

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001812-WC

WEDDLE ENTERPRISES, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-85666

ROYCE JASPER; HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE; HOWARD
LYND, M.D.; HARRY LOCKSTADT, M.D.;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, LAMBERT, AND WINE, JUDGES.

WINE, JUDGE: Weddle Enterprises, Inc. petitions this Court for review of an opinion of the Kentucky Workers' Compensation Board affirming the Administrative Law Judge's opinion awarding Royce Jasper permanent total

disability benefits and determining that the surgery Jasper underwent was reasonable and necessary to the work-related injury he sustained. Weddle asks this Court to reverse the Board on the ground that the Board failed to properly apply the doctrine of issue preclusion. For the reasons set forth herein, we affirm.

Factual and Procedural History

On April 27, 2005, Jasper was performing his duties as an employee of Weddle when a valve, weighing approximately 150 pounds, slipped and fell into the ditch where he was working, landing on his back. Jasper sought medical treatment and made an injury claim. The case was originally assigned to Administrative Law Judge Andrew Manno (“ALJ Manno”).

Subsequent to his injury, Jasper was treated by Dr. Amr El-Naggar and Dr. Harry Lockstadt. Both doctors recommended surgery. However, although Dr. El-Naggar was of the opinion that a fusion surgery would be most appropriate, Dr. Lockstadt was of the opinion that disc surgery would be more appropriate. Thereafter, Jasper moved to bifurcate the claim on the grounds that he needed surgery which was denied by Weddle and that it appeared that the appropriate next step would be to allow the parties to take proof on the medical necessity of the surgery.

On September 13, 2006, a benefit review conference was held, and it was ordered that the issue of the compensability of surgery be bifurcated from the other issues. The parties initially filed briefs and introduced various medical proof. While both Dr. El-Naggar and Dr. Lockstadt suggested surgery for Jasper, three

other doctors, Drs. Travis, Wolens, and Tutt, did not feel that surgery was necessary.

On November 20, 2006, ALJ Manno entered an interlocutory opinion, award, and order stating that the issues to be resolved were (1) the occurrence of an injury, (2) the compensability of proposed medical treatment (including an MRI, fusion surgery, and/or artificial disc surgery), and (3) potential post-award temporary total disability benefits. ALJ Manno found that Jasper had suffered a work related injury. However, he noted that it was unclear whether the injury was temporary or permanent. Thus, he found that an MRI was reasonable and necessary to determine if additional treatment was necessary for Jasper. ALJ Manno indicated that he would order an evaluation by a University evaluator pursuant to Kentucky Revised Statute (“KRS”) 342.315 after the MRI was performed. ALJ Manno then placed the claim in abeyance pending the completion of the MRI testing and evaluation. The issues of potential disc or fusion surgery and potential post-award temporary total disability benefits were passed pending the receipt of the University evaluation report.

On November 2, 2007, with the MRI and University evaluation having been completed, ALJ Manno entered an interlocutory opinion and order on the bifurcated issues. The University evaluator agreed with Drs. El-Naggar and Lockstadt that surgery was appropriate, specifically recommending fusion surgery. However, ALJ Manno rejected the findings of the University evaluator, and instead agreed with the medical opinions of Drs. Tutt and Travis that surgical intervention

would not be related to the work injury. As ALJ Manno found that surgery would not be related to the work injury, he ordered that Weddle was not responsible for the surgery. Jasper filed a petition for reconsideration thereafter on the ground that ALJ Manno violated the provisions of KRS 342.315 by failing to give the opinion of the University evaluator presumptive weight. The petition was not granted except for modification of typographical errors concerning Jasper's name.

Jasper then filed a notice of appeal to the Workers' Compensation Board ("the Board") pursuant to KRS 342.285. Weddle responded by filing a motion to dismiss Jasper's notice of appeal on the grounds that the order was interlocutory in nature, and that Jasper therefore could not appeal from it.¹ Weddle received the result it sought, as the Board dismissed the appeal and remanded the case for further adjudication.

Thereafter, Jasper underwent the proposed fusion surgery (which had been deemed non-compensable by ALJ Manno) and filed for an extension of time to offer proof. ALJ Manno granted the motion for an extension of time, and Jasper submitted additional proof, including the post-surgery deposition of Dr. Lockstadt.

On August 1, 2008, the claim was reassigned to ALJ Edward D. Hays. ALJ Hays scheduled a benefit review conference for November 19, 2008. On February 20, 2009, ALJ Hays entered an opinion, award, and order awarding Jasper permanent total disability benefits and determining that the surgery Jasper underwent was reasonable and necessary to the work-related injury.

¹ Interestingly, Weddle takes a contrary position on appeal. Namely, that the order *was* final and, thus, that the doctrine of issue preclusion should now apply.

Weddle filed a petition for reconsideration which alleged that ALJ Hays impermissibly “re-litigated” issues which were finally decided by ALJ Manno. Said petition was denied by ALJ Hays on April 24, 2009. Thereafter, Weddle appealed to the Board. The Board affirmed the opinion, award, and order of ALJ Hays. Weddle now petitions this Court for review.

Standard of Review

On review of a decision of the Board, we reverse only if the Board has overlooked or misconstrued controlling law or has so flagrantly erred in evaluating the evidence that gross injustice has resulted. *Daniel v. Armco Steel Co.*, 913 S.W.2d 797, 798 (Ky. App. 1995). This effectively requires a review of the ALJ’s decision. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Where the ALJ has found in favor of the party bearing the burden of proof, as here, we will affirm the decision if it is supported by substantial evidence. *Special Fund v. Francis*, 708 S.W.2d at 643.

Analysis

The sole issue on appeal is whether the doctrine of issue preclusion applies to preclude a subsequent ALJ from revisiting an issue previously decided in an interlocutory order by a former ALJ. More specifically, the issue is whether the doctrine of issue preclusion would preclude ALJ Hays from revisiting the interlocutory opinion, award, and order of ALJ Manno, which found that the proposed disc or fusion surgery was non-compensable.

However, we need not reach a discussion of issue preclusion in this case because we find the doctrine of judicial estoppel to be applicable. The principle acts to estop Weddle's claim on appeal as Weddle now takes a position contrary to the position it took earlier in the administrative proceeding. *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422 (Ky. App. 2008). See also, T. Scott Belden, Annotation, *Judicial Estoppel in Civil Action Arising from Representation or Conduct in Prior Administrative Proceeding*, 99 A.L.R.5th 65 (2002). Judicial estoppel is a quasi-estoppel principle that may "be applied to prohibit a party from taking inconsistent positions in judicial [or quasi-judicial] proceedings." *Hisle*, 258 S.W.3d at 434; *Colston Investment Co. v. Home Supply Co.*, 74 S.W.3d 759 (Ky. App. 2001). The formula often applied for this principle asks whether (1) the party is taking a position clearly inconsistent with an earlier position, (2) the party succeeded in persuading a court to accept the earlier position, and (3) the party would derive an unfair advantage if not estopped. *Id.*

In the present case, after Jasper filed his notice of appeal from ALJ Manno's interlocutory opinion, award, and order, Weddle filed a motion to dismiss on the ground that the interlocutory opinion was not final and appealable, but subject to change or modification. The Board agreed with Weddle and dismissed Jasper's claim. Thus, Weddle succeeded in persuading the Board to accept its position. Now Weddle attempts to argue that the issues in the order were finally decided and that ALJ Hays was precluded from revisiting the issues therein. Thus, according to Weddle, it would appear that Jasper should have had no recourse at

all. This would be an unfair advantage to Weddle and detriment to Jasper. Thus, we find that Weddle is barred from advancing this argument on appeal. *See, Hisle, supra.*

Accordingly, we affirm the Board's decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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