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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000321-WC

KENTUCKY STATE POLICE-POST #9,
AND KENTUCKY DIVISION OF FORESTRY — APPELLANTS

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-00162

ROBIN BELCHER, HON. THOMAS DAVIS,
ADMINISTRATIVE LAW JUDGE;AND THE
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellants, Kentucky State Police Post #9 (KSP) and Kentucky Division of Forestry (KDF) appeal the January 18, 2008 opinion of the Workers' Compensation Board, reversing and remanding the July 27, 2007,

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

opinion of Administrative Law Judge Thomas A. Davis (ALJ Davis). On appeal, KSP and KDF argue that the Board overlooked or misconstrued controlling precedent regarding the "law of the case" doctrine. We agree but affirm on other grounds.

The Appellee, Robin Belcher was employed as a dispatcher for KSP and in a secretarial capacity for KDF. Belcher last worked for KSP on February 15, 2005, and last worked for KDF on July 7, 2005. On February 3, 2006, Belcher filed a claim alleging cumulative trauma "wear and tear" injuries against both former employers. Belcher forwarded notice letters to both past employers regarding the "likely diagnosis" of wear and tear through counsel on November 8, 2005.

Belcher claimed injuries to her low back which she asserted were sustained on February 15, 2005 and July 7, 2005 while employed as a dispatcher for KSP and KDF. Belcher began working for KSP in November of 1994 as a dispatcher. Belcher testified that she was required to sit for extended periods of time and perform repetitive reaching. In February of 2005, she transferred to the Division of Forestry, where her job duties included typing, filing, copying, ordering supplies, and going to the post office. According to Belcher, nothing specific happened on the alleged dates of injury aside from her recollection that she was simply unable to sit or stand for long periods of time. Belcher testified that she had begun to experience pain approximately two-and-a-half to three years prior

to the time of her deposition on April 27, 2006, including numbness in her right foot and leg.

In October 2002, Belcher sought treatment from her family physician, Dr. David Martin. At that time she was told she had a nerve problem. Thereafter, in March 2005, Belcher began receiving treatment at The Brain and Spine Center upon Dr. Martin's referral. At that time, she was scheduled for an MRI and was referred to Dr. John Gilbert, a Lexington neurosurgeon.

In March 2005, Belcher began treatment with Dr. Chip Salyers, a chiropractor who performed adjustments and x-rays. Belcher treated with Dr. Salyers two times per week for approximately three to four weeks. Significantly for purposes of the issue raised on appeal, Dr. Salyers issued a May 24, 2005, office note in which he noted that Belcher chiefly complained of pain in the lumbar region of her back on the right, and pain radiating into the hip, knee and foot on the right. In that report, under "History of Present Illness," Dr. Salyers listed contributing factors as "Occupation *may* contribute to condition – computer work, repetitious work, sitting, and typing." (Emphasis added.)

With respect to the issue of notice, Belcher testified that she did not file a first report of injury until approximately October of 2005. The record on remand indicated that the First Report of Injury was actually requested by her supervisor, Dexter Conley, after counsel for KSP and KDF received the notice letters sent by Belcher in November of 2005 regarding the "likely diagnosis" of a work-related wear and tear injury.

In addition to the aforementioned treatment notes of Dr. Salyers, Belcher also filed the January 23, 2006, Form 107 of Dr. Joseph Rapier into the record. That document indicates that Dr. Rapier obtained a history from Belcher, reviewed medical records, and performed a physical examination. Thereafter, Dr. Rapier diagnosed degenerative disc disease of the lumbar spine, including protrusions without evidence of radiculopathy. According to Dr. Rapier's report, Belcher's complaints were somewhat consistent with a right-sided S1 nerve root pattern. Dr. Rapier opined that within a reasonable medical probability, Belcher's work was the cause of her complaints. He assigned a 12% impairment to the body as a whole in accordance with the *5th Edition of the AMA Guides*. Dr. Rapier opined that Belcher had no active impairment prior to the work injury, and restrictions were placed on her work activities at that time.

In issuing his original Opinion and Award in this matter, the ALJ reviewed both lay and medical testimony in the record, and was persuaded that Belcher did not know with certainty the cause of her back problems until July of 2005. A review of the record indicates that it was in July of 2005 that Belcher ceased working at KDF. In his initial Opinion, the ALJ further stated that "no doctor or trusted person specialist" had informed Belcher that her condition was work-related. The ALJ went on to note that while Belcher's supervisor knew she was having problems, Belcher did not file a first report of injury until October of 2005, and then only with the Division of Forestry.

Nevertheless, the ALJ was persuaded that the delay from July to October of 2005, did not prejudice Belcher's employer, and stated that as the employer's argument was essentially that Belcher suffered no medical impairment, their treatment of the case would have been no different. The ALJ thus awarded benefits based on the 12% impairment rating assessed by Dr. Rapier, enhanced by the 3x multiplier of KRS 342.730(1)(c)(1). As previously noted, neither party filed a Petition for Reconsideration following the issuance of the Opinion and Award.

Thereafter, the Kentucky State Police Post #9 and the Kentucky Division of Forestry filed a direct appeal to the Workers' Compensation Board, arguing that there was insufficient evidence of substance to support the ALJ's award, including his conclusion that Belcher provided due and timely notice of her claim.

In an Opinion rendered on December 15, 2006, the Board vacated in part and remanded to the ALJ. The Board found that the record contained sufficient evidence to support the ALJ's findings on causation. However, the Board also correctly stated that the law does not require a claimant to give notice that she sustained a work-related cumulative trauma injury until he or she is informed of that fact by a physician. *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503 (Ky. 2001); *Alcan Foil Products v. Huff*, 2 S.W.3d 96 (Ky. 1999); *Special Fund v. Clark*, 998 S.W.2d 487 (Ky. 1999); and *Blue Diamond Coal Co. v. Blair*, 445 S.W.2d 869 (Ky. 1969).

In deciding to vacate and remand to the ALJ, the Board noted that the ALJ appeared to have selected Belcher's last day of work, July 5, 2005, as the date on which she first learned that her low back condition was work-related, but determined, in light of the medical evidence of record, that this date was arbitrary. In so finding, the Board noted that the only two physicians of record whose reports even remotely supported a finding that Belcher was informed that her condition was work-related were the aforementioned May 24, 2005 and January 23, 2006, reports of Drs. Salyers and Rapier respectively. The Board noted that it was undisputed that Belcher gave notice of her allegedly work-related condition to her supervisors at KDF in October of 2005, and subsequently to her former employers at KSP in November of 2005. Citing *Blue Diamond Coal Co. v. Blair*, 445 S.W.2d 869 (Ky. 1969), the Board noted that delay in giving notice is not excused by lack of prejudice to the employer.

In remanding the matter to the ALJ, the Board stated as follows:

> We believe the ALJ can infer from the record that Belcher first learned her condition was work-related from either Dr. Salyers or Dr. Rapier. On remand, the ALJ is instructed to resolve this question. If the ALJ is persuaded that Belcher was first so informed by Dr. Rapier in January 2006, then the notice she provided to the petitioner in October/November 2005 was timely. *American Printing House for the Blind v. Brown*, 145 S.W.3d 145 (Ky. 2004). If on the other hand the ALJ is persuaded that Belcher first learned from Dr. Salyers on May 24, 2005, that her condition was work-related, then the ALJ must determine whether the respondent's delay in providing notice until the following October was occasioned by mistake or other reasonable cause. *See* KRS 342.200. In so ruling, the ALJ must set out in

> writing a sufficient factual basis for his conclusions supported by evidence of record. *Kentland Elkhorn Coal Corp. v. Yates*, 743 S.W.2d 47 (Ky. App. 1988), *Shileds v. Pittsburgh and Midway Coal Mining Co.*, 634 S.W.2d 440 (Ky. App. 1982).

Significantly for our purposes, Belcher did not appeal the December 15, 2006, Opinion of the Board, and the case was remanded to the ALJ, who was instructed to act in accordance with the mandate above.

Thereafter, on remand, the ALJ ordered the parties to file supplemental briefs on the issue of notice. In so doing, the ALJ framed the issue as whether or not notice was given as soon as practicable by Belcher to her employers. ALJ Davis stated that he was persuaded that KSP and KDF had presented the most persuasive argument with respect to the issues on remand. ALJ Davis indicated that he was of the belief that Belcher was notified of the work-relatedness of her injury by Dr. Salyers in May 2005, and was persuaded by the record that KSP and KDF were given notice in November 2005.

Thus, ALJ Davis concluded that KSP and KDF did not receive notice as soon as practicable, and indicated in his opinion that the fact that Belcher continued to work past May 2005 did not nullify the fact that she had been made aware that her condition was work-related. ALJ Davis found that Belcher would not have instructed her attorney to file notice letters if she did not know that her condition was work-related. ALJ Davis therefore found that the delay or failure to give notification was not occasioned by mistake or other reasonable cause.

Accordingly, Belcher's claim against KSP and KDF was dismissed by the ALJ for failure to give due and timely notice.

Belcher appealed to the Board, asserting that ALJ Davis's application of the Board's directives on remand was not supported by substantial evidence, that ALJ Davis had abused his discretion in refusing to conduct a supplemental hearing to clarify Belcher's knowledge or lack thereof regarding the content of Dr. Salyer's May 24, 2005, treatment note, that ALJ Davis erred in his determination that Belcher's counsel's notice letters constituted evidence that Belcher was aware of the work-relatedness of her condition, and that any delay in providing notice was excusable.

KSP and KDF argued in response that the Board had specifically instructed that ALJ Davis could infer from the record that Belcher first learned her condition was work-related from either Dr. Salyers or Dr. Rapier, and outlined the information ALJ Davis relied upon in making that decision. That information included the May 24, 2005, treatment note of Dr. Salyers, the November 2005 notice letters from Belcher's counsel, and Belcher's supervisor's indication in the first report of injury that he first became aware of the alleged work-related injury on November 10, 2005.

Most importantly, for purposes of this appeal, KSP and KDF argued the law of the case doctrine prevented Belcher from arguing that it was improper for the Board to instruct ALJ Davis that he could infer notice from the report of Dr. Salyers because Belcher did not appeal the Board's initial opinion. KSP and KDF

asserted that because Belcher did not appeal the initial opinion of the Board, but instead waited to appeal from ALJ Davis' Order on Remand, her objection to the Board's initial finding regarding Dr. Salyers amounted to an attempt to relitigate a previously decided issue. KSP and KDF thus argued that the Board was restricted to determining whether the ALJ abused his discretion in refusing to grant a supplemental hearing on the notice issue.

Thereafter, on January 18, 2008, the Board issued a second opinion, reversing and remanding back to ALJ Davis. In so doing, the Board held that it had previously inappropriately stated that the ALJ could infer from the record that Belcher first learned her condition was work-related from either Dr. Salyers or Dr. Rapier. Indeed, the Board went on to find that Dr. Salyer's treatment note of May 24, 2005, was in fact not sufficient to trigger notice.

In its January 18, 2008, Opinion, the Board specifically addressed the law of the case doctrine. In so doing, the Board found that this doctrine would prohibit relitigation of the Board's initial finding that it was arbitrary for ALJ Davis to find that Belcher was not informed of work-related back pain until July of 2005. However, the Board further reasoned that the doctrine would not prohibit their determination of whether or not the record contained substantial evidence to support the ALJ's new finding on remand.

The Board held that even if the law of the case doctrine did apply to prohibit Belcher from arguing that the May 24, 2005, treatment note should not have triggered her obligation to give notice, the Board is vested with the discretion

and obligation to correct clear error in its prior decision upon appeal, when said appeal had not progressed beyond an administrative level. Accordingly, the Board reversed the ALJ's Order on Remand, and again remanded with directions for the ALJ to reinstate an award of benefits in conformity with the views expressed in that opinion. It is from that decision that KSP and KDF now appeal.

KSP and KDF assert that this matter is governed by the law of the case doctrine and, accordingly, the Board's January 18, 2008, Opinion should be vacated. In so arguing, KSP and KDF rely on *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982) in asserting that because Belcher did not appeal the Board's December 15, 2006, Opinion, it became the law of the case, and could not be altered by the Board or any other appellate body upon subsequent appeal.

Under the law of the case doctrine, if an appellate body passes on a legal question and then remands the cause to the fact-finder below for further proceedings, all legal questions thus determined by the appellate body cannot be determined differently during a subsequent appeal in the same case as a matter of law. *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). Thus, all prior rulings by that appellate body become law for the limited purposes of that particular case. *Sidney Coal Co. Inc./Clean Energy Mining Co. v. Huffman*, 233 S.W.3d 710 (Ky. 2007). Therefore, parties on a second appeal may not relitigate matters affecting the subject of the litigation which could have been introduced in support of the contention of the parties on the first appeal. *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461 (Ky. 1955).

Clearly, the law of the case doctrine, as applied to the matter sub judice, prohibits relitigation of the Board's initial ruling that it was arbitrary for the ALJ to find that Belcher was not advised of work-related back pain until July of 2005. In its January 18, 2008, Opinion, the Board acknowledged that the law of the case doctrine would apply to its decision as to the arbitrariness of the ALJ's determination with respect to the July 2005 notice date. However, the Board found that it would not prohibit its review of whether substantial evidence existed to support the ALJ's new finding on remand.

The Board asserts that because this case has never passed beyond the Board level, and because the original appeal to the Board did not specifically concern the question of whether or not the May 24, 2005, treatment note was sufficient to trigger notice, the Board's holding that the note was sufficient to trigger notice was not a final and appealable conclusion of law. In so holding, the Board asserts that its discussion of the treatment notes of Dr. Salyers and Dr. Rapier was dicta.

The law in our state is clear that decisions by the Workers' Compensation Board which are not appealed to the Court of Appeals become the law of the case. *Whittaker v. Morgan*, 52 S.W.3d 567 (Ky. 2001). Indeed, in *Davis v. Island Creek Coal Co.*, 969 S.W.2d 712 (Ky. 1998), our Supreme Court made clear that since the 1987 revision of KRS Chapter 342, the Board's role is appellate unless there is an allegation of fraud or misconduct on the part of some person engaged in the administration of the Act. Whether the Board directs the ALJ to

take further evidence on remand, or to reach a conclusion based on the evidence of record, a decision by the Board is final and appealable if it sets aside the ALJ's decision, and either directs or authorizes the entry of a different award on remand. This is so because such a decision divests the party who previously prevailed before the ALJ of a vested right.

Having reviewed the opinion of the Board in detail, we are ultimately of the opinion that the Board's 2006 opinion did nothing more than vacate the ALJ's finding that Belcher had notice in July 2005, on the ground that the finding was arbitrary. The balance of that opinion which discussed whatever evidence or findings the ALJ might make on remand was nothing more than dicta. *See H.R. v. Revelett*, 998 S.W.2d 778, 780 (Ky. App. 1999)(appellate court's discussion of evidence in first opinion was dicta which did not constitute the law of the case). Thus, the Board's reversal of the ALJ in its January 2008 opinion did not violate the law of the case doctrine.

Having found that the Board's comments in its initial opinion were ultimately not necessary to its decision, and thereby finding that the law of the case doctrine does not apply, we hereby concur with the result reached by the Board and affirm.

ALL CONCUR.

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