, and due to the doctrine of *res judicata*. For reasons to be set forth herein, we affirm.

Abate testified in Claim No. 2019-96474 on October 21, 2019. Abate injured his right shoulder when he pulled a pin on a tractor-trailer on October 15, 2018. The pin was jammed and he had to pull on it approximately fifteen times before he succeeded. He felt a pop in his right shoulder and his arm “was on fire.” Abate testified he performed all aspects of his job with his left hand before he underwent right shoulder surgery. His left shoulder pain progressed from October 2018 to January 2019. Abate’s left shoulder was symptomatic while his right shoulder was recovering. He had sharp pains and weakness in the left shoulder. He received physical therapy for both shoulders and injections in his left shoulder. The injections were not very helpful but eased the pain for seven to ten days. Abate wanted a second MRI of the left shoulder because the first one was not of good quality.

Abate testified by deposition in the present claim on October 23, 2020. He returned to work in November 2018 after his right shoulder injury. He began experiencing symptoms in his left shoulder in November 2018 and into January 2019 while he was avoiding use of his right arm. Abate believed the left shoulder complaints were related to the right shoulder injury. Abate acknowledged Dr. Ty Richardson first evaluated the left shoulder on January 22, 2019. Dr. Richardson administered an injection in the left shoulder. Before filing Claim No. 2019-96474,

Abate saw Dr. Richardson on March 11, 2019 for a re-check of his shoulders. Abate acknowledged he was informed by Dr. Richardson at that time the left shoulder condition was work-related. Abate attributed his left shoulder injury to the work he performed from the first week of November 2018 through January 2019 while he worked primarily with his left arm. His doctor advised him he had tendinitis. Abate had physical therapy for both shoulders and received injections in the left shoulder. Dr. Richardson referred Abate for an MRI in April 2019, which revealed left shoulder impingement syndrome and left AC joint osteoarthritis. Abate later saw Dr. Mark G. Smith in October 2019 for a second opinion regarding bilateral shoulder complaints. Abate had a second MRI on his left shoulder and underwent surgery on the left shoulder by Dr. Smith on January 23, 2020.

Abate admitted the language in the settlement agreement in Claim No. 2019-96474 provided for settlement of bilateral shoulder injuries. He acknowledged he waived his right to future medical treatment for his shoulders. Abate stated he understood at the time of the settlement the diagnosis for his left shoulder was impingement or tendinitis based on the first MRI of the left shoulder. Abate did not believe he would have future left shoulder problems. Abate stated Dr. Richardson did not inform him that he would need surgery on his left shoulder. Abate last worked for Grainger on January 18, 2019.

Dr. Smith prepared a July 29, 2020 report that was introduced as proof in Claim No. 2019-96474, stating Abate suffered an injury to his right shoulder on October 15, 2018. Dr. Richardson performed surgery in February 2019. Dr. Smith stated Abate's left shoulder gradually became problematic while working one-handed

duty during recovery from the right shoulder surgery. The pain did not respond adequately to injections, time, or rehabilitation. Surgery on the left shoulder was performed on January 23, 2020. Although Abate did not have a discrete episode of injury to the left shoulder, Dr. Smith felt he had increased pain in the left shoulder over a period of time while he was treated for his right shoulder. Dr. Smith stated that although Abate's left shoulder injury may not be caused directly by work activities, it was aggravated by them.

Dr. Kaveh Sajadi evaluated Abate on September 6, 2019. Dr. Sajadi received a history of a right shoulder injury on October 15, 2018 and subsequently developed left shoulder problems performing his work using his left arm to protect his right shoulder. Abate reported feeling pain like a knife stabbing him in his left shoulder. He reported having four or five injections in the left shoulder that provided relief for up to ten days. Dr. Sajadi noted an April 17, 2019 MRI of the left shoulder showed mild AC arthropathy with cystic changes in the distal clavicle, no significant partial thickness rotator cuff tear, and no full thickness rotator cuff tear. There was mild degenerative signal at the superior labrum. Dr. Sajadi noted some sequences were slightly off axis so interpretation was slightly limited. Dr. Sajadi felt the left shoulder complaints are secondary to overuse and compensation due to the right shoulder injury. Dr. Sajadi diagnosed a left shoulder strain. Dr. Sajadi did not believe Abate needed further treatment for the left shoulder.

Dr. Richardson saw Abate on October 14, 2019 for a recheck of his shoulders. His report was introduced in Claim No. 2019-96474. Dr. Richardson noted Abate was nine months post-surgery of the right shoulder. Abate was still

having significant pain in his left shoulder. Dr. Richardson noted it had been four months since the last left shoulder injection. Abate reported difficulty sleeping because of pain in both shoulders. Dr. Richardson diagnosed left shoulder impingement syndrome, left chronic labral tear, and right shoulder adhesive capsulitis-postoperative. Dr. Richardson stated the left shoulder became more painful as Abate relied more and more on his left upper extremity. Dr. Richardson noted Abate was considering surgical care for the left shoulder with his personal insurance.

The ALJ reviewed and considered the settlement agreement in Claim No. 2019-96474, which was approved by Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ Weatherby”) on November 29, 2019. The nature and description of injury on page one stated, “bilateral shoulders by pushing or pulling while working for Grainger”. Mr. Abate received a lump sum settlement of \$104,900.00 and waived his right to past/future medical benefits, vocational rehabilitation, and the right to reopen for his bilateral shoulder conditions.

The ALJ also set forth a procedural history of this case as follows: The plaintiff filed this claim alleging cumulative trauma to his left shoulder alleging an injury date of January 18, 2019 on August 5, 2020. The defendant filed a Special Answer and a Motion to Dismiss the claim. The Plaintiff filed a response and the defendant then filed a reply. The Administrative Law Judge passed the Motion to Dismiss to the Benefit Review Conference (“BRC”). The Defendant filed a Petition for Reconsideration, which was overruled.

The defendant then filed a renewed Motion to Dismiss, and a BRC was held on December 1, 2020. At the BRC, the claim was bifurcated on the threshold issues of whether the Plaintiff's left shoulder cumulative trauma injury claim is barred by the 2019 settlement, or if the claim is barred by KRS 342.270. The defendant's two Motions to Dismiss were considered its initial brief. The Plaintiff filed a brief, and finally, the defendant filed a response.

After considering the above evidence, the ALJ made the following Findings of Fact and Conclusions of Law relevant to this appeal, which are set forth, *verbatim*:

An agreement to settle a workers' compensation claim is a contract between the parties. There are strong public policy reasons favoring the settlement of workers' compensation claims. KRS 342.265(1) is to be interpreted as promoting "the prompt disposition of workers' compensation claims with a minimum of expense by permitting parties to agree to settle their dispute." *Hudson v. Cave Hill Cemetery*, 331 S.W.3d 267, 271 (Ky. 2011). Once approved, an agreement to settle a claim is binding on the parties and may not be reopened under KRS 342.125 if precluded by the underlying agreement. *Whittaker v. Pollard*, 25 S.W.3d 466, 469 (Ky. 2000).

Questions regarding the construction or interpretation of a contract are legal in nature as are questions regarding the existence of ambiguity in a contract. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440 (Ky. 2005). If a contract is ambiguous and could be interpreted reasonably in several different ways, the contract may be interpreted by a court, and should be interpreted to discern the parties' intent from the entire document. If the agreement is ambiguous, the court may also consider relevant extrinsic evidence such as the situation of the parties, the purpose of the agreement and the circumstances under which it was executed. *Frear v. P.T.A. Industries, Inc.*, 103 S.W. 3d 99, 107 (Ky.

2003).

In this case the Form 110 approved in claim number 2019-96474, is not ambiguous. In it, the plaintiff clearly waived his rights to reopen the claim under KRS 342.125, and waived the right to future medical treatment for the plaintiff's injuries for valuable consideration. *Huff Contracting v. Sark*, Ky. App., 12 S.W.3d 704 (2000). The Administrative Law Judge is sympathetic to the fact that Mr. Abate required medical treatment for his shoulders subsequent to the settlement which he perhaps did not anticipate. However, that is the nature of a settlement and a settlement may not be rescinded on the grounds of one party's mistake. Further, the settlement agreement itself stated that the plaintiff understood he may need more treatment for his shoulders and was willing to take that risk in exchange for the monetary settlement.

The plaintiff's present claim is the same as the claim he settled in 2019. There is no dispute that the plaintiff did not work for Grainger after November 29, 2019 and was not exposed to cumulative trauma after that date which may have given rise to a new claim. Instead, the plaintiff claims that he was never advised of a cumulative trauma injury to his left shoulder until he was told by Dr. Mark Smith on July 29, 2020 that his left shoulder had been injured by cumulative trauma. This assertion is contradicted by the report of Dr. Sajadi dated September 6, 2019, which states that Mr. Abate's left shoulder injury was caused by overuse at work, due to compensation for the right shoulder injury. The record of Dr. Ty Richardson's appointment on October 22, 2019 is less clear but indicates that the plaintiff's left shoulder has become more painful as Mr. Abate relied more and more upon his left shoulder. It is abundantly clear from Mr. Abate's own testimony that he was aware during the pendency of his previous case that his left shoulder had been injured by overuse at work because he had to use it to compensate for his right arm injury. Overuse of the shoulder is another way of stating cumulative trauma. The plaintiff's new claim herein is the same one that he brought in 2019 for shoulder injuries which originated with the right shoulder injury. KRS 342.270 (1) states:

“...When the application is filed by the employee or during the pendency of that claim, he or she shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him or her. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.”

In this case the plaintiff brought and litigated a claim for left and right shoulder injuries and received a settlement, in the process of which he dismissed those claims and the opportunity to reopen those claims. The Administrative law Judge finds that the plaintiff was aware of a claim for cumulative trauma to his left shoulder due to work at Grainger in September and October, 2019. The Administrative Law Judge finds that the claim for cumulative trauma injury to his left shoulder which is the subject of Claim No. 2020-01063 was settled in the November 29, 2019 Settlement Agreement. The ALJ further finds that the agreement waived the plaintiff's right to reopen and to any further medical treatment under the workers' compensation claim against the defendant, Grainger, for both shoulders. Therefore, this claim shall be dismissed because it is barred by the settlement in Claim No. 2019-96474.

As the claimant in a workers' compensation proceeding, Abate had the burden of proving each of the essential elements of his case. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Compelling evidence” is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App.

1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Abate argues the ALJ erred in dismissing his claim for a cumulative trauma injury to his left shoulder. Abate argues the uncontroverted medical evidence

shows he sustained a cumulative trauma injury as a result of working one-handed duty for three months. Specifically, Abate argues the ALJ in dismissing this claim noted his left shoulder symptoms were documented in connection with his 2018 injury claim: that two physicians attributed the left shoulders symptoms to “overuse” or “overcompensation” and concluded the 2018 claim was the same as the instant claim. Abate argues this is an incorrect inference as the two claims, No. 2020-01063 and No. 2019-96474, are not the same. Abate further argues while it is obvious he demonstrated left shoulder symptoms due to “overuse”, such an opinion is not tantamount to a medical opinion that he sustained a work-related cumulative trauma injury. Abate argues that since no physician opined whether he suffered a cumulative trauma injury as a result of the three months of one-handed work, he must prevail as an “overcompensation” or “overuse” injury, are not legally synonymous with a cumulative trauma injury. Abate attempts to distinguish between suffering an “overuse /overcompensation” injury, which was part of the 2018 injury claim, and suffering a cumulative trauma injury which he argues represents a separate and distinct injury caused by cumulative trauma and not “overuse”. We disagree and affirm.

On October 15, 2018, Abate suffered a work-related traumatic injury to his right and left arm and filed a Form 101 alleging that on October 5, 2018, “while pulling fifth wheel pin, Plaintiff injured right shoulder. Subsequently, injured left shoulder while favoring right shoulder”.

On November 26, 2019, ALJ Weatherby approved a Form 110. Under brief description of occurrence resulting in injury, the agreement states,

“bilateral shoulders by pushing or pulling while working for Grainger”. The parties agreed to settle for a lump sum of \$104,900.00 as a full and final settlement of Abate’s bilateral shoulder injury claims.

On August 5, 2020, Abate filed a second Form 101 alleging he suffered a cumulative trauma injury to his left shoulder over a three month period when he was working one-handed as a result of his prior right shoulder injury. On appeal, Abate argues the injury that manifested on January 18, 2019, and was due to cumulative trauma, is somehow different from the injury he sustained as a result of overcompensating with the left shoulder as the result of the right shoulder injury occurring on October 15, 2018. We fail to distinguish any difference other than Abate arguing a “cumulative trauma” injury is somehow distinguishable from a “overuse” injury. We believe such an argument is a distinction without a difference.

In 2019, the claims for the injuries to Abate’s left shoulder as alleged in the original application for benefits, filed in 2018, were settled, fully and finally. That determination was not appealed. Accordingly, the ALJ’s decision, with regard to future workers’ compensation benefits for his left shoulder condition, now long since final, is subject to the doctrine of *res judicata*.

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 benefits owed for the left shoulder condition is precluded.

We believe the ALJ's decision that Abate's claim is barred by *res judicata* is supported by substantial evidence. The principle of *res judicata* is a central tenant within our legal system. Bolin v. T & T Mining, 231 S.W.3d 130, 133 (Ky. 2007). Additionally, *res judicata* applies to claims for workers' compensation benefits. Turner v. Bluegrass Tire Co., 331 S.W.3d 605, 608 (Ky. 2010). In Turner, the Supreme Court of Kentucky explained that "final workers' compensation awards, like other judgments, are subject to the doctrine of finality." *Id.* The doctrine of finality "precludes further litigation of issues that were decided on the merits in a final judgment." *Id.*

Memorandums of agreement approved by an ALJ are among those decisions and orders described as final judgments capable of enforcement by a Circuit Court under KRS 342.305. In other words, the settlement agreement between the parties, subsequently approved by ALJ Weatherby in November 2019, represents a final judgment. The concept of finality is supported by the principle that "litigation should end when the rights of the parties have been finally determined." *Id.*

The *res judicata* doctrine "prohibits the relitigation of matters which actually were, or could have been, litigated to a conclusion in an earlier action."

Godbey v. University Hosp. of the Albert B. Chandler Med. Ctr., 975 S.W.2d 104, 105 (Ct. App. 1998).

Therefore, we believe the ALJ properly exercised his discretion in determining the Form 101 alleging a cumulative trauma injury to the left shoulder, manifesting on January 18, 2019, is an improper attempt to re-litigate the left arm injury occurring from overuse in compensating for the October 15, 2018 right arm injury. Consequently, the dismissal of claim number 2020-01063 is supported by substantial evidence with no compelling evidence submitted to overcome the same.

Accordingly, the January 27, 2021 Opinion and Order, as well as the Order denying the Petition for Reconsideration dated February 26, 2021, are **AFFIRMED.**

ALL CONCUR

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