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Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002340-WC

THOMAS HEAVY HAULING — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 94-WC-11055

ELBERT POWELL; HON. ROBERT L. WHITTAKER, DIRECTOR OF WORKERS' COMP FUNDS; HON. BRUCE W. COWDEN, JR., ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

DYCHE, JUDGE: Thomas Heavy Hauling ("THH") appeals from a decision of the Workers' Compensation Board which affirmed in part, reversed in part and remanded an opinion, order and award issued by an administrative law judge ("ALJ") in favor of Elbert Powell. The ALJ found Powell to be permanently occupationally disabled because of a worsening of a 1994 work-related injury in

combination with prior work and non-work related injuries. The ALJ awarded Powell permanent total disability benefits, apportioned equally between THH and the Workers' Compensation Fund ("WCF"). The Board affirmed this award, as well as the equal apportionment, but vacated the ALJ's calculation of benefits and remanded this matter. We affirm in part and reverse in part.

In 1989, Powell commenced his employment with THH as a truck driver. On February 8, 1994, Powell injured his neck while acting in the course and scope of his employment. Powell underwent multiple surgical procedures on his cervical spine and later settled his claim on February 23, 1996, for a lump sum based on 30% permanent partial disability. Although Powell has not worked for income since 1994, he was elected to the unpaid office of constable of Hopkins County, Kentucky.

After his motion for reopening was granted, Powell testified concerning his physical condition. Powell stated that, despite undergoing surgery on his cervical spine, he still experiences significant pain. To minimize the pain, Powell performs daily at-home treatment, including wrapping a hot towel around his neck and using a traction device. Further, Powell stated that he receives treatment on his neck from Dr. Timothy Schoettle and Dr. Frank Berklacich. Despite this treatment, Powell noted that he still experiences pain that radiates down

his arm into his fingers, feels numbness on the left side of his face and has difficulty sitting and standing. Further, Powell cannot use his neck brace or wear a seat belt while seated in an automobile because these items rub a neck tendon and cause pain. Powell stated that this pain has prevented him from obtaining employment or engaging in hobbies.

During his testimony, Powell also admitted that, in addition to the neck injury sustained while employed by THH, he has suffered a number of other injuries. While serving in the United States Marine Corps in the 1960s, Powell injured his knee playing volleyball. In December 2000, Powell underwent knee replacement surgery and was assessed a 40% disability because of this surgery. Powell receives benefits for this injury.

In 1984, while working for Wynn Oil Company, Powell sustained a work-related back injury for which he underwent surgery at the L4/L5 level. Powell filed a workers' compensation claim and received a lump sum settlement based upon a 40% disability rating. Additionally, on November 21, 1995, while serving as constable in Hopkins County, Powell sustained a lower back injury after being hit by a truck while directing traffic. ALJ Donald Smith, on August 19, 1998, found Powell to be 30% occupationally disabled, with 10% of that disability pre-

existing due to Powell's prior injuries. ALJ Smith attributed only 20% occupational disability to the 1995 back injury[1].

On reopening, Powell produced medical evidence concerning the worsening of his 1994 neck injury. Dr. Timothy Schoettle has treated Powell since the 1994 injury. During the original claim, Dr. Schoettle opined that Powell possessed a 15% whole body impairment with 50% due to a dormant, pre-existing condition of cervical spondylosis and stenosis which were aroused by the 1994 work-related injury. At that time, Dr. Schoettle believed that Powell would qualify for a driving job that involved no lifting. On January 13, 2000, Dr. Schoettle expressed uncertainty as to whether Powell was a candidate for multi-level fusion. Dr. Schoettle also noted in February 2000 that Powell had severe cervical arthritis at C3/C4. At this point, Dr. Schoettle referred Powell to Dr. Edward Mackey for a second opinion on whether Powell would benefit from additional surgery. On March 13, 2000, Dr. Mackey opined that Powell would not benefit from additional neck surgery.

The record also contains medical evidence from Dr. Frank Berklacich. Initially, Dr. Berklacich recommended conservative treatment for Powell's chronic neck pain. MRI and

[1] In its opinion, the Board noted that none of these parties filed any documentation from the 1995 claim in the record. The Board stated that the ALJ took judicial notice of the contents of the 1995 claim, as maintained by the Commissioner of the Department of Workers' Claims and is considered to be a matter of public record.

CT scan results were also not strongly supportive of an additional surgery. However, in November 2000, Dr. Berklacich suggested that Powell would benefit from surgery only if it was performed as an extension of a prior anterior fusion. Dr. Berklacich testified that his November 2000 opinion was based on an MRI that showed a significant worsening of Powell's cervical spine. Dr. Bercklacich suspected this worsening would continue and require another cervical fusion. Finally, Dr. Berklacich assessed Powell with an impairment rating of 25% to 30%.

Dr. Frank Wood performed an independent medical examination of Powell on June 26, 2001 and diagnosed Powell with cervical spondylosis with myelopathy. Dr. Wood opined that Powell's subjective complaints of pain are consistent with his objective findings. As a result of his examination, Dr. Wood assessed Powell with a 15% whole body permanent partial rating. However, Dr. Wood found no worsening of Powell's neck condition.

Based upon this evidence, the ALJ found Powell to have incurred 60% impairment because of the worsening of his 1994 neck injury. The ALJ further found Powell to be totally occupationally disabled and awarded benefits based upon this 60% impairment, combined with his prior knee and back injuries. The ALJ evenly apportioned liability for this worsening between THH and WCF and granted a credit of 30%, representing the 1994 settlement. While the Board ruled that substantial evidence

supported the ALJ's findings as to Powell's disability and the apportionment of liability, it vacated the ALJ's calculation of benefits. In vacating the ALJ's calculations, the Board reasoned that, since ALJ Smith found a 10% disability because of the 1994 neck injury, res judicata principles mandate that the credit should have been 10% instead of 30%. Accordingly, the Board remanded this matter to the ALJ for a finding of fact as to the credit due to THH and WCF. This petition followed.

We note that our review of decisions from the Workers' Compensation Board is to be deferential. In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992), the Kentucky Supreme Court outlined this Court's role as follows:

> The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the 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.

A claimant in a workers' compensation action bears the burden of proving every essential element of his cause of action. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Since Powell was successful before the ALJ, the question on appeal is whether substantial evidence supports the ALJ's conclusion. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is evidence which, when taken

alone or in light of all the evidence, has probative value to induce conviction in the mind of a reasonable person. Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994), citing Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

As the finder of fact, the ALJ has the sole authority to assess and to evaluate the quality, character, and substance of the evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999). In order to reverse the ALJ's decision, it must be shown that no substantial evidence supports that decision. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Guided by these legal principles, we now turn to THH's assertions of error.

On appeal, THH presents several assertions of error. First, THH argues that the ALJ's finding that Powell is totally disabled is not supported by substantial evidence. We disagree. Dr. Berklacich testified that an MRI scan revealed a worsening of Powell's neck injury and linked that worsening to the 1994

work-related injury. Also, Dr. Berklacich indicated that Powell's cervical range of motion had diminished and that Powell does possess spinal cord effacement, which will further deteriorate his physical condition. Finally, Dr. Berklacich noted that this worsening ultimately requires surgery.

We also note that Powell's own testimony supports the ALJ's conclusions. Powell testified that he is unable to use a computer, drive a truck for extended periods of time, or perform many daily activities without pain. To treat his pain, Powell places a hot towel around his neck and uses a traction device at least two times a day. Powell also stated that his ability to walk, stand, lift, carry, and perform fine motor skills has diminished since 1996. Finally, Powell does not believe that he can perform any income producing work given his age, education, and vocational background. While the ALJ must necessarily consider the worker's medical condition when determining the extent of the occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985); Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976). A worker's testimony is competent evidence of his physical condition and of the worker's ability to perform various activities both before and after being injured. Hush v.

Abrams, Ky., 584 S.W.2d 48 (1979). Here, after considering Patterson's age, education, and experience, as well as the medical and testimonial evidence, the ALJ determined that Patterson could no longer engage in any gainful employment. Drawing this inference is well within the ALJ's authority. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

THH also asserts that the ALJ erred in finding Powell to be totally occupationally disabled by considering the occupational implications of Powell's prior injuries. This argument is completely without merit. The law on the date of injury controls the rights of the parties with regard to a workers' compensation claim. Meade v. Reedy Coal Co., Ky., 13 S.W.3d 619 (2000). At the time of Powell's neck injury, Kentucky law provided that, even though a claimant has a noncompensable occupational disability that existed prior to a compensable injury, the prior disability is not excluded when determining whether total disability exists. Teledyne-Wirz v. Willhite, Ky. App., 710 S.W.2d 858 (1986), superseded by statute as stated in McNutt Construction v. Scott, Ky., 40 S.W.3d 854, 858 (2001). Clearly, under the law in effect in 1994, the ALJ was required to consider those injuries Powell sustained prior to 1994.

Next, THH argues that the ALJ erroneously apportioned some liability to it for Powell's permanent total disability.

In making this argument, THH asserts that, under the "excess disability" line of cases, Campbell v. Sextet Mining Co., Ky., 912 S.W.2d 25 (1995), Fleming v. Windchy, Ky., 953 S.W.2d 604 (1997), and Whittaker v. Fleming, Ky., 25 S.W.3d 460 (2000), the medical evidence herein clearly shows that Powell's 1995 lower back injury caused the increased disability at issue herein. We find THH's reliance on these cases to be totally unfounded.

THH correctly points out that a claimant is not entitled to benefits for permanent total disability until that claimant becomes totally disabled. Windchy, 953 S.W.2d at 607. The employer on risk at the time of the last injury necessary to the finding of permanent total disability is responsible for lifetime benefits representing the percentage of disability caused by that final injury. Campbell, 912 S.W.2d at 28; Windchy, 953 S.W.2d at 607-608. Any excess disability, that greater amount of disability resulting from the combined effect of the latest injury superimposed on the previous disability, is apportioned to the WCF. Campbell, 912 S.W.2d at 28; Fleming, 25 S.W.3d at 462-463.

These three "excess disability" cases, however, are distinguishable from the matter currently before us. Each of these cases dealt with the apportionment of liability between two work-related injuries under original consideration or active disability pre-dating both injuries for which the claimant had

already been compensated. Moreover, each claimant in the "excess disability" cases was not totally disabled until the occurrence of the second injury. See Campbell, 912 S.W.2d at 26; Windchy, 953 S.W.2d at 605. Here, in contrast, substantial medical evidence shows that Powell did not become totally disabled until after his 1995 back injury. Based upon this evidence, the ALJ determined that the worsening of Powell's 1994 cervical injury occurred after the effects of the 1995 event, with that worsening ultimately responsible for rendering Powell totally and permanently disabled. It is clear that the ALJ properly refused to apply the law found within the "excess disability" cases because the subsequent worsening of Powell's 1994 injury, not the effects of the 1995 injury, constituted Powell's last work-related traumatic event for purposes of determining apportionment and liability. Hence, we adopt the following apportionment of liability from the ALJ's decision as our own:

> After considering all the evidence presented on reopening, the Administrative Law Judge finds that the Plaintiff has sustained his burden of showing that from the 1994 injury standing alone, the Plaintiff's occupational disability has increased from 30% to 60%. . . . The Administrative Law Judge takes judicial notice of the fact that based on Dr. Berklacich's opinion that [sic] the Plaintiff's condition has worsened to the extent expressed above. The Administrative Law Judge does feel that the facts enumerated above demands [sic] application

> of Teledyne Wirz v. Wilhite, Ky. App., 710 S.W.2d 858 (1986). From the facts of this case, it is clear that the Plaintiff has previously incurred a pre-1994 knee injury while employed in the marine corp [sic] which has necessitated a total knee replacement performed in 2000. In addition, the Administrative Law Judge takes judicial notice of the fact that the Plaintiff had previously sustained a work-related low back injury which necessitated surgery in 1984 [and] was settled for a 40% occupational disability. Although the Administrative Law Judge is cognizant of the fact that the 1995 low back injury occurred subsequent to the injury which is the subject matter of this reopening and, therefore, any occupational disability ramifications emanating from this injury should not be taken into account when determining whether the Plaintiff is permanently totally disabled, [See Johnson v. Scotts Branch Coal Company, Ky. App., 754 S.W2d 555 (1988)], the Administrative Law Judge makes a finding that based on the restrictions imposed by the worsening of the 1994 cervical injury together with the restrictions emanating from the prior left knee condition as well as the prior low back condition, that the Plaintiff has a 100% occupational disability. See also Teledyne Wirz v. Wilhite, Ky. App., 710 S.W.2d 858 (1986).

Next, THH asserts that the Board erred in not giving it a credit for a 30% occupational disability as a result of the finding regarding Powell's subsequent lower back injury. We reject this argument.

While THH presents no authority in support of this argument, we believe that Kentucky law clearly addresses this issue. Generally, compensation otherwise recoverable by reason

of a work-connected permanent injury is not affected by a pre-existing handicap that "is not a contributing factor to the present work situation in which the injury occurred." Schneider v. Putnam, Ky., 579 S.W.2d 370, 372 (1979). If a prior injury does not contribute to the subsequent total and permanent occupational disability, then that injury is not pre-existing for the purposes of determining the degree of occupational disability which existed prior to the subsequent injury. See Wells v. Bunch, Ky. 692 S.W.2d 806 (1985). In this event, the employer is not entitled to a credit for that prior injury. Id. Here, since the ALJ determined that Powell's 1994 injury solely caused total and permanent occupational disability, THH is not entitled to a 30% credit representing the award for that back injury. This result is supported by substantial evidence.

Finally, THH argues that the Board erred in reversing the ALJ's calculation of the credit it is entitled for any overlapping periods of benefits previously paid to Powell for his 1994 neck injury. We agree.

The ALJ found Powell to be totally disabled, but gave THH a credit of 30%, representing the occupational disability assigned to Powell as a result of the 1996 settlement agreement. The Board vacated this credit and remanded this issue because ALJ Smith's 1998 findings are res judicata. The Board's determination is incorrect.

The rule of res judicata operates to bar repetitious suits involving the same cause of action. Yeoman v. Com., Health Policy Board, Ky., 983 S.W.2d 459 (1998). Res judicata is formed by two subparts: (1) claim preclusion, and (2) issue preclusion. Id. at 464-465. Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same action. Id. at 486. Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. Id.

Here, our focus is on issue preclusion since the Board found that the 1998 findings by ALJ Smith actually litigated and decided the extent of Powell's 1994 neck injury. For issue preclusion to operate as a bar to further litigation, certain elements must be present. First, the issue in the second case must be the same as the issue in the first case. Restatement (Second) of Judgments § 27 (1982). Second, the issue must have been actually litigated. Id. Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. Id. Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment. Id. Moreover, the party bound by the doctrine must have been given a full and fair

opportunity to litigate the issue in the prior proceeding. Moore v. Commonwealth, Cabinet for Human Resources, Ky., 954 S.W.2d 317 (1997).

Here, it is clear that the doctrine of issue preclusion cannot apply to the matter before us. There is no evidence before us that the extent of Powell's 1994 neck injury was actually litigated before ALJ Smith. Even if this issue was fully litigated before ALJ Smith, THH was never a party to Powell's 1995 workers' compensation action[2]. Thus, since THH was not a party to the 1995 litigation, this employer could not have been provided with a full and fair opportunity to litigate the extent of any disability sustained by Powell due to his 1994 neck injury. Thus, we believe that the Board prejudiced THH by incorrectly applying the doctrine of res judicata in this matter and reverse the Board on this issue. The ALJ, pursuant to Whittaker v. Rowland, supra, correctly calculated the credit due THH for overlapping payments on Powell's 1994 neck injury.

The opinion of the Workers' Compensation Board is affirmed in part and reversed in part.

HUDDLESTON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS WITH SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I fully concur in the majority opinion, but I write separately to clarify an

[2] The parties to the 1995 action were Powell, the Hopkins County Fiscal Court, and the Special Fund.

additional point. The majority correctly holds that the doctrine of *res judicata* does not apply to this case. However, the Board's opinion seems to confuse the doctrine of *res judicata* with a related doctrine, collateral estoppel. Indeed, these doctrines are frequently conflated in case law and collateral estoppel is sometimes referred to as a form of issue preclusion encompassed *by res judicata*. *See* Gregory v. Commonwealth, Ky., 610 S.W.2d 598, 600 (1980); and Rosenbalm v. Commercial Bank of Middlesboro, Ky. App., 838 S.W.2d 423, 429 (1992). *But see* Yeoman v. Commonwealth, Health Policy Board, Ky., 983 S.W.2d 459, 465 (n. 2) (1998). Nonetheless, collateral estoppel is a distinct theory from *res judicata*.

Res judicata and collateral estoppel each concern the preclusive effects of a former adjudication. Carroll v. Owens-Corning Fiberglas Corp., Ky., 37 S.W.3d 699, 702 (2000). Under the doctrine of collateral estoppel, however, such an adjudication precludes re-litigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action or involved the same parties as the second suit. Napier v. Jones By & Through Reynolds, Ky. App., 925 S.W.2d 193, 195-96 (1996). But while identity of parties is not a prerequisite for the application of collateral estoppel, the party against whom it is invoked must have been given a full and fair opportunity to litigate the

issue in the prior action. Sedley v. City of West Buechel, Ky., 461 S.W.2d 556, 559 (1970). *See also* Moore v. Commonwealth, Ky., 954 S.W.2d 317, 318-19 (1997). In this case, THH was never a party to Powell's 1995 claim, and it cannot be bound by an adjudication in which it did not participate. Therefore, the finding by the ALJ in the 1995 claim that Powell had only a 10% active disability due to his neck claim has no preclusive effect in this re-opening. Accordingly, I fully agree with the panel that the Board erred in setting aside the ALJ's calculation of the credit due to THH for Powell's pre-existing active disability.

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