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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000826-WC

HAROLD L. TURNER, JR. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-01208

BLUEGRASS TIRE CO., INC.;
HONORABLE GRANT ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

DIXON, JUDGE: Harold L. Turner, Jr., seeks review of a decision of the Workers' Compensation Board affirming an Administrative Law Judge's order denying Turner's motion to reopen. We affirm.

Turner was employed as a mechanic for Bluegrass Tire Co., Inc. ("Bluegrass"), from 1992 through May 2007. In August 2006, Turner sought medical treatment for pain and swelling in his left knee, and his doctor concluded the symptoms were work-related. Turner alleged he informed his supervisor, Randy Richards, of his work-related medical condition shortly after the doctor's appointment.

Turner underwent arthroscopic surgery a short time later and missed two weeks of work. Thereafter, Turner worked without incident until he had partial knee replacement surgery in May 2007. Turner was cleared for work two months after surgery; however, his position at Bluegrass had been terminated.

On September 13, 2007, Turner filed a Form 101 seeking permanent income and medical benefits for his knee injury. A benefit review conference and final hearing were held April 30, 2008. The ALJ considered the testimony of Turner, his medical records, and the deposition testimony of Richards and Gary Duff, the owner of Bluegrass.

In an opinion and order rendered June 20, 2008, the ALJ concluded Turner had failed to give Bluegrass timely notice of his injury and dismissed the claim. The ALJ's opinion noted that the testimony regarding notice was conflicting, as Turner alleged he told Richards following his August 2006 doctor's appointment. Richards and Duff, on the other hand, testified they did not know the injury was work-related until Turner filed his Form 101 in September 2007. In reaching his conclusion, the ALJ also cited Turner's testimony that he continued to

work, did not approach Bluegrass about a workers' compensation claim or payment of medical bills, and he did not file a Form 101 until after his position was terminated.

In October 2008, Turner filed a motion to reopen based on fraud, mistake, and newly discovered evidence, pursuant to KRS 342.125(1)(a)-(c). Turner tendered the sworn statement of his former co-worker, Christopher Breeze, who testified he witnessed a conversation between Turner and Richards regarding Turner's injury.

On November 7, 2008, the ALJ rendered an order denying Turner's motion, finding that he failed to set forth prima facie grounds for reopening. Turner then appealed to the Board, and the Board affirmed the ALJ in an opinion rendered April 3, 2009. The Board summarized the evidence, noting that Turner submitted an affidavit describing "a chance encounter" with Breeze in August 2008. During the course of their conversation, Turner told Breeze he lost his worker's compensation claim because Richards denied having notice the injury was work-related. To Turner's surprise, Breeze stated he witnessed the conversation in August 2006 when Turner gave notice to Richards. Breeze then offered to give a sworn statement describing the conversation.

From March 2006 through early 2008, Breeze worked at Bluegrass as a sales clerk. Breeze acknowledged that he had worked with Turner for a year and a half, and the two became friends during that time. Breeze testified that, in August 2006, he saw Turner hand Richards a piece of paper and say, "the doctor

found that it was work-related." Breeze further stated that Richards asked Turner what he was going to do, and Turner responded that he was unsure. According to Breeze, Richards then told Turner he would put the paper in Turner's file. Breeze also claimed that, on subsequent occasions, he heard Richards and Duff talking about Turner's "situation."

In its analysis, the Board thoroughly summarized the evidence presented by Turner and noted the similarity in the language of KRS 342.125(1) and CR 60.02. The Board ultimately concluded Turner failed to establish grounds for reopening and affirmed the ALJ's order. This petition for review followed.

KRS 342.125 states in relevant part:

> (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; . . . [.]

A party seeking to reopen a workers' compensation claim must "make a reasonable prima facie preliminary showing of the existence of a substantial possibility of the presence of one or more of the prescribed conditions that warrant a change . . . before his adversary is put to the additional expense of relitigation." *Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 681, 682 (Ky. 1972). Where the ALJ determines a movant failed to present a prima facie case for reopening, the

decision is reviewed for an abuse of discretion. *Hodges v. Sager Corp.*, 182 S.W.3d 497, 500 (Ky. 2005). An abuse of discretion occurs when the "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

It has been recognized that KRS 342.125 provides relief from an otherwise final workers' compensation decision in a manner similar to the application of CR 60.02 in civil litigation. *Keefe v. O. K. Precision Tool & Die Co.*, 566 S.W.2d 804, 806 (Ky. App. 1978). In *Richardson v. Head*, 236 S.W.3d 17 (Ky. App. 2007), this Court stated:

> CR 60.02 . . . authorizes relief from a final judgment based upon newly discovered evidence only if: (1) the evidence was discovered after entry of judgment; (2) the moving party was diligent in discovering the new evidence; (3) the newly discovered evidence was not merely cumulative or impeaching; (4) the newly discovered evidence is material; and (5) the evidence, if introduced, would probably result in a different outcome.

Id. at 20, *quoting Hopkins v. Ratliff*, 957 S.W.2d 300, 301-02 (Ky. App. 1997).

In the case at bar, Turner ignores *Richardson* and instead cites a criminal case, *Bedingfield v. Commonwealth*, 260 S.W.3d 805, 810 (Ky. 2008).[1] Turner theorizes that Breeze's sworn statement constituted newly discovered

[1] In *Bedingfield*, the Kentucky Supreme Court concluded the defendant was entitled to a new trial because DNA testing technology, which was unavailable at the first trial, subsequently excluded the defendant as a genetic match to the evidence from the victim's rape kit. *Bedingfield*, 260 S.W.3d at 809-10. The Court noted, "When newly discovered evidence is of such a nature that it is manifest to the conviction, substantially impacts the testimony of a material witness, or would have probably induced a different conclusion by the jury had the evidence been heard, then assuredly, the interests of justice demand that a criminal defendant is entitled to have such evidence set before the court." *Id*. at 810.

evidence showing Richards testified falsely and proving Turner gave timely notice of his work-related injury. Turner further characterizes Breeze as an "independent witness" who contradicted the pivotal testimony of Richards on the issue of notice.

Despite Turner's argument that the "interests of justice" reasoning of *Bedingfield* is applicable herein, we conclude that the proper analysis is the five-part test found in *Richardson*.

We question Turner's diligence in locating Breeze as a witness. Turner claims he did not know that Breeze witnessed the conversation; however, the record shows that Breeze and Turner were friends. As the conversation between Richards and Turner took place at the front of the store, near Breeze's usual workspace, Turner could have asked Breeze if he overheard the conversation at any point during the subsequent eight months Turner worked at Bluegrass or at the time he filed his claim. We further note, despite Turner's argument to the contrary, Breeze's statement clearly served only to impeach the testimony of Richards. When the ALJ "could reasonably find that due diligence in discovering new evidence was not exercised, that the new evidence was principally of an impeaching character, or that it was not of the compelling character which would lead to a different result, any one of those grounds would justify the denial . . . [.]" *Richardson*, 236 S.W.3d at 22 (citation omitted).

After thoroughly reviewing the record and considering Turner's arguments, we conclude the ALJ did not abuse his discretion by denying Turner's

motion to reopen. The record reveals that Turner failed to make a prima facie showing of fraud, mistake, or newly discovered evidence to warrant reopening.

For the reasons stated herein, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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