

Commonwealth Of Kentucky

Court Of Appeals

No. 97-CA-003284-MR

OVERHEAD DOOR

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
NO. 0808721

PATRICIA KUHN; SHEILA C. LOWTHER,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

*** **

BEFORE: BUCKINGHAM, GUIDUGLI and HUDDLESTON, Judges.

HUDDLESTON, JUDGE: Overhead Door seeks review of an opinion of the Workers' Compensation Board which affirmed a decision of an Administrative Law Judge dismissing on res judicata grounds its motion to reopen a 1969 award to Patricia Kuhn to dispute the compensability of certain medical expenses. Because the Board's

opinion expresses our views on the matter, we adopt the substance and much of the language of the opinion as our own.¹

Patricia Kuhn was injured on April 5, 1967, while working for Overhead Door, when her left ring and middle fingers were caught in a press. Allegedly as a result of the injury, she experienced pain in her left hand, jaw, ears, right index finger and other parts of her body. She was diagnosed as suffering from rheumatoid arthritis.² In January 1968 Kuhn filed a claim seeking workers' compensation benefits. Dr. Nathan Abrams testified that the injury to Kuhn's fingers triggered the onset of rheumatoid arthritis. Dr. Nicholas Giannestras testified there was a casual relationship between Kuhn's injury and rheumatoid arthritis. In its July 28, 1969, award, the "old" Board found Kuhn totally occupationally disabled. The Board determined that ten percent of Kuhn's disability was due directly to the April 5, 1967, injury and the remaining ninety percent was due to rheumatoid arthritis brought into disabling reality by the injury. The Board awarded Kuhn benefits for total occupational disability and medical benefits not to exceed \$3,500.00 as then provided by the Workers' Compensation Act. In May 1973 the Board sustained Kuhn's motion

¹ The Board's opinion was written by Board Chairman Abell with Board member Greathouse concurring and Board member Lovan concurring in part and dissenting in part. Member Lovan's dissent is not a part of our opinion.

² Rheumatoid arthritis is a chronic and progressive systematic disease affecting connective tissue, and is especially common in women. Stedman's Concise Medical Dictionary 93 (2d ed. 1994).

to award her medical benefits in excess of \$3,500.00 for the treatment of her injury and resulting disability.

In 1996 Kuhn's treating physician recommended that she undergo knee replacement surgery to address a problem resulting from the effects of rheumatoid arthritis. In May 1996, Overhead Door filed a motion to reopen seeking to challenge the medical expenses relating to her knee. In reaching its decision, the "new" Board considered the testimony of Drs. Steven Warren, Julian Colton and David Neustadt.

Dr. Warren, Kuhn's treating orthopedic surgeon, reported that knee replacement surgery is necessary because of Kuhn's rheumatoid arthritis. Dr. Colton is Kuhn's treating rheumatologist. Based upon a review of the testimony of Dr. Abrams, Dr. Colton felt that the knee replacement surgery was associated with Kuhn's work-related injury. Dr. Neustadt examined Kuhn in 1968 at the request of the "old" Board, but his report was struck from the record as being untimely filed. On reopening, Kuhn introduced Dr. Neustadt's report which indicated that the relationship of trauma in rheumatoid arthritis is an unsettled issue. He stated, however, that since the cause of rheumatoid arthritis is unknown, it is possible that trauma acted to precipitate the rheumatoid arthritis.

Overhead Door supported its argument with more recent testimony from Dr. Neustadt and testimony from Dr. James Ehlich. According to Dr. Neustadt, there has been extensive research on the etiology of rheumatoid arthritis since 1967. He stated that it is

currently believed that rheumatoid arthritis is due to a genetic predisposition which can be provoked or precipitated by various factors, including infection, stress, pregnancy and trauma. He stated that trauma could precipitate rheumatoid arthritis in a joint which receives a direct blow, but he did not think that the injury to Kuhn's fingers could precipitate rheumatoid arthritis in her knees.

Dr. Ehlich reviewed Kuhn's medical records and opined that the trauma associated with Kuhn's 1967 injury could have caused degenerative arthritis in her fingers, but would not have any effect on the development of rheumatoid arthritis in her knees. He also stated that for there to be any connection between her knee problems and an injury she would have had to sustained a direct trauma to the knees.

The ALJ found that the issue of causation was litigated and decided by the "old" Board in 1967. Thus, the ALJ concluded, the doctrine of res judicata applies to the instant case precluding re-litigation of the issue of causation. Overhead Door argues that the standard for applying res judicata in a reopening to contest medical expenses is different from that applied in reopenings under Ky. Rev. Stat. (KRS) 342.125 to change an award of income benefits. Overhead Door relies on at the law at the time of injury and thereafter during disability. In 1967, KRS 342.020(1) read as follows:

In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief

from the effects of an injury or occupational disability, such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required.

Overhead Door argues that this language contemplates the possibility of a difference between medical treatment that may reasonably be required at the time of injury and that which may be required "thereafter during disability." Overhead Door, therefore, contends that res judicata does not preclude reopening of Kuhn's claim to contest medical expenses on the basis that new medical evidence has been uncovered that establishes that the condition being treated is not the result of Kuhn's work-related injury.

According to KRS 342.020(1), an employer may reopen a claim in order to contest medical expenses which do not appear to be reasonable and necessary for the cure and/or relief of a work-related injury. Overhead Door likens contesting the work relatedness of the medical expense with the work relatedness of the underlying condition.

The issue of work relatedness of a condition is precisely the same whether in the context of an award of income benefits or in the context of an award of medical benefits. The work relatedness of Kuhn's rheumatoid arthritis was in issue in the original claim and was fully litigated and determined. Where causes of action are the same, a final decision on the merits in the first action is a complete bar to a second action. Vaughn's Adm'r v. Louisville & N. R. Co., 297 Ky. 309, 179 S.W.2d 441, 444 (1944).

Even where a statute allows for the reopening of an award under specific circumstances, res judicata applies except in those specified circumstances. Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972).

KRS 342.125 allows for the reopening of workers' compensation claims upon a showing of a change of occupational disability, mistake, fraud or newly discovered evidence. In order for Overhead Door to avoid the bar of res judicata, it must demonstrate that one of these grounds for reopening exists. There has been no allegation of fraud or change in Kuhn's occupational disability. Overhead Door refers to the testimony of Drs. Neustadt and Ehlich as "newly discovered evidence" since there has been a change in the thinking of rheumatology experts since 1967 regarding the casual connection between trauma and rheumatoid arthritis. We do not believe that the new medical opinions qualify as newly discovered evidence. "Newly discovered evidence" has been defined as such evidence as will affect the ultimate outcome of a proceeding and which could not have been discovered by due diligence and presented for consideration prior to the ultimate decision. Durham v. Copley, Ky., 818 S.W.2d 610 (1991). Cases which address the issue of what constitutes newly discovered evidence have all been based upon the presupposition that the evidence in question existed at the time of the original decision, but was undiscovered despite the exercise of due diligence. See Massey v. McKinley, Ky.App., 690 S.W.2d 131 (1985). See also Howell v. Standard Oil Co., 234 Ky. 347, 28 S.W.2d 3 (1930), and Ford Motor Co. v. Vanover, 303 Ky. 831,

198 S.W.2d 660 (1946). In short, we do not believe that medical opinions developed nearly thirty years after an event can qualify as "newly discovered evidence." The fact that the consensus of medical experts has changed over three decades does not indicate ignorance on the part of the "old" Board of a material fact that would constitute a "mistake" under KRS 342.125

The two bases for the application of res judicata are: (1) public policy requiring an end to litigation, and (2) the prevention of hardship on an individual vexed twice for the same cause. Barnett v. Commonwealth, Ky., 348 S.W.2d 834 (1961). We do not believe that either of these policies is served by allowing a claim to be reopened and forcing the claimant to repeatedly prove the work relatedness of a condition whenever there is a change in the consensus of medical experts regarding the etiology of a condition.

Overhead Door also contends that res judicata should not apply because it had no incentive to litigate causation because it was not foreseeable for it to be compelled to pay for a total knee replacement thirty years in the future, and the "old" Board's decision only directed it to pay meager income benefits (\$4.00 per week for 400 weeks). However, the 1967 version of KRS 342.125 provides that "the employer shall pay for the cure and relief from the effects of an injury . . . such medical, surgical and hospital treatment" Since Kuhn suffered from rheumatoid arthritis, a chronic and progressive disease, it was foreseeable that she would need extensive medical treatment for her disease. Overhead Door had

every opportunity and incentive to litigate this case. We must maintain our scrupulous regard for finality and consider the hardship that reopening a claim at every shift in consensus will have on injured workers.³

The Board has not, in our opinion, "overlooked or misconstrued controlling statutes or precedent" in deciding this case, nor has it "committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992). That being so, the Board's decision must be and it is hereby affirmed. We decline Kuhn's invitation to remand this case to the ALJ for an award of costs and attorney fees as we do not consider Overhead Door's appeal to be unreasonable or improvident.

ALL CONCUR.

BRIEF FOR APPELLANT:

William P. Swain
Peter J. Glauber
BOEHL, STOPHER & GRAVES
Louisville, Kentucky

BRIEF FOR APPELLEE
PATRICIA KUHN:

Robert C. Cetrulo
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³ See 7 Kurt A. Philipps, Jr., Kentucky Practice, CR 60.02 (5th ed. 1995).