RENDERED: MAY 3, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002381-WC

WAL-MART STORES, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-98-56606

JUDY FECKLEY; LLOYD EDENS, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, EMBERTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Wal-Mart Stores, Inc., appeals from an order of the Workers' Compensation Board, entered October 3, 2001, upholding an award of income benefits to Judy Feckley. Feckley suffered work-related injuries to her back, neck, and right arm. Her impairment rating, the Administrative Law Judge found, was seven percent. In an earlier appeal to the Board, Wal-Mart argued that the physician who attributed this seven-percent impairment rating to Feckley had misapplied the American Medical Association's *Guide to the Evaluation of Permanent Impairment,* and thus that the ALJ had erred as a matter of law in relying on

that physician's testimony. The Board rejected that argument, but remanded the claim for reconsideration in light of facts the ALJ had earlier misapprehended.

Wal-Mart did not appeal from the adverse Board ruling, and on remand the ALJ again awarded income benefits based on a seven-percent impairment rating. Once again Wal-Mart appealed to the Board and again contended that the physician's impairment-rating evidence was incompetent because not in conformity with the *Guide*. Feckley argued that the Board's earlier ruling on that issue had become the law of the case. The Board decided that the law-of-the-case doctrine did not apply, but nevertheless reiterated its prior ruling on the evidentiary question and upheld Feckley's award.

Wal-Mart then appealed to this Court. It argues that, because the physician based his impairment rating on the so called range-of-motion model without explaining why he did not use the injury model (the model the *Guide* apparently prefers), his testimony should have been deemed incompetent as a matter of law. We need not reach this question because we agree with Feckley that the Board's initial ruling has become the law of the case. Accordingly, we affirm.

In Whittaker v. Morgan,[1] our Supreme Court considered the converse of the present situation. In that case the Special Fund appealed to the Board from an order awarding income benefits and argued that it was entitled to set off an earlier award

[1]Ky., 20 S.W.3d 567 (2001).

according to a particular formula. Although the Board agreed that the Fund was entitled to a credit, it rejected the Fund's proposed formula and remanded to the ALJ for calculation of the credit in another manner. The Fund appealed to this Court, and we dismissed the appeal as premature. Reversing, the Supreme Court reasoned as follows:

> [T]he Board decided the legal question that was raised by the Special Fund and rejected its argument, . . . Had the Special Fund failed to appeal the adverse determination by the Board, that determination would have become the law of the case and, therefore, would have precluded a subsequent appeal of the issue. For that reason, the Board's decision was ripe for appeal.[2]

Here, too, in Wal-Mart's first appeal to the Board, the Board rejected Wal-Mart's legal argument on the merits. At that point, the Board's decision became ripe for appeal.[3] Wal-Mart's attempt to relitigate the issue in a second appeal was thus untimely.[4] By then, the Board's initial ruling had become the law of the case, and further appellate review, including the Board's reconsideration,[5] was foreclosed. We conclude that the

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[2] *Id.* at 569-70.

[3] Williamson v. Commonwealth, Ky., 767 S.W.2d 323, 325 (1989) ("[I]f a party is aggrieved by an adverse appellate determination, his remedy is in an appellate court at the time the adverse decision is rendered. This is so because an objection in the trial court is futile and an appeal from the trial court's implementation of the appellate determination is nothing more than an attempt to relitigate an issue previously decided.").

[4] Although we agree with Feckley that Wal-Mart's appeal is untimely, we do not agree with her suggestion that Wal-Mart should be sanctioned pursuant to KRS 342.310. The evidentiary question that Wal-Mart has attempted to raise is a legitimate one, and there is no indication that Wal-Mart's appeal has been pursued in bad faith.

[5] The Board attempted to distinguish Whittaker v. Morgan on the ground that, in that case,

(continued...)

Board erred by not applying the law-of-the-case doctrine to Wal-Mart's second appeal. The error was harmless, however, because, despite the Board's unauthorized reconsideration of the disability-rating issue, the result did not change. Accordingly, we affirm the October 3, 2001, order of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE JUDY FECKLEY:

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[5](...continued)
the remand to the ALJ required that the result be modified whereas in this case the remand only authorized a modification. Our Supreme Court has ruled, however, that either sort of remand is appealable. Davis v. Island Creek Coal Company, Ky., 969 S.W.2d 712, 713 (1998) ("If the [order of remand] either set aside the board's [now the ALJ's] award or authorized the [ALJ] to enter a different award, then the order . . . was final and appealable.").