

RENDERED: MARCH 29, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF MARCH 15, 2019, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001111-WC

MIRANDA S. MORRIS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-87-17285, WC-89-03216,
WC-90-04415 & WC-90-12160

NAEGLE OUTDOOR ADVERTISING;
HON. DOUGLAS W. GOTT, CHIEF
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE, JUDGE; AND HENRY, SPECIAL JUDGE.¹

CLAYTON, CHIEF JUDGE: Miranda Morris appeals from a Workers' Compensation Board opinion affirming the opinion and order of August 29, 2017, and order on reconsideration of October 13, 2017, entered by the Chief Administrative Law Judge (CALJ). Morris seeks compensation for a full mouth dental restoration from her former employer, Naegle Outdoor Advertising. The Board agreed with the CALJ that the restoration was not compensable because the work-relatedness of such a treatment was decided in a prior medical fee dispute and is now res judicata. Having reviewed the record and applicable law, we affirm.

Morris's case has a long and contentious history spanning over thirty-one years. The total cost of the medical and dental expenses paid over this period exceeds \$627,000. As the Board observed in its opinion, this "claim is a consolidation of four separate injury claims, and the proof submitted in this long-litigated file is extensive by any measure. In the current medical fee dispute, proof from over twelve dentists was submitted, in addition to five lay witnesses." The following summary of the case is highly abbreviated and confined only to those facts necessary for the resolution of this appeal.

¹ Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

During the course of her employment as an account executive at Naegle, Morris was injured in four separate motor vehicle accidents, occurring in 1987, 1988, 1989 and 1990. She sustained injuries to her head, neck, back, and temporomandibular joint (TMJ), as well as psychological injuries. She filed four separate workers' compensation claims for injuries relating to each accident.

In 1995, Morris entered into a settlement of the claims with Naegle, pursuant to which they agreed that Morris had cervical spine, lumbar spine, TMJ, and psychiatric injuries. The agreement, which was approved by the Administrative Law Judge (ALJ) Thomas A. Dockter, provided for a full and final settlement of the income benefits payable to Morris for all four claims. Morris did not, however, waive her right to future medical benefits and the parties retained the right to reopen the settlement to contest or compel payment of medical benefits.

Prior to the settlement, Morris underwent three surgical procedures to treat her TMJ condition. Following the settlement, Morris was further treated for her TMJ condition by Dr. Louis Mercuri and by Dr. George Kushner. Dr. Kushner performed TMJ surgery on Morris in 1997 and 2005, including a replacement of the TMJ joints. The artificial joints were later removed. In 2003, Dr. Kushner referred Morris to Dr. David Fox for dental treatment. Dr. Fox performed a full dental reconstruction in 2003. It is unclear who paid for this procedure.

In 2009, Dr. Fox consulted Dr. Kushner about a full mouth restoration, but Dr. Kushner advised against extensive restoration of Morris's crowns and bridgework due to TMJ issues. Morris then consulted Dr. Dennis Jenkins who recommended the restoration of the crowns and bridgework of twenty-two teeth. Naegle disputed the proposed treatment on the grounds that it was a routine dental follow-up and cosmetic procedure unrelated to any of Morris's work injuries.

The ALJ, Howard E. Frasier, agreed with Naegle, finding that Dr. Jenkins's proposed treatment was not work-related. ALJ Frasier's opinion observed that, unlike the TMJ condition that was specifically mentioned in the settlement agreement and for which multiple surgeries had been performed, no express mention was made in the settlement agreement of any strictly "dental" injury. After considering the opinions of Dr. Kushner and Dr. Jenkins regarding work-relatedness, the ALJ found Dr. Kushner to be more credible because he had been treating Morris for much longer. "While Dr. Jenkins has expressed an opinion on work-relatedness, he has only recently come on the scene, and the undersigned finds the testimony of Dr. Kushner to be more credible that the TMJ condition, at least from a dental aspect, had stabilized in 2009." The ALJ also addressed the compensability of Dr. Fox's recommendation of tooth cleaning every three months. "Regular teeth cleaning is a common hygienic practice for all

persons to follow, and [Morris] has simply not shown how this would in 2011 have a causal connection to the original work injuries.”

Morris appealed, challenging the ALJ’s conclusion that the dental restoration was not work-related. On December 22, 2011, the Board affirmed the ALJ’s determination that the dental work and tooth cleaning were not work-related or reasonable and necessary and were consequently not compensable.

Morris thereafter consulted several other doctors and was eventually treated by Dr. Pasquale Malpeso, an oral surgeon in New York City. Naegle filed a medical dispute, arguing that it was the same dental treatment that was deemed non-compensable in the earlier action. The parties reached a compromise agreement under which Naegle agreed to pay for Morris to be treated by Dr. Sarah Johnson, a Louisville prosthodontist. Dr. Johnson planned to remove Morris’s crowns and rebuild the cores with possible implants and root canals. Morris became dissatisfied with Dr. Johnson and actually removed and reglued different sets of temporary provisional prosthodontic pieces. Morris refused any further treatment from Dr. Johnson and returned to treatment with Dr. Malpeso and then with her cousin, Dr. Claudette Gibson. Naegle challenged the bills of both these physicians, arguing that the earlier proceeding had determined the dental treatment was not work-related and that the matter was therefore *res judicata*. Naegle ultimately settled with Dr. Johnson, but maintained its challenge to treatment by

Dr. Malpeso, Dr. Gibson and Dr. Goodman, a specialist in Beverly Hills who provided a similar treatment plan to that proposed by Dr. Malpeso, for a fee of \$150,000.

Following the final hearing, the CALJ determined that Morris was not entitled to medical benefits for the dental restoration because the claim was barred by the doctrine of res judicata. His opinion states in relevant part as follows:

[T]he most glaring conclusion is that a full-mouth restoration treatment plan has already been decided. The prior medical dispute involved a \$42,575.00 treatment plan from Dr. Jenkins to restore . . . Morris' teeth, and that is the same treatment at issue now.

The prior ALJ [Frasier] found the proposed treatment unrelated to the "TMJ" injury identified in the settlement agreement, and also not reasonable and necessary. A finding of reasonableness and necessity of treatment is a snapshot in time, and can later be decided another way given a change in circumstances. But a finding on relatedness is different. It is res judicata, and not capable of being set aside.

Morris filed a petition for reconsideration which was denied. The Board subsequently affirmed the CALJ's analysis. This appeal by Morris followed.

Our standard of review requires us to show considerable deference to the ALJ and to the Board. "The ALJ, as the finder of fact . . . has the authority to determine the quality, character and substance of the evidence presented"

Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985). Our role in reviewing the decision of the Board "is to correct the Board only where the 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

We address first Morris’s contention that the CALJ erred in invoking the doctrine of res judicata to bar her claim because it was not previously raised by Naegle and was consequently unpreserved.

The doctrine of res judicata “stands for the principle that once the rights of the parties have been finally determined, litigation should end. Thus, where there is an identity of parties and an identity of causes of action, the doctrine precludes further litigation of issues that were decided on the merits in a final judgment.” *Whittaker v. Cecil*, 69 S.W.3d 69, 72 (Ky. 2002). In the context of workers’ compensation litigation,

once an ALJ-adjudicated award and order becomes final, the ALJ’s determinations with respect to, *e.g.*, causation, notice, apportionment, etc., cannot be readdressed under KRS [Kentucky Revised Statutes] 342.125 except upon an allegation of fraud, newly discovered evidence, or mistake The reason, of course, is that revisiting issues previously decided is precluded by the principle of res judicata. The doctrine of res judicata applies to the rulings of a Workmen’s Compensation Board the same as it does to the decisions of a court.

Garrett Mining Co. v. Nye, 122 S.W.3d 513, 522 (Ky. 2003) (internal citation and quotation marks omitted).

In her petition for reconsideration of the CALJ's opinion and order, Morris argued that the doctrine of res judicata was not properly raised before the CALJ and that in any event the ALJ's 2011 opinion had not actually ruled on the issue of work-relatedness, finding only that the dental restoration was not reasonable and necessary. In denying the petition in his order entered on October 13, 2017, the CALJ stated:

Plaintiff [Morris] attempts to characterize ALJ Frasier's Opinion in 2011 as ruling on the reasonableness and necessity of the same dental restoration work that is at issue now, but the prior ALJ plainly found the proposed dental work was not connected with the work related TMJ condition. Also, Plaintiff is correct that the parties did not emphasize the res judicata issue in their argument of this case, but the issue was clearly preserved by the Defendant [Naegle] in its Form 112's that were incorporated into the orders summarizing the issues to be decided in this medical dispute.

The record before us confirms the CALJ's ruling. In the medical fee dispute filed on August 26, 2013, challenging the compensability of the treatment by Dr. Malpeso, Naegle stated in pertinent part as follows:

Morris previously submitted a treatment plan that encompassed proposed dental treatment involving extensive dental work (\$24,000) allegedly related to her prior work injuries, and it was submitted as one of several consolidated medical fee disputes in 2011. The ALJ determined that such treatment was not reasonable, necessary and related to the work related injuries and such decision was affirmed by the WC Board.

The new treatment plan submitted by a Dr. Malpeso, a Park Avenue dentist in NYC, proposes even more extensive dental work (\$114,000). The Employer is disputing this treatment as the potential treatment provider is not a properly designated treating physician, **the proposed treatment is not compensable under the principles of res judicata**, the charges contained therein are not based on the Kentucky Medical Fee schedule, the claimant has failed to show a change of condition since this issue was last litigated, and for other reasons set forth in the accompanying Motion to Reopen.

Attached to the medical dispute form are copies of the opinions of ALJ Frasier and the Board dating from 2011. Under these circumstances, we agree with the Board that Naegle's statement on the medical dispute form was sufficient to invoke the doctrine of res judicata and certainly placed Morris on notice that it would be considered by the CALJ.

Furthermore, ALJ Frasier's 2011 opinion and order, as affirmed by the Board, found that Morris had not met her burden of proving that the full dental restoration was work-related. The Board affirmed this ruling. Morris nonetheless argues that ALJ Frasier's findings were pertinent only to the dispute as it stood in 2011 and have no prospective effect. She contends that she is the victim of failed dentistry and that her ongoing dental problems stem from her TMJ surgery. But the dental treatment Morris is now seeking is virtually identical to the treatment she sought in 2011 that was deemed not work-related. Morris has not shown or

explained how a procedure that was not work-related then has become work-related now.

The Board noted that because the 1995 settlement agreement did not expressly reference or acknowledge dental injury or the compensability of dental expenses, Morris bore the burden of proving her dental care is causally related to her work injuries. She failed to meet this burden in 2011 when ALJ Frasier failed to find causation/work-relatedness between her work injuries and the full mouth restoration. Due to the res judicata effect of ALJ Frasier's ruling that a dental restoration is not work-related, the Board did not err in affirming the opinion and orders of the CALJ.

For the foregoing reasons, the Board's opinion and order of June 22, 2018, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE NAEGLE
OUTDOOR ADVERTISING:

C. Patrick Fulton
Louisville, Kentucky