

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-000390-WC

FRANKIE LEWIS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-08085

LANTECH, INC.; HON. DONNA TERRY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, McANULTY, AND SCHRODER JUDGES.

McANULTY, JUDGE. Appellant petitions the Court for review of the decision of the Workers' Compensation Board (Board). The issue in this workers' compensation appeal is whether the claimant was required to file a new claim, rather than seek a reopening of his previous compensation claim, for a separate and distinct physical injury from that of the original claim, but which arose from the same repetitive type of work. The Board concluded that appellant should have filed a new claim instead

of seeking a reopening. The Board determined, as a result, that appellant did not bring the new claim within the applicable statute of limitations. We affirm.

Appellant Frankie Lewis worked as a material handler for appellee Lantech, Inc., beginning in 1994. Appellant experienced left shoulder pain, and had surgery consisting of a left shoulder acromioplasty and bursectomy in October 1995. He returned to regular duty in December 1995. In January 1996, appellant began to experience similar symptoms in his right shoulder. He was diagnosed with bilateral bursitis of the subacromial area, possible cervical radiculitis and possible early subacromioclavicular joint degeneration. On December 2, 1996, appellant filed an application for resolution of injury claim. In an Opinion and Award dated October 20, 1997, an Administrative Law Judge (ALJ) awarded appellant benefits based upon 40% disability for the left shoulder condition. The ALJ awarded no permanent income benefits for the right shoulder condition.

On January 11, 2001, appellant filed a motion to reopen his prior claim on the grounds that he had developed problems with his cervical spine and that his shoulder problems had worsened as a result of the injury. The motion averred that in January 1998, appellant's physician deemed appellant's cervical problems to be work-related. Dr. O. M. Patrick

adjudged that appellant had an additional 25% impairment due to the cervical symptoms. Dr. Patrick's opinion was that part of appellant's impairment was due to repetitive work activities while at Lantech. He stated that appellant's cervical symptoms could have been present earlier but were masked by his shoulder symptoms. Dr. Patrick agreed that the neck injury was "separate and apart" from either of the shoulder injuries, but stated that he thought the same activities caused the same damages - that they were all work-related, wear and tear incidents. However, he asserted that the right shoulder injury did not lead to the neck problems, and it was a distinct injury caused by the same repetitive activities over a span of time.

The ALJ in this case found that appellant's cervical condition was related to the same repetitive work activities as formed the basis for his shoulder claim. The ALJ found that the date that it became apparent that appellant's shoulder injury was work related was January 22, 1998. However, the ALJ found that appellant's motion to reopen was not timely filed.

On appeal to the Board, appellant argued that the ALJ's opinion was erroneous because under KRS 342.125(4) he was entitled to reopen his claim within four years of the original Opinion and Award. Appellant asserted that although the three conditions he had were separate medical disorders, they were the

result of the same cumulative trauma from his work. The Board affirmed the dismissal, stating:

. . . As was determined by the ALJ, Lewis' cervical condition does not arise out of the same "injury" as those for which he was granted benefits in 1997, although the mechanism of those injuries may have been the same. KRS 342.0011(1) defines "injury" for purposes of our Workers' Compensation Act as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." We interpret this definition in light of the Supreme Court's holding in Fischer Packing Co. v. Lanham, [Ky., 804 S.W.2d 4 (1991)], as necessitating that a new condition reared for the first time on reopening must not only arise out of the same series of events that produced the original condition, but that the subsequent condition must also be proximately caused by the same harmful change in the human organism.

In this instance that is simply not the case. Lewis' left and right shoulder conditions are, without question, medical disorders separate and distinct from the harmful changes that have ultimately manifested themselves in the petitioner's cervical spine. Hence, contrary to Lewis' declarations, reopening was not the proper vehicle by which to commence prosecution of his cervical injury claim. Rather, that injury was unique unto itself and, therefore, should have been raised for the first time post award by means of a new application filed within two years of the date Lewis first became aware of its work-related cause.

It is from this portion of the decision that appellant appeals.

On appeal, appellant argues that the Board did not correctly interpret the Fischer Packing v. Lanham opinion. The function of further review of the Board in the Court of Appeals is to correct the Board only where we perceive the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-688 (1992). Appellant contends that the Board's opinion imposes a legal burden on claimants who sustain cumulative trauma injuries that the law does not require of claimants who sustain injuries from a single traumatic incident.

We have examined the Board's reliance on Fischer Packing v Lanham, and the authority cited therein, and we believe that the Board reached the correct conclusion under that precedent. The Board correctly determined that there must be a causal relationship between the original injury or harmful change on which the award is based and the subsequent condition raised. KRS 342.125(1)(d). When there is no causal relation between the first injury and the subsequent condition, reopening is not the appropriate remedy. 8 Larson's Workers' Compensation Law, § 131.03[1][b]. We conclude that the Board correctly construed the controlling precedent in this case, and we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Phillipe W. Rich
Howes & Rich
Louisville, Kentucky

BRIEF FOR APPELLEE:

Laurie Goetz Kemp
Woodward, Hobson & Fulton LLP
Louisville, Kentucky