

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-001547-WC

DAVID C. SUMMERS

APPELLANT

V. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
CLAIM NO. WC-00-59766

U.S. LIQUIDS;  
HONORABLE SHEILA C. LOWTHER,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: To reopen a workers' compensation claim, a claimant must make a prima facie showing of one or more of the statutory grounds for reopening contained in Kentucky Revised Statutes (KRS) 342.125(1) before the claimant is even entitled to a hearing on the merits. KRS 342.125(1)(b) permits reopening

on the basis of “[n]ewly-discovered evidence which could not have been discovered with the exercise of due diligence.”

David Summers moved to reopen his claim against U.S. Liquids on the basis that he was discharged by that employer after his award was entered. He asserts that evidence of this post-award discharge is newly-discovered evidence within the meaning of KRS 342.125(1)(b). In the alternative, he asserts that the dismissal of his motion to reopen is manifest injustice, which he asserts is a judicially-created ground for reopening. Similarly, he asserts that the dismissal of his motion to reopen is against public policy.<sup>1</sup> The Administrative Law Judge (ALJ) dismissed Summers’s motion without a hearing for failure to make a prima facie showing for reopening, a decision later affirmed by the Workers’ Compensation Board (Board). We agree that Summers has failed to make a prima facie showing of any legitimate ground for reopening. So we affirm the Board’s decision.

Summers worked for U.S. Liquids as a maintenance mechanic, a position requiring him to lift up to one hundred pounds, climb stairs and ladders, stoop frequently, walk considerable distances, and be on his feet for several hours at a time. On December 9, 2000, while working for U.S. Liquids, he

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<sup>1</sup> Summers also moved to reopen on the basis of change in disability. See KRS 342.125(1)(d). As he does not refer to this claim in his brief before this Court, he has, apparently, waived this issue on appeal. Thus, we need not address the merits of this matter.

fell from a portable storage tank, injuring his feet and hips. The only contested issue in Summers's workers' compensation claim was the extent of his permanent occupational disability.

Dr. Mark Petrik, Summers's treating physician, provided the only medical report submitted in the claim. Dr. Petrik stated that Summers would require bracing, analgesics, and ambulatory support for the rest of his life because of permanent injuries to his feet, despite three surgeries to his left foot and one surgery to his right foot. He also anticipated that Summers might require additional surgery. He assigned the following permanent physical restrictions to Summers: no squatting, crouching, or climbing ladders; stair-climbing should be limited to one flight; walking should be limited to 30-40 feet at a time with crutches or a cane; sitting should be limited to 30 minutes at a time; and standing should be limited to 8-9 minutes at a time. Dr. Petrik assessed Summers as having a 40 percent whole-person impairment rating.

Due to accommodations by U.S. Liquids, Summers was able to return to fulltime, light-duty work after his injury; but he was no longer able to perform overtime work. He worked in the office placing orders and going through old paperwork in preparation for the planned installation of a new computer. In his deposition, Summers admitted that he had been told that the

office job was not permanent and stated that he did not know how long it would last. In the opinion, order, and award, the ALJ found Summers to have a 40 percent occupational disability, based on Dr. Petrik's report. Notwithstanding Summers's return to light-duty work in an accommodated position, the ALJ also applied the three multiplier found in KRS 342.730(1) based on her finding that Summers lacked the physical capacity to return to the type of work that he performed at the time of the injury.<sup>2</sup>

Summers alleges that on October 5, 2002, shortly after the workers' compensation order and award was final, he was told that he was being terminated by U.S. Liquids because "the case settled." In September 2003, Summers underwent additional surgery to his right foot because of his work-related injury. On February 2, 2004, Summers filed a motion to reopen his claim based on his post-award discharge by U.S. Liquids. He submitted a follow-up report by Dr. Petrik, which showed that his impairment rating and physical restrictions were unchanged. Summers's motion to reopen was dismissed by the ALJ, without a hearing, for failure to state a claim. Summers appealed to the Board, which affirmed the ALJ's ruling. Summers then petitioned for review in this Court.

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<sup>2</sup> Although the ALJ's opinion, award, and order notes that U.S. Liquids objected to the application of the three multiplier, it also notes that the parties stipulated at the Benefit Review Conference on June 12, 2002, that "[Summers] does not retain the physical capacity to return to his former work."

Relief from the terms of a final workers' compensation order or award may be obtained only if the claim is reopened in accordance with statutory provisions.<sup>3</sup> A claimant seeking to reopen a claim is not automatically entitled to a hearing on the merits.<sup>4</sup> The claimant must first "make a reasonable prima facie preliminary showing of existence of a substantial possibility of the presence of one or more of the prescribed conditions" for reopening set forth in KRS 342.125(1).<sup>5</sup> Summers asserts that the evidence of his post-award discharge established a prima facie case for reopening under KRS 342.125(1)(b), which permits reopening on the basis of "[n]ewly-discovered evidence which could not have been discovered with the exercise of due diligence."

In the alternative, Summers asserts that he established a prima facie showing to reopen on the basis of "manifest injustice," which he asserts as a judicially-created ground for reopening a workers' compensation claim. Finally, he

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<sup>3</sup> Uninsured Employers' Fund v. Turner, 981 S.W.2d 544, 545 (Ky. 1998).

<sup>4</sup> Tuttle v. O'Neal Steel, Inc., 884 S.W.2d 661, 665 (Ky. 1994).

<sup>5</sup> Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681, 682 (Ky. 1972). See also Dingo Coal Company, Inc. v. Tolliver, 129 S.W.3d 367, 370 (Ky. 2004) (clarifying that while the version of KRS 342.125(1)(d) enacted December 12, 1996, addresses the procedural requirements for establishing a prima facie showing in any motion to reopen on the grounds of a change of disability filed on or after that date, it does not affect the substantive proof required to establish a worker's right to receive additional income benefits upon reopening, which is governed by the version of KRS 342.730 which was effective on the date of injury).

asserts that public policy requires that he be permitted to reopen his workers' compensation claim after his discharge.

Each of these issues raised by Summers addresses a pure question of law. Upon review, the role of the Court is to correct the Board on matters of law "only where [] the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent."<sup>6</sup>

There are no published opinions addressing whether "[n]ewly-discovered evidence" within the meaning of KRS 342.125(1)(b) encompasses evidence which did not yet exist when the workers' compensation claim was decided. For the sake of convenience, we shall henceforth describe the later category of evidence as "new evidence."<sup>7</sup> We must look to general principles of statutory construction.

The words and phrases of the statute must be construed according to their common and ordinary meaning.<sup>8</sup> In order to give full effect to the legislative intent embodied in a statute, construing a statute in such a way as to render a word

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<sup>6</sup> Western Baptist Hosp. v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992).

<sup>7</sup> *Cf. Stephens v. Kentucky Utilities Company*, 569 S.W.2d 155, 157-158 (Ky. 1978) (using the term "new evidence" to describe evidence arising after the Public Service Commission's order when deciding whether the trial court properly remanded an order of the Commission on the basis of this new evidence pursuant to KRS 278.440, which permits remand on the basis of "newly-discovered evidence").

<sup>8</sup> KRS 446.080(4).

or phrase mere surplussage is disfavored.<sup>9</sup> If newly-discovered evidence includes new evidence, then that portion of KRS 342.125(1)(b) requiring that the evidence "could not have been discovered with the exercise of due diligence" is superfluous. Of course, that which does not exist cannot be discovered. The fact that part of the statute becomes redundant if newly-discovered evidence is considered to include new evidence suggests that this construction is erroneous.

Even when construing unambiguous statutory language, it is proper to look to previous constructions of analogous statutes or rules for guidance.<sup>10</sup> The issue of whether newly-discovered evidence encompasses new evidence has been addressed before in the context of Rule 60.02(b) of the Kentucky Rules of Civil Procedure (CR). CR 60.02(b) permits a party to seek relief from a final judgment or order based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02." When construing this phrase, Kentucky's highest court has stated that "[g]enerally, it is held that facts not in existence at the time of trial do not constitute a ground for a new trial because of

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<sup>9</sup> See, e.g., Kurtsinger v. Board of Trustees, 90 S.W.3d 454, 457-458 (Ky. 2002); State Street Bank and Trust Co. v. Heck's, Inc., 963 S.W.2d 626, 630 (Ky. 1998).

<sup>10</sup> Prudential Bldg. & Loan Ass'n v. City of Louisville, 464 S.W.2d 625, 626 (Ky. 1971).

newly discovered evidence.”<sup>11</sup> As this Court has explained, construing newly-discovered evidence in CR 60.02(b) to exclude new evidence serves to advance the overriding “social and institutional interest in reliable, final judgments.”<sup>12</sup>

The same general principles of finality of judgments also apply to workers’ compensation claims.<sup>13</sup> The fact that the instant case concerns the statutory scheme of workers’ compensation, rather than an ordinary civil case, makes it especially important that KRS 342.125(1)(b) not be misconstrued to permit reopening where the General Assembly did not intend to do so.<sup>14</sup> This is illustrated in Stephens v. Kentucky Utilities Company in which the Supreme Court addressed whether the

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<sup>11</sup> Cawood v. Cawood, 329 S.W.2d 569, 571 (1959) (holding that the trial court properly decided that the movant was not entitled to relief from a divorce judgment and a new trial on the issue of alimony just because she had cancer where there was no evidence that she had cancer at the time of the trial on the divorce action).

<sup>12</sup> Alliant Hospitals, Inc. v. Benham, 105 S.W.3d 473, 480 (Ky.App. 2003) (holding that the trial court neither abused its discretion nor erred by denying hospital’s motion seeking relief from a final judgment in a medical malpractice case, which included approximately two million dollars in future medical expenses, where the hospital asserted that the infant’s death almost immediately after the judgment was final was newly-discovered evidence).

<sup>13</sup> Johnson v. Gans Furniture Industries, Inc., 114 S.W.3d 850, 855-856 (Ky. 2003) (noting, however, that unlike other judgments, workers’ compensation awards may be reopened under certain, specified conditions as determined by statute).

<sup>14</sup> *Cf.* Stephens, 569 S.W.2d at 159 (noting as significant the fact that the case involved construing the statutory phrase “newly-discovered evidence” in the context of a rate-making case where judicial review of the administrative body’s actions is limited by statute, rather than in the context of an ordinary civil trial).

provision in KRS 278.440 permitting remand of an order of the Public Service Commission (PSC) on the basis of "newly-discovered evidence" also includes "new evidence."<sup>15</sup> The trial court had ordered remand based on new evidence, specifically, evidence of actual operating experience which occurred after the Commission's order.<sup>16</sup> The Supreme Court described the trial court's construction as "a judicial amendment to KRS 278.440"<sup>17</sup> and, hence, impermissible. The Court also refuted the idea that the trial court had an inherent power to consider new evidence in the interest of properly deciding the matter if considering that evidence violated the legislatively-proscribed means of judicial review of a decision of the PSC.<sup>18</sup> The instant case poses a similar situation. The procedures for reopening a workers' compensation award are constrained by statute. We must not construe KRS 342.125(1)(b) in such a fashion as to amend the statute by providing an additional ground for reopening which the legislature did not intend but, rather, construe it as written to reflect the legislative intent therein. Based on the ordinary meaning of the phrase and consistent with previous constructions of analogous language in CR 60.02(b) and

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<sup>15</sup> *Id.* at 157-159.

<sup>16</sup> *Id.* at 156-157.

<sup>17</sup> *Id.* at 157.

<sup>18</sup> *Id.* at 157-159.

KRS 278.440, we hold that newly-discovered evidence within the meaning of KRS 342.125(1)(b) does not include new evidence, meaning evidence which did not come into being until after a workers' compensation award was entered. Evidence of Summers's discharge after his award was entered is new evidence. Therefore, it cannot support a prima facie case for reopening pursuant to KRS 342.125(1)(b).

Summers asserts "manifest injustice" as an alternative ground for reopening, claiming that the Kentucky Supreme Court "clearly established 'manifest injustice' as an appropriate criterion for reopening under KRS 342.125" in Durham v. Copley.<sup>19</sup> Summers's claim of manifest injustice rests on his allegation that U.S. Liquids was able to prevent him from receiving total disability benefits by accommodating him in a light-duty position while his claim was pending but then discharging him the moment that the award was settled, without regard for the fact that he might be unable to obtain another position given his severe physical restrictions. Even if this were true, it does not state a ground for reopening because, contrary to Summers's claims, Durham did not establish manifest injustice as an independent ground for reopening a workers' compensation claim. In Durham, the Board and this Court both held that a

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<sup>19</sup> 818 S.W.2d 610 (Ky. 1991).

newly-discovered medical report was not ground for reopening under KRS 342.125(1)(b) because it could have been discovered before the award with due diligence.<sup>20</sup> However, the Supreme Court found that the evidence compelled a contrary result.<sup>21</sup> It was this error which the Supreme Court deemed "egregious" and constituting "a manifest injustice."<sup>22</sup> Durham did not establish manifest injustice as an independent ground for reopening.<sup>23</sup> Consequently, Summers's claim to have established a prima facie case for reopening on the basis of manifest injustice is without merit.

Finally, Summers asserts that dismissing his petition for reopening is against public policy. He asserts that U.S. Liquids effectively blocked him from receiving a permanent total

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<sup>20</sup> *Id.* at 612.

<sup>21</sup> The Board's decision was based on the fact that the report was dated approximately 40 days before the claim was decided, but the Supreme Court noted that the Board ignored the fact that the claimant's attorney was not informed of the report or of the doctor's findings until approximately 48 days after the claim was decided. *Id.* at 611-612.

<sup>22</sup> *Id.* at 612. See also, Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 331 (Ky. 1997) (characterizing the claimant's reliance on the supposed "manifest injustice" standard of Durham as "misplaced" because there was "no indication in this case that new evidence has been discovered which would have altered the ALJ's decision").

<sup>23</sup> We note that even if such an attempt at judicial amendment were made, it would not be within the court's authority. See Commonwealth ex rel. Cowan v. Wilkinson, 828 S.W.2d 610, 614 (Ky. 1992) (stating that "[j]udicially created common law must always yield to the superior policy of legislative enactment" and noting that a court "cannot legislate by judicial fiat").

disability award by offering him an accommodated position until the award was final leaving him worse off after his discharge than if the company had not accommodated him in the first place. He asserts that dismissing his motion for reopening in this situation leaves him without a remedy. First, we note that a remedy already exists, as set forth in Gunderson v. City of Ashland.<sup>24</sup> Gunderson holds that an injured employee may receive permanent total disability benefits even if the employee is able to return to work full time in a light-duty job due to the efforts of an accommodating employer where the employee otherwise would be unable to find employment in the competitive job market due to his work-related disability.<sup>25</sup> In his brief, Summers concedes that he did not seek permanent total disability in his original claim under Gunderson because he thought it would be too difficult to establish his total disability while working. Where a remedy is available, a party may not argue public policy to seek another, preferred remedy. Even if we agreed that Summers was without a remedy, which we do not, we cannot do what he asks of us. "It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court

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<sup>24</sup> 701 S.W.2d 135 (Ky. 1985).

<sup>25</sup> *Id.* at 136-137.

considers to be in the public interest."<sup>26</sup> Therefore, Summers's public policy argument does not establish a prima facie case for reopening.

In conclusion, none of the three grounds for reopening asserted by Summers is a valid basis for reopening under KRS 342.125(1). As such, he has failed to establish a prima facie case for reopening and is not entitled to a hearing on the merits of his motion to reopen. We affirm the Board's decision affirming the ALJ's dismissal without a hearing of Summers's motion to reopen for failure to make a prima facie case for reopening.

ALL CONCUR.

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BRIEF FOR APPELLEE U.S.  
LIQUIDS:

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<sup>26</sup> Commonwealth ex rel. Cowan, 828 S.W.2d at 614.