

RENDERED: MARCH 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001287-WC

MOUNTAIN CLAY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-08755

RAY CRAWFORD; DR. MICHAEL
CITAK; DR. SANDRA K.
SCHULDHEISZ; LAKE CUMBERLAND
REGIONAL MEDICAL CENTER;
BLUEGRASS RADIOLOGY
ASSOCIATES; HON. DANIEL
WOLFF, IV, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Mountain Clay, Inc., appeals from the Workers' Compensation Board's reversal of an opinion and order of administrative law judge (ALJ) Daniel Wolff, IV. Upon review, we agree with the Board that some of the issues determined by ALJ Wolff were decided in a prior opinion and award from ALJ Marcel Smith and are, therefore, controlled by the principle of *res judicata*. However, we conclude that the decisions made by ALJ Wolff regarding new medications and treatments were appropriate, and on these issues, we reverse and remand for reinstatement of that portion of the ALJ decision regarding those medications and treatments.

Ray Crawford was employed by Mountain Clay in a surface coal mining operation for over 20 years. Crawford filed a black lung claim that was settled for a lump sum in 1997. Pursuant to that settlement, future medical services related to Crawford's compensable injuries and lung condition were to remain available. On October 9, 2006, Mountain Clay filed a motion to reopen disputing Dr. Sandra Schuldheisz's treatment plan of lifelong rotating antibiotics, bronchodilators and oxygen on grounds that such treatment was not reasonable and necessary for coal workers' pneumoconiosis. On December 12, 2007, ALJ Smith entered an opinion and order, amended on January 24, 2008, finding "the oxygen and medications prescribed by Dr. Schuldheisz are reasonable and necessary" for

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

the treatment cure and relief of Crawford's industrial disease which was causally related to his employment with Mountain Clay. There was no appeal and that opinion and order became final.

Thereafter, Crawford was admitted to the hospital on December 22, 2008, December 28, 2008, and January 3, 2009, with breathing problems. During those hospital stays he was prescribed antibiotics and underwent procedures to drain fluid from his lungs as a result of pneumonia. Mountain Clay made motions to reopen and contested payment of those medical expense claims. ALJ Wolff heard evidence and rendered an opinion and order on February 13, 2009. Nothing in that opinion and order recognized the prior decision of ALJ Smith.

ALJ Wolff found that the hospitalizations were a result of community acquired pneumonia, influenza, and strep and were not related to black lung disease. He further found that prescription sleeping aids provided to Crawford along with prescription antibiotics were not reasonable or necessary for the treatment of black lung and absolved Mountain Clay of all liability as it related to the hospital stays. Crawford appealed that decision to the Board.

The Board on review held that "causation issues had previously been determined by ALJ Smith's . . . [order] . . . and thus, said determinations constituted the 'law of the case' in this matter, we agree that ALJ Wolff erred as a matter of law in not finding the disputed hospitalizations and prescriptions compensable." The Board then reversed the findings of ALJ Wolff and remanded the matter for entry of an order requiring Mountain Clay to pay for the

hospitalizations and associated treatment and medications. Mountain Clay brought this appeal.

The doctrine of *res judicata* provides that an existing final judgment rendered upon the merits is conclusive of a cause of action and of facts or issues litigated. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 464 (Ky. 1998). Within the doctrine is the concept of issue preclusion. “Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action.” *Id.* at 465.

As previously stated, Crawford’s black lung claim was settled in 1997. In that proceeding, the presiding ALJ adopted the opinion of Dr. Schuldheisz which determined that Crawford suffered from work-related diseases including COPD, hypoxemia, and coal worker’s pneumoconiosis. ALJ Smith additionally found that these conditions made Crawford more susceptible to contracting pneumonia and required longer recovery periods. ALJ Smith determined that Mountain Clay should pay for antibiotic treatment as part of the plan to limit Crawford’s susceptibility to pneumonia. Certain findings by ALJ Wolff conflict with the previous findings of ALJ Smith and were in error as a matter of law. Crawford’s work-related illnesses and entitlement to treatment with antibiotics were conclusively determined by ALJ Smith. Those determinations were not subject to subsequent litigation or decision by ALJ Wolff.

With respect to sleep aids, ALJ Wolff was in a different position. He reviewed hospital records including information on the sleep aids Soma and

Ambien in relation to Crawford's diagnosis of COPD, hypoxemia, and pneumonia. Although the Board found no evidence that Soma and Ambien were not appropriate for Crawford's work-related illness, Dr. Broudy testified that neither was a reasonable and necessary treatment for black lung and its related diseases.

ALJ Wolff was the rightful fact-finder as it related to the sleeping aids and the Board was not at liberty to substitute its judgment in this regard. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). As this was a new issue, ALJ Wolff alone was in the best position to draw reasonable inferences from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997). As there was sufficient evidence presented to ALJ Wolff that the sleep aids were unrelated to Crawford's work-related illness and because those issues were new and had not been previously decided, Mountain Clay should be relieved of responsibility for payment for these medications.

For reversal of an ALJ determination, there must be no substantial evidence of a probative value. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Here, there was sufficient evidence regarding the sleep aids to support ALJ Wolff's determination, and the Board erred in its reversal on this issue. In all other respects, we affirm the Workers' Compensation Board.

Accordingly, the final determination of the Workers' Compensation Board is affirmed in part and reversed in part, and this cause is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, RAY
CRAWFORD:

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