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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001079-WC

CALVIN BLACK — APPELLANT

V. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-02-1755

CMT TRUCKING; ELMER KINCAID, JR.,D/B/A ELMER KINCAID JR TRUCKING;
J. LANDON OVERFIELD, JR., ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2004-CA-001220-WC

ELMER KINCAID, JR., D/B/A ELMER KINCAID JR TRUCKING — CROSS-APPELLANT

V. — CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-02-1755

CALVIN BLACK, JR.;
J. LANDON OVERFIELD, JR., ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

MINTON, JUDGE: The doctrine of res judicata operates to prevent the relitigation of issues already decided and to promote judicial economy. Res judicata applies specifically to prevent parties involved in a prior action from reopening final judgments. In 1991, an Administrative Law Judge found Calvin Black had developed coal workers' pneumoconiosis while employed by Nally & Hamilton Enterprises, Inc. He was awarded retraining incentive benefits (RIB). Eleven years later, Black again filed for disabilities related to his pneumoconiosis, this time with a different employer, CMT Trucking/Elmer Kincaid, Jr., d/b/a Elmer Kincaid, Jr. Trucking ("Kincaid"). The ALJ assigned to this claim found that Black did not have pneumoconiosis and that he had not given Kincaid timely notice. Therefore, his claim was dismissed. On appeal, the Workers' Compensation Board reversed with regard to the issue of notice but affirmed the ALJ's finding that Black did not have pneumoconiosis. Black requested this Court review the Board's decision, arguing the doctrine of res judicata should apply. Kincaid filed a cross-petition for review, asking us to determine whether the Board correctly determined Black's notice was timely. On both issues, we affirm.

When Black brought his original workers' compensation claim against Nally & Hamilton in 1991, the ALJ determined that he had a "1/1" radiographic classification for pneumoconiosis. Since the disease was linked to his employment with Nally & Hamilton, Black was awarded RIB.

Shortly thereafter, Black went to work as a truck driver for a gravel-hauling company. And, in 1999, he began his employment as a coal truck driver for Kincaid. Black's job primarily consisted of hauling coal betweens mines and tipples throughout Eastern Kentucky and Tennessee.

Black accepted a voluntary lay-off from Kincaid on March 21, 2002. Six-months later, Dr. Matthew Vuskovich, a certified "B-reader," interpreted a radiographic film for Black. Dr. Vuskovich determined that Black was positive for category 2/1 pneumoconiosis. Based on Dr. Vuskovich's evaluation, Black filed for benefits from Kincaid in October 2002. Black claimed his pneumoconiosis was "arising out of" and contracted "in the course of his employment" with Kincaid.

On April 22, 2003, Dr. A. Dahnan evaluated Black and interpreted his radiographic film as completely negative for pneumoconiosis. In contrast, in June 2003, Dr. Glen Baker evaluated Black and determined he was positive for category 1/0 pneumoconiosis.

Following these evaluations, Black moved to reopen the claim against Nally & Hamilton. In support of his motion, Black submitted the report of Dr. Vuskovich, indicating his condition had worsened to Category 2/1 pneumoconiosis. On October 2, 2003, the Chief ALJ denied Black's motion to reopen, stating that the reopening was time-barred by KRS[1] 342.125(3).

Because of the disparity in the interpretations of Black's radiographic film and in accordance with KRS 342.316(13), a consensus procedure was undertaken to determine whether Black was afflicted with pneumoconiosis. Under KRS 342.316(13), a consensus procedure can be applied to all claims not assigned to an ALJ before July 15, 2002. The classification assigned by the consensus is presumed to be correct unless there is clear and convincing evidence to the contrary.

The three doctors who conducted the consensus were all certified B-readers. Dr. Larry K. West, a Board-certified radiologist, interpreted Black's chest x-ray and determined he was completely negative for pneumoconiosis. He assigned Black a Category 0/0. Dr. Robert Pope, a Board-certified pulmonary specialist, also interpreted the chest film as negative. Although Dr. Pope did find some abnormalities with Black's

[1] Kentucky Revised Statutes.

x-ray, he did not believe there was sufficient evidence to positively diagnose Black; so he assigned a Category 0/1. Finally, Dr. Robert Powell, also a Board-certified pulmonary specialist, interpreted Black's film as positive for pneumoconiosis and assigned him a Category 1/1.

The consensus interpretation was that Black was negative for coal workers' pneumoconiosis. Based on this interpretation, the ALJ assigned to the case found that Black did not have pneumoconiosis. Specifically, the ALJ stated:

> Plaintiff does not have the disease of coal workers pneumoconiosis based on the evidence submitted in this claim. In making this finding, I have accepted the consensus classification which, pursuant to KRS 342.316(13), is presumed to be the correct classification of Plaintiff's condition unless overcome by clear and convincing evidence. I find no clear and convincing evidence in the record which would overcome the presumption afforded the consensus classification by the cited statute.

With regard to the issue of notice, the ALJ further found that Black had not met his burden of proof in establishing that he gave due and timely notice to Kincaid. The ALJ stated that although Black knew or should have known since 1991 that he had been diagnosed with pneumoconiosis, he did not make an effort to notify Kincaid until October 14, 2002. The ALJ found that the notification was not given "as soon as practicable" as required by KRS 342.316(2); therefore, since Black "received the

diagnosis in 1991, last worked for [Kincaid] on March 21, 2002, and did not give notice until October of 2002," the ALJ held his notice was untimely.

On appeal, the Board affirmed that portion of the ALJ's decision that held Black did not have pneumoconiosis. The Board stated that since Nally & Hamilton was not a party to Black's 2002 claim, res judicata did not apply because there had not been an identity of parties or issues.

With regard to the issue of notice, the Board determined the ALJ's decision was erroneous as a matter of law. Specifically, the Board held that Black's duty to notify did not arise until after Dr. Vuskovich issued his report diagnosing Black with category 2/1 pneumoconiosis. Consequently, the Board held that "the question that should have been addressed by the ALJ with regard to the notice issue is whether, after the issuance of Dr. Vuskovich's report and upon learning of a potential progression of his coal workers' pneumoconiosis, Black's notice to Kincaid Trucking in October 2002 was sufficient[.]" Since the ALJ did not address this issue, the Board held the matter was moot.

In response to the Board's decision, both parties sought review. This opinion follows.

BLACK'S PETITION FOR REVIEW

Black's sole argument is that the Board erroneously upheld the ALJ's finding that he did not have pneumoconiosis. In support of this argument, Black argues that the doctrine of res judicata applies because, in his 1991 claim for benefits, he was found to be positive for the disease. We disagree.

The application of res judicata to workers' compensation decisions is firmly established in Kentucky. In Godbey v. University Hospital of the Albert B. Chandler Medical Center Inc., this Court stated that "'Kentucky has for many years followed the rule that the decisions of administrative agencies acting in a judicial capacity are entitled to the same res judicata effect as judgments of a court.'"[2]

As commonly stated:

> the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.[3]

Res judicata actually involves two distinct subparts:

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[2] 975 S.W.2d 104, 105 (Ky.App. 1998) (citations omitted).

[3] 46 Am.Jur.2d §514, Judgments.

"claim preclusion," which embodies the typical definition of res judicata, and "collateral estoppel" or "issue preclusion."[4] "Claim preclusion bars a party from [relitigating] a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action."[5] In contrast, "[i]ssue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical."[6] The general rule of issue preclusion is "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[7] One exception to this general rule allows for relitigation of an issue when "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action."[8]

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[4] Yeoman v. Com., Health Policy Board, 983 S.W.2d 459, 464 (Ky. 1998); *see also* Sedley v. City of West Buechel, 461 S.W.2d 556 (Ky. 1970).

[5] Yeoman, *supra* at 464.

[6] *Id.*

[7] RESTATEMENT (SECOND) OF JUDGMENTS, §27.

[8] RESTATEMENT (SECOND) OF JUDGMENTS, §28.

While claim preclusion is dependent upon the mutuality of the parties, issue preclusion is not.[9] This means that "issue preclusion . . . allows the use of the earlier judgment by one not party to the original action to preclude relitigation of matters litigated in the earlier action."[10]

Black argues that, "the doctrine of res judicata should operate as a bar to any findings by the consensus panel that he does not have the occupational disease and thus should bar the finding by the Administrative Law Judge that [he] does not have [coal miners' pneumoconiosis]." Black's reliance on this doctrine is misplaced for several reasons; therefore, we must disagree with his contention.

Initially, we note that because there is no mutuality of the parties between the 1991 claim and the instant case, res judicata, or claim preclusion, cannot apply. This was the Board's reasoning. The Board specifically stated, "In 1991, Black was determined to have Category 1, coal workers' pneumoconiosis while in the employ of Nally & Hamilton, Inc. Nally & Hamilton, Inc. is not a party to this action. Therefore, neither res judicata nor collateral estoppel relate."

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[9] Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

[10] Godbey, *supra*, at 105 (emphasis added).

We agree with the Board's conclusion to the extent that it denies application of the doctrine of res judicata because Nally & Hamilton is not a party to this action. But this fact alone does not necessarily preclude the application of collateral estoppel, or issue preclusion, since that doctrine is not reliant on mutuality. Nonetheless, upon further analysis of Black's claim under issue preclusion, we do not believe there is sufficient evidence to support his contention that the 1991 findings regarding his pneumoconiosis were binding on the present case.

First, issue preclusion is not applicable to this case because the causation issue presented in 1991 is not the same causation issue presented in 2002. The issue before the ALJ in 1991 was whether Black was afflicted with coal workers' pneumoconiosis arising out of and in the course of his employment with Nally & Hamilton. On the contrary, the issue before the ALJ in this case is whether Black's pneumoconiosis arose out of and in the course of his employment with Kincaid. As noted, the doctrine of issue preclusion is only relevant when the issues presented in the former and latter actions are identical.[11] Here, they clearly are not.

Moreover, since the statutory standards for pneumoconiosis claims were amended in 2002, Black's 1991 claim

[11] *Id.*

was not decided under the same law as his 2002 claim. Since different standards were used to determine the status of Black's disease, it cannot be said that the issues were the same. So issue preclusion cannot apply.

Second, as stated by Professor Larson in his treatise on workers' compensation law:

> It is almost too obvious for comment that res judicata does not apply if the issue is the claimant's physical condition or degree of disability at two different times, particularly in the case of occupational disease. A moment's reflection would reveal that otherwise there would be no such thing as reopening for a change in condition.[12]

As the issue in this case was Black's physical condition, particularly the status of his occupational disease, issue preclusion cannot apply.

Finally, we question the propriety of Black's ability to claim either res judicata or issue preclusion in this case. As previously noted, "issue preclusion . . . allows the use of the earlier judgment *by one not party to the original action* to preclude relitigation of matters litigated in the earlier

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[12] Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, §79.72(f), Vol. 8 (1999); *see also* Fields v. Workmen's Compensation Appeal Board (Duquesne Light Company), 114 Pa.Cmwlth. 645, 647, 539 A.2d 507 (1988).

action."[13] Since Black brought the original claim against Nally & Hamilton, he was a party to the original action.

Also, because Kincaid was not a party to the original action, the RESTATEMENT (SECOND) OF JUDGMENTS states that relitigation is proper because "the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action."[14] Kincaid could not have obtained review of the claim between Black and Nally & Hamilton; therefore, relitigation of the issue is appropriate, and the application of issue preclusion in this action would be erroneous.

We do not believe that the doctrine of res judicata—either in its manifestation as claim preclusion or issue preclusion—can be applied in this case. So we affirm the Board's decision holding that the ALJ properly found Black to be negative for coal workers' pneumoconiosis.

KINCAID'S CROSS-PETITION FOR REVIEW

Kincaid argues that the Board's holding with regard to the timeliness of Black's notice to his employer was erroneous as a matter of law. Kincaid specifically states that since the issue of whether notice was timely is a question of fact, the

[13] Godbey, *supra*, at 105 (emphasis added).

[14] RESTATEMENT (SECOND) OF JUDGMENTS, §28.

Board abused its discretion in holding that the ALJ's findings were erroneous. We disagree.

KRS 342.316(2) states:

> [N]otice of claim shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur.

In Newberg v. Slone,[15] the Kentucky Supreme Court interpreted the KRS 342.316(2) notice requirement, stating, "[w]hat we are convinced of is that the notice provision of KRS 342.316(2)(a) is clear and requires notice to an employer when the worker has knowledge of a potentially compensable condition."[16] The Court has further held that "[a]n examination of some of our opinions pertaining to the notice provision of KRS 342.316(2) reveals that the requirement to give notice as soon as practicable means within a reasonable time under the circumstances of each particular case."[17]

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[15] Ky., 846 S.W.2d 694 (1992).

[16] *Id.* at 695.

[17] Peabody Coal Company v. Harp, 351 S.W.2d 170, 171-172 (Ky. 1961).

With regard to the timeliness of Black's notice, we believe the holding in Blackburn v. Lost Creek Mining[18] is germane. In Blackburn, a miner filed a claim for pneumoconiosis benefits. Although two doctors found he was positive for the disease, two other doctors claimed he was negative; the ALJ adopted the findings that the miner was negative and his claim was dismissed. Several years later, the miner again applied for benefits for pneumoconiosis but from a different employer. The new employer, Lost Creek, denied his claim and asserted that the miner was required to give them notice "of his previous diagnosis and his potential claim as soon as practicable after he ceased his employment with Lost Creek in August, 1995."[19] The Supreme Court disagreed, stating "[t]he claimant became employed by Lost Creek after the [initial] decision and did not obtain a second diagnosis of category 1/0 disease . . . until after the employment with Lost Creek ceased; whereupon, he attempted to notify Lost Creek."[20] The Court held that the miner had given Lost Creek notice "as soon as practicable" in accordance with KRS 342.316(2).

[18] 31 S.W.3d 921 (Ky. 2000).

[19] *Id.* at 924-925.

[20] *Id.* at 925.

The same analysis applies in the instant case. Although Black had previously been diagnosed with pneumoconiosis, he was under no duty to notify Kincaid until he obtained the second diagnosis from Dr. Vuskovich. At that point, Black had a "compensable injury" that could be attributed to his employment with Kincaid. Notifying Kincaid of his prior diagnosis would have been fruitless because until he was "re-diagnosed" by Dr. Vuskovich, Black did not have any further compensable injury for which he could have claimed benefits from Kincaid. The ALJ's findings with regard to this issue were clearly erroneous. Since the Board is charged with deciding "whether the evidence is sufficient to support a particular finding made by the ALJ,"[21] we believe the decision to reverse was clearly within the Board's province.

Black notified Kincaid within a month of receiving his diagnosis from Dr. Vuskovich. We believe this delay was reasonable; therefore, we affirm the Board's holding.

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

ALL CONCUR.

[21] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687 (Ky. 1992).

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