

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2009-SC-000531-WC

DATE 4/8/10 Kelly Klaber D.C.
APPELLANT

JAMES STUMP

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-000101-WC
WORKERS' COMPENSATION BOARD NO. 97-82433

RIVERTOWN STEEL;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

VACATING AND DISMISSING

As framed by the parties, this appeal concerns the date from which an Administrative Law Judge (ALJ) may award temporary total disability (TTD) benefits in a reopened workers' compensation claim. In the claimant's initial appeal of the decision at reopening, the Workers' Compensation Board relied on *Bartee v. University Medical Center*¹ to affirm a finding that the claimant's entitlement to TTD began on the date he filed a motion to reopen. The Board remanded the claim to the ALJ to determine the date that the period of TTD

¹ 244 S.W.3d 91 (Ky. 2008).

ended. The ALJ did so and awarded benefits accordingly. Affirming the decision, the Board again relied on *Bartee*. The Court of Appeals affirmed.

The claimant argues that *Bartee* was decided incorrectly and should be reconsidered. We vacate the Court of Appeals' decision and dismiss. The Board decided the issue in the claimant's initial appeal and he failed to take a timely appeal of the adverse decision. Thus, the law of the case doctrine precluded him from re-litigating the issue following the remand. The Board erred by considering the second appeal and the Court of Appeals erred by failing to vacate and dismiss.

The claimant injured his lower back while working for Rivertown Steel, Inc., in 1989. He underwent diskectomy surgeries at L4-5 in 1989 and 1990 but did not wish to undergo a recommended L4-5 and L5-S1 fusion. The parties agreed to settle the claim in November 1990 for an amount that was based on a 40% occupational disability, with the claimant reserving his right to future medical benefits.

The claimant later returned to work for Biologix of River Valley, where he injured his lower back again on May 3, 1997. He underwent a laminectomy and diskectomy at L4-5 in July 1997, after which he quit working entirely. He also underwent a lumbar decompression with diskectomy at L4-5 in 2003. Finally, in 2004, he underwent a repeat laminectomy as well as a fusion at L4-5 and L5-S1.

On January 4, 2005, the claimant filed an application for benefits based

on the injury that occurred at Biologix. On June 22, 2005, he filed a motion to reopen the settled claim against Rivertown. The ALJ approved a settlement in which the claimant and Biologix resolved all outstanding issues between them in September 2006.

The issues submitted to the ALJ in the reopening included Rivertown's liability for the 2004 surgery and resulting disability as well as the claimant's entitlement to TTD related to the surgery. The ALJ found that the 2004 surgery was causally related to the 1989 injury that occurred at Rivertown. The ALJ based the finding on medical evidence that indicated a fusion was recommended initially in 1989; that the claimant experienced continuous symptoms of lumbar instability thereafter but continued to refuse to undergo the procedure until 2004; and that the intervening surgeries would not have caused the instability that gave rise to the need for the fusion. The ALJ refused to award TTD, reasoning that TTD may be awarded from the date the motion to reopen is filed but that KRS 342.125(3) limits the period for seeking TTD to the period of income benefits, which had expired for the 1989 injury.

The claimant appealed both of the ALJ's legal conclusions. Relying on KRS 342.125(4) and *Bartee*, the Board affirmed with respect to the date for beginning TTD but reversed and remanded with respect to the ALJ's interpretation of KRS 342.125(3). The Board determined that the period of an award included both the period of income and medical benefits.

Neither party appealed the Board's decision. Thus, the claim was

remanded to the ALJ, who awarded TTD from June 22, 2005, through September 23, 2005. The claimant appealed the decision on remand, asserting that *Bartee* was decided incorrectly. The Board and the Court of Appeals rejected the argument and affirmed. We have concluded that they erred by considering the merits of the appeal because the law of the case doctrine precluded re-litigation of issues the Board decided in the initial appeal.

The law of the case doctrine applies to former rulings of an appellate court and concerns the extent to which a decision made at one stage of litigation is binding at a subsequent stage. *Davis v. Island Creek Coal Co.*² and *Whittaker v. Morgan*³ explain that the doctrine applies to the Board's decisions because its jurisdiction is appellate. The doctrine requires a party wishing to appeal an adverse decision of the Board to do so at the time the decision is rendered, *i.e.*, within 30 days of the date on which the Board enters its final decision.⁴ The doctrine precludes an attempt to raise the issue in an appeal from the implementation of the Board's decision on remand because it amounts to an attempt to re-litigate the previously-decided issue.⁵ Absent a change in the issues or evidence on remand, the doctrine limits the questions on appeal to whether the ALJ properly construed and applied the Board's order.

² 969 S.W.2d 712 (Ky. 1998).

³ 52 S.W.3d 567 (Ky. 2001).

⁴ KRS 342.290; CR 76.25(2).

⁵ See *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989); *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982).

The decision the Board entered on May 16, 2008, became final because the claimant failed to take a timely appeal. Thus, the law of the case doctrine barred re-litigation of the issues the Board decided, including the date for beginning post-award TTD. The doctrine limited the questions subject to appeal following the Board's remand to whether the ALJ properly construed and applied the order of remand.

The decision of the Court of Appeals is vacated and this appeal is dismissed.

All sitting. All concur.

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