

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000297-WC

ATWOOD DEZARN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-13-00144 AND WC-13-00659

INTERNATIONAL COAL GROUP;
HON. JEANIE OWEN MILLER, ALJ; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, NICKELL AND VANMETER, JUDGES.

NICKELL, JUDGE: The Workers' Compensation Board ("Board") entered an Opinion reversing and remanding the August 21, 2014, Opinion, Order and Award on Remand and September 15, 2014, Order on Reconsideration entered by an

Administrative Law Judge (“ALJ”) following a previous remand by the Board.

Atwood Dezarn now petitions this Court for review of the Board’s decision.

Following a careful review, we affirm.

Dezarn filed two applications for benefits against International Coal Group (“ICG”), the first alleging work-related injuries to his right shoulder sustained in a fall on February 14, 2011, and the other alleging cumulative trauma injuries involving multiple body parts with an alleged date of injury of February 28, 2013. The matters were consolidated for review by the ALJ, but only matters pertaining to the 2011 injury are before us on appeal. In an Opinion, Order and Award dated December 10, 2013, the ALJ awarded Dezarn permanent partial disability (“PPD”) benefits for his right shoulder injury, and also included a 5% impairment rating and corresponding award for a cervical spine injury. Dezarn and ICG separately appealed the ALJ’s award for differing reasons.

On June 6, 2014, the Board rendered its Opinion partially vacating the ALJ’s award, specifically with respect to Dezarn’s alleged neck injury. The Board concluded

Dezarn’s Form 101 and the Benefit Review Conference Order reference only a shoulder injury occurring due to the 2011 accident. In his deposition and final hearing testimony, Dezarn stated he injured only his shoulder in the 2011 fall. When asked about his neck pain, he stated it developed some 12 years earlier and had gradually worsened. He further stated his belief that the neck pain was due to the constant turning required when operating a bulldozer. In his brief before the ALJ, Dezarn

discussed his various conditions, including neck pain, and stated “all his problems (other than the specific right shoulder injury that resulted in a partial thickness rotator cuff tear) are the direct result of cumulative trauma injuries.”

While Dr. [Arthur] Hughes’ report may support a finding Dezarn injured his neck in the 2011 fall, as he asserts on appeal, only issues identified in the Benefit Review Conference as contested can be the subject of further proceedings. 803 KAR 25:011 §13 (14). As detailed above, there is no evidence to suggest a neck injury as a result of the 2011 fall was tried by consent. Rather, it is apparent all parties considered Dezarn’s neck complaints to be a part of his cumulative trauma claim. As such, that portion of the ALJ’s order attributing Dezarn’s neck injury to the February 14, 2011 work-related incident must be vacated.

On remand, the ALJ must clarify an additional inconsistency related to Dezarn’s neck condition. At page 16 of the December 10, 2013 Opinion, Order and Award, the ALJ states she “find[s] [Dezarn] has sustained his burden of proving a causal connection/work-relatedness of his work activities over 20 years (with this employer or its predecessors) to the condition of his lumbar back, neck, and upper extremities. For this finding I rely on the opinion of Dr. Hughes and more significantly the records of the Family Medical Center of Clay County.” However, despite this finding, the ALJ awarded benefits for Dezarn’s neck injury as part of his claim relating to the February 14, 2011 injury, rather than his cumulative injury claim. Furthermore, Dr. Hughes’ report cannot be relied upon to conclude Dezarn suffered cumulative trauma to his neck; the report unequivocally attributes the neck condition to his 2011 fall.

Accordingly, on remand, the ALJ is asked to clarify her findings with respect to Dezarn’s neck condition. For the reasons stated above, benefits for the neck condition may

not be awarded as part of his February 14, 2011 injury claim. Because this portion of the award has been vacated, the ALJ must also recalculate the benefits for the specific injury claim, including reconsideration of the appropriate multiplier. Additionally, if the ALJ intended to award benefits for the neck condition as part of the cumulative injury claim, as stated in her opinion, she must amend the cumulative trauma award accordingly.

Neither party appealed from this decision.

On August 21, 2014, the ALJ rendered her Opinion, Order and Award on Remand. The ALJ restated much of the medical testimony relied upon in her initial award related to the neck injury and again included an award for Dezarn's neck injury in connection with the February 14, 2011, fall. Further, relying on *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136 (Ky. 1991), the ALJ found determination of whether an issue is tried by consent rests solely with the fact-finder. Based on this assumption and her review of the record, the ALJ concluded the issue of Dezarn's neck injury in relation to the February 14, 2011, fall had been tried with the consent of the parties. ICG petitioned for reconsideration, arguing the ALJ had failed to follow the mandates set forth in the Board's Opinion in awarding benefits for the neck injury. The petition was denied by order entered on September 15, 2014. ICG again appealed to the Board.

On January 23, 2015, the Board entered its Opinion reversing and remanding upon concluding the ALJ did not, in fact, adhere to the mandates of its previous Opinion. The Board stated it had previously

determined the issue of a cervical injury as a result of the February 14, 2011 fall had not been tried by consent. For this reason, we vacated in part that portion of the ALJ's Opinion attributing Dezarn's neck injury to the February 14, 2011 accident and plainly stated "benefits for the neck condition may not be awarded as part of his February 14, 2011 injury claim." On remand, though not asked to make this specific finding, the ALJ determined the issue had, in fact, been tried by consent. She again awarded benefits relating to the neck injury as a result of the February 14, 2011 accident.

The Board went on to hold the ALJ was barred from making a determination on the issue of trial by consent in this case because the issue was never raised before her. As such, only the Board could make such a determination. Further, citing *Brown v. Commonwealth*, 313 S.W.3d 577, 611 (Ky. 2010), *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989), and *Hutson v. Commonwealth*, 215 S.W.3d 708, 713-14 (Ky. App. 2006), the Board concluded the mandate rule incorporated in the law of the case doctrine required the ALJ to follow the determination of the Board on remand. Because the ALJ had acted outside her jurisdiction and authority on remand, the Board reversed the August 21, 2014, and September 15, 2014, opinions and orders, and remanded the matter to the ALJ with instructions to enter a new Opinion conforming to the Board's pronouncements. Dezarn timely petitioned this Court to review the Board's decision.

Dezarn challenges the Board's decision, claiming it committed flagrant error in reversing the ALJ's determination that the neck injury had been tried by consent. He contends the ALJ correctly relied on *Nucor* in determining

she had sole authority to decide the issue of trial by consent and, pursuant to that authority, such a finding can only be reversed if clearly erroneous. Dezarn claims the ALJ's decision was supported by substantial evidence and was therefore not assailable on appeal. We disagree with Dezarn's assessment.

Our function when reviewing a Board decision "is to correct the Board only where the (sic) Court perceives 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, 687-88 (Ky. 1992). Thus, the "standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law." *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 860 (Ky. 2001) (citing *American Beauty Homes v. Louisville & Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964)).

The question we are called on to decide is whether an ALJ may give a different answer to a legal question already pronounced by the Board in the same case. Clearly, she may not.

We must be cognizant of Dezarn's failure to include a neck injury in his claim for benefits arising from the February 14, 2011, fall—the claim was always for only a right shoulder injury; the lack of a motion to amend the pleadings to conform to the evidence or any other attempt to place the neck injury in issue as

a specific injury arising from the February 14, 2011, accident; and the failure to raise the issue of trial by consent before the ALJ. In addition, no appeal was prosecuted from the Board's June 6, 2014, Opinion which expressly reversed the ALJ's award of compensation for the neck injury and explicitly found the matter had not been tried by consent.

In the instant case, the ALJ implied on remand the Board was without authority to determine whether an issue had been tried by consent. The ALJ relied on *Nucor* for the proposition that such determinations were left solely to the fact-finder's discretion. However, *Nucor's* holding is inapposite because the issue was never raised before the ALJ. In such cases, the appellate body must determine whether an issue was tried by consent. *See Parrish v. Ky. Board of Medical Licensure*, 145 S.W.3d 401 (Ky. App. 2004); *Kentucky County Public Parks Corp. v. Modlin*, 901 S.W.2d 876 (Ky. App. 1995); *Allied Machinery, Inc. v. Wilson*, 673 S.W.2d 728 (Ky. App. 1984). When an appellate body makes a determination of law, that decision is binding on lower courts and tribunals in subsequent proceedings.

The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact. As the term 'law of the case' is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further

proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court.

Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982) (internal citation and quotation marks omitted).

Our review indicates the Board undertook a detailed analysis of the procedural and legal posture of the case, as well as the supporting evidence, before concluding Dezarn had not alleged a neck injury in relation to the February 14, 2011, accident. Except for a single answer to a leading question on direct examination, Dezarn insisted all along only a right shoulder injury resulted from his fall. When the Board concluded the neck injury had been improperly considered, no appeal was taken. Thus, that decision became final and constitutes the law of the case. As such, it was controlling on the ALJ who was wholly without authority to render a contrary decision. *Id.* The ALJ plainly erred in so doing.

The Board's January 23, 2015, Opinion reached the correct result under controlling statutes and precedents. Nothing therein indicates the existence

of a gross injustice, flagrant error or overlooking of applicable legal authority. Consequently, no basis exists for overturning the decision. Thus, for the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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