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Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001224-WC

KHRIS BASSHAM (DECEASED) BY
GLENDA BASSHAM, WIDOW — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-64829

RUSSELLVILLE WAREHOUSING;
HON. R. SCOTT BORDERS,
Administrative Law Judge;
and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: The issue presented in this appeal is whether a post-award change of opinion by a medical expert constitutes a "mistake" sufficient to warrant re-opening of a claim under KRS 342.125(1)(c). In a two-to-one opinion, the

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Workers' Compensation Board concluded that a prima facie case for reopening had been established by submission of evidence that a medical witness, whose testimony was relied upon in the original ruling of the Administrative Law Judge, had reversed his opinion as to causation based upon examination of autopsy data unavailable at the time the award was rendered. We agree with the opinion of the dissenting board member Gardner that evidence of the expert's recantation, submitted more than one year after the award had become final, did not constitute a "mistake" authorizing a de novo review of the issue of causation. Because we are convinced that the Board's expansive construction of what constitutes "mistake" undermines the doctrine of res judicata, one of the most fundamental components of our jurisprudence, we reverse its decision that the employer had set out a prima facie case for reopening.

The tragic facts of this case are not complex. Khris Bassham was awarded workers' compensation benefits on the basis of his claim that more than seven years of exposure to significant amounts of manganese dust in the course of his employment with Russellville Warehousing ("Russellville") had rendered him totally disabled. Because the extent of Mr. Bassham's disability was evident, the primary contested issue was causation. In support of his claim, Mr. Bassham offered the testimony of Dr. Paul Nausieda, a neurologist specializing in

Parkinson's disease with a subspecialty in manganese poisoning. In reporting his findings based upon treatment of Mr. Bassham, Dr. Nausieda observed that over a two-year period his condition had deteriorated from having difficulty walking, controlling his movements and suffering violent cognitive effects to the point that he was in a near vegetative state requiring round-the-clock care. The results of urinalysis testing showed that an exceptionally high level of manganese remained in Mr. Bassham's system almost six months after his last exposure. Dr. Nausieda ultimately concluded that Mr. Bassham's disability was due to manganese poisoning.

Russellville's defense was predicated primarily upon the opinion of Dr. Brad Racette, a specialist in movement disorders who practices at Washington University School of Medicine in St. Louis. After evaluating the medical records generated in the course of Mr. Bassham's treatment, Dr. Racette was of the opinion that his history was not consistent with manganese poisoning and offered the alternate diagnosis of Prion disease which is a group of disorders caused by a slow virus, an example of which is mad cow disease. He felt a more likely cause of Mr. Bassham's symptoms was a form of Creutzfeldt-Jakob disease which he described as a rapidly progressing disorder often characterized by ataxia, unsteady gait, with findings

similar to those found in Mr. Bassham's medical records, including the rapidly progressing dementia.

In a painstakingly detailed 61-page opinion entered on September 13, 2004, the Administrative Law Judge ("ALJ") stated that he was persuaded from his review of all the medical and lay evidence that Mr. Bassham "suffers from an occupational disease, that has manifested itself in a neurological disorder all due and causally related to his exposure to manganese dust while working at the Russellville warehouse." The ALJ then awarded total and permanent occupational disability benefits based upon his finding that Mr. Bassham had been rendered "a bedfast invalid" as a result of occupational disease secondary to manganese exposure. Neither party appealed and the decision became final. Approximately two months later on November 11, 2004, Mr. Bassham died and his wife, appellee Glenda Bassham, was subsequently awarded a continuation of the award of benefits.

On October 31, 2005, nearly thirteen months after the award became final, Russellville filed a KRS 342.125 motion to reopen seeking a revocation of all previous awards on the basis of newly discovered evidence and mistake. Russellville's motion was premised upon a change of opinion by Dr. Nausieda after he reviewed autopsy data following Mr. Bassham's death. In a report to counsel, Dr. Nausieda stated that a pathologic

examination by the National Prion Laboratory confirmed the existence of a Creutzfeldt-Jakob agent in Mr. Bassham's nervous system and that pathologic testing is more accurate than serologic tests administered during life. Dr. Nausieda also acknowledged that there were no pathologic lesions consistent with manganese toxicity as he had previously believed, nor was there any evidence that Mr. Bassham had more than one primary neurologic disorder.

Armed with this information and relying upon the reasoning advanced in Messer v. Drees,[2] Russellville argued that justice required reopening due to the fact that there was no longer a medical basis for upholding the award. In rejecting that contention, the ALJ concluded that Dr. Nausieda's revised opinion, based solely upon autopsy results, could not be construed as "newly discovered" evidence as it could not have been discovered in the exercise of due diligence while the case was pending. Neither could his change of opinion be considered to be "mistake" under KRS 342.125 as the award was proper under the facts that existed at the time of rendition. An appeal to the Board produced the divided opinion at issue here. The majority of the Board, while agreeing that Dr. Nausieda's recantation did not constitute newly discovered evidence, was

[2] 382 S.W.2d 209 (Ky. 1964).

convinced that his mistake as to causation set out a prima facie case for reopening. We disagree.

As fully explored in our opinion in Alliant Hospitals, Inc. v. Benham,[3] this case places in sharp focus the tension between two fundamental principles upon which our jurisprudence is based: that litigation should end in a reliable judgment and that courts of law, to the extent feasible, should seek truth and base their judgments thereon. As a starting point for our discussion, we find instructive the analysis of that conflict in the context of workers' compensation law set out by this Court in Keefe v. O. K. Precision Tool & Die Co.:[4]

> In the present case we are faced with a basic legal conflict. Determination of this conflict depends upon which of two lines of reasoning we follow. The first is to allow any award or judgment to be reopened or recomputed if there is a mistake of law or fact. The alternative is to follow the line of cases adopting the doctrine of res judicata.
>
> The workmen's compensation statutes have allowed some relief from the finality of judgments, just as Civil Rule 60.02 has allowed relief to any civil litigant. KRS 342.125 provides:
>
> (1) Upon its own motion or upon the application of any party interested and a showing of change of conditions, mistake or fraud or newly discovered evidence, the board may at any time review any award or order, ending, diminishing or increasing the compensation previously awarded . . .
>
> The only difference between CR 60.02 and

[3] 105 S.W.3d 473, 478 (Ky.App. 2003).

[4] 566 S.W.2d 804, 806 (Ky.App. 1978).

> this statute is the Board's authority to change its final award based upon a "change of condition" of the claimant. This provision conforms with the social policy behind workmen's compensation legislation, but is not applicable in the present case. The only basis available for reconsideration of the award in this case is whether the Board's final award constituted a "mistake" of law.

More recently, in Wheatley v. Bryant Auto Service,[5] our Supreme Court revisited earlier caselaw on the question of mistake as it impacts finality and concluded that errors in applying the appropriate law to a workman's claim justifies invocation of the reopening statute. The premise overarching all the caselaw in this area is "whether the [employee] got the relief to which the law entitled him, based upon the truth as we are now able to ascertain it."[6]

The problem with applying the reopening statute to re-litigate, on the basis of subsequent medical information, awards which were correct at the time they were rendered is aptly illustrated by our opinion in Alliant Hospitals:[7]

> "... everyone knew that the fact finder was not determining a historical truth but was making an estimate, a prediction of future events, to establish damages. For example, in personal injury litigation, experts attempt to assess the injured party's

[5] 860 S.W.2d 767 (Ky. 1993).

[6] Id. at 769, citing Messer v. Drees, supra.

[7] 105 S.W.3d at 480, citing Fowler-Propst v. Dattilo, 807 P.2d 757 (N.M. App. 1991).

> condition in order to predict future disability, medical care, pain and suffering, etc. Both parties know that their expert testimony may be proved wrong by subsequent events. Yet neither expects a favorable damage award to be set aside when future events show that the prediction was inaccurate. Such adjustments could go on indefinitely, leading to multiple reopening of a single case. Parties take their chances based on the information existing at the time of trial."

While the Alliant court concluded that such subsequent evidence cannot be considered "newly discovered" for purposes of CR 60.02, we are convinced that neither does it fall within the purview of "mistake" as envisioned in the reopening statute. Any other view would lead to absurd and unpredictable results. With each medical advance, previously sound medical opinions might be called into question, subjecting almost every award to re-litigation. And taken to its logical extreme, might we not expect to see demands for autopsies upon every claimant's demise in order to challenge the accuracy of his or her final award? Clearly, such scenarios not only distort the purpose of the reopening statute, but would bring chaos to the workers' compensation system.[8]

[8] Messer, supra at 212. "[B]earing 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."

We find support for our decision in the rationale advanced by the opinion of the Supreme Court in Whittaker v. Hall, declining to extend the re-opening statute to include mistake based upon subsequent events:[9]

> KRS 342.125 does not authorize a reopening to clarify an award. Under certain circumstances, reopening is a remedy for a mistake in an award, **but "mistake" is not a proper ground to reopen an award that was correct under the facts that existed when it was rendered.**

There is no dispute that the origin of Mr. Bassham's disability was fully and fairly contested through the testimony of two eminently qualified experts or that, at the time it was rendered, the award was appropriately supported by evidence of substance. Just as subsequent interpretations of the law cannot serve to justify reopening awards made final under the doctrine of res judicata,[10] a change in expert opinion based upon subsequent developments does not create a fresh opportunity to re-litigate a previously sound decision.[11] In situations such as this, factual accuracy achieved only in hindsight must give way to essential societal and institutional interests in reliable, final judgments.

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[9] 132 S.W.3d 816, 819 (Ky. 2004), emphasis added.

[10] Keefe, 566 S.W.2d at 807.

[11] Hall, supra.

The judgment of the Workers' Compensation Board is reversed.

ALL CONCUR.

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