

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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

2006-SC-000213-WC

DATE Feb 15, 07 E. L. A. Grant DC.

FEDERICO PANTOJA-LOPEZ

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-001166-WC
WORKERS' COMPENSATION NO. 02-66411

ELK HILL FARM,
HONORABLE JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board (Board) and the Court of Appeals have affirmed an Administrative Law Judge's (ALJ's) finding that the claimant's injury caused only a permanent partial disability. Appealing, the claimant asserts that the order granting interlocutory temporary total disability benefits (TTD) was final and appealable; therefore, the employer's failure to appeal rendered the finding of total disability the law of the case. He argues that when coupled with the lack of any subsequent improvement in his condition, the finding required the ALJ to determine subsequently that his permanent disability was total. We affirm.

The claimant worked as a groom on a horse farm. On June 6, 2002, he injured his back while filling water buckets. Sometime thereafter, the employer instituted

voluntary TTD benefits and the claimant underwent surgery. The claimant later testified that he last had medical treatment in April, 2003; that he sometimes took Tylenol; that he was unable to work due to pain; and that because he didn't improve after the first surgery, he did not want the additional surgery that was recommended.

Medical evidence indicated that Dr. Kiefer evaluated the claimant in November, 2002, for back, left hip, and left leg pain. Noting that straight leg raising caused hip and radicular pain on the left side and that MRI revealed a herniated disc at L4-5, he recommended surgery.

In December, 2002, Dr. Yamamoto evaluated the claimant. He found clinical signs and symptoms of left L5 radiculopathy and also noted that MRI revealed a small disc that was just against the L5 nerve root. He strongly recommended surgery and performed the procedure in January, 2003. As of March, the claimant's symptoms continued despite the surgery. Dr. Yamamoto recommended physical therapy and pain management, noting that the claimant could not return to work until his pain was better controlled. He also recommended a functional capacity evaluation so that the claimant could apply for disability benefits. Shortly thereafter, Dr. Yamamoto assigned a 10-13% impairment rating under DRE lumbar category III, using the AMA Guides to the Evaluation of Permanent Impairment. Consulted for a second opinion, Dr. Ravvin thought that some residual disc fragments might remain and recommended exploratory surgery as well as a fusion and instrumentation. In a letter dated May 1, 2003, Dr. Yamamoto reduced the claimant's impairment rating to 10%.

Dr. Becherer performed an independent medical evaluation in May, 2003. He diagnosed persistent musculoskeletal pain on the left without evidence of specific nerve root injury; failed back syndrome and epidural fibrosis; and failed back surgery. In his

opinion, the claimant would not be at maximum medical improvement (MMI) until his pain was managed; however, he would be at MMI if he did not receive epidural injections to help control his pain. Dr. Becherer assigned a 13% impairment rating under DRE lumbar category III.

In November, 2003, Dr. Kriss reviewed the claimant's medical records and noted that he had refused to attempt most of the tests on the functional capacity evaluation. Dr. Kriss diagnosed complaints of persistent neuropathic radicular pain despite appropriate treatment. He thought that epidural steroid injections would be beneficial and also thought that medication to block abnormal nerve signals, such as Amitriptyline or Neurontin, might be helpful. In his opinion, further surgery was unlikely to improve the claimant's condition and might aggravate it due to increased scarring of the nerve. With pain management therapy, the claimant should reach MMI by January 16, 2003, which was one year after the surgery. Without the therapy, he would be at MMI presently.

Based on the herniated disc, surgery, and significant neuropathic radicular pain, Dr. Kriss assigned a 13% impairment rating, which was the maximum for DRE lumbar category III. He thought that the claimant lacked the physical capacity to return to his former work as a horse groom and restricted him to activities in which he could change positions briefly every 1-2 hours; lift no more than 25 pounds; and avoid frequent repetitive bending and twisting from the waist. He noted, however, that even patients with persistent neuropathic radicular pain are capable of work that is not physically demanding. In his opinion, the claimant could perform sedentary work or light work that involved walking if it was not constant or excessive.

After performing an ERGOS functional capacity evaluation, Rick Pounds

reported that the claimant was able to lift, carry, and climb with tote boxes weighing up to 20 pounds. He was also able to perform sustained pushing and pulling at cart and shoulder height at the medium demand level. However, the claimant rated his discomfort level at 9/10 and denied the ability to perform most of the activities, including the ability to lift an empty tote box. Pounds noted that the claimant would have received at least a light physical demand level had he given a consistent effort.

Shari Deogracias performed a vocational assessment for the employer. She stated that if the functional capacity evaluation was accurate, the claimant would not be able to work in a competitive employment market. However, the opinions expressed in Dr. Kriss' report indicated that the claimant had the functional capacity to work at the sedentary to light physical demand level. Ms. Deogracias stated that such work was available locally and listed examples.

When the claim was first submitted to an ALJ for a decision, the parties had identified the contested issues as being the extent and duration of impairment and whether TTD benefits had been overpaid. In an interlocutory award and order rendered on January 16, 2004, the ALJ determined that the correct TTD rate was less than the employer had paid voluntarily. Concluding that the ERGOS evaluation was not credible and that claimant was not at MMI because the recommended pain management efforts had not been exhausted, the ALJ ordered the parties to cooperate in having him referred to a qualified pain management specialist of his choice. The ALJ also ordered the employer to resume TTD payments until the claimant reached MMI and placed the claim for permanent income benefits in abeyance.

Dr. Ballard conducted a pain management evaluation on April 6, 2004, noting a history of back pain that was more severe on the left and did not improve after surgery;

numbness in the left leg, hip, and toes; and weakness in the left leg. The claimant rated the severity of his pain at 9 out of a possible 10 and reported that his present activity was to spend the day on the couch. At a follow-up exam performed two weeks later, Dr. Ballard noted that the most recent MRI was unremarkable. On April 27, 2004, she noted that lumbar spine x-rays were also unremarkable. She recommended a trial of Neurontin but did not recommend injections or the use of narcotic pain medication. In her opinion, the claimant would be at MMI at his next appointment.

The claimant moved to have the claim removed from abeyance and submitted Dr. Ballard's reports through April 27, 2004. Nothing in the record indicates that he failed to agree to the referral to Dr. Ballard. However, his motion asserted that the "experiment of . . . allowing an insurance company to choose a pain doctor who would provide pain medicines has failed" and that Dr. Ballard did nothing more than provide Neurontin. Arguing that there had been no change in his condition or in his treatment, he requested a permanent total disability award. Objecting, the employer asserted that the claimant had failed to attempt the therapy that Dr. Ballard prescribed, that he was not financially burdened due to the ongoing TTD benefits, and that there was no specific finding of total disability.

The claim was later reassigned to a successor ALJ who relied upon the predecessor's specific findings that the claimant was entitled to medical benefits, that the ERGOS functional capacity report was not credible, and that the claimant was entitled to TTD benefits until he reached MMI. Noting that the most recent medical record was Dr. Ballard's and that the next scheduled appointment would have been on May 4, 2004, the ALJ determined that the claimant reached MMI on that date. Relying on Dr. Kriss and Ms. Deogracias, the ALJ found that he could perform light or sedentary

work and that such work was available. He received permanent partial disability benefits that were based on a 13% impairment and tripled under KRS 342.730(1)(c)1.

Contrary to the claimant's assertion, the interlocutory TTD award did not compel the ALJ to determine subsequently that his permanent disability was total. In Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995), the court adopted the view set forth in Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1989), that an interlocutory award of TTD is not final and appealable. The court determined subsequently in KI USA Corp. v. Hall, 3 S.W.3d 355 (Ky. 1999), that Ramada Inn v. Thomas, *supra*, remained valid under the December 12, 1996, amendments to Chapter 342. Although the claimant asserts that the employer had a constitutional right to appeal the award, the employer did not attempt to do so. Therefore, no constitutional question is before us.

Neither the law of the case doctrine or the principle of issue preclusion applies to the present facts. Scamahorne v. Commonwealth, 376 S.W.2d 686 (Ky. 1964), and more recently Dickerson v. Commonwealth, 174 S.W.3d 451 (Ky. 2005), explain that Kentucky applies the law of the case doctrine only to former rulings by an appellate court. As explained in Yeoman v. Commonwealth, Health Policy Board, 983 S.W.2d 459 (Ky. 1998), the principle of issue preclusion applies to issues that are actually litigated and finally decided in an earlier action.

Finally, the lack of any change in the claimant's condition after the TTD award did not compel a finding that his permanent disability was total. Although KRS 342.0011(11)(c) requires evidence of a "complete . . . inability to perform any type of work" to support a finding of permanent total disability, Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), construed KRS 342.0011(11)(a) as imposing less a

stringent standard for a finding of TTD. Therefore, the fact that a worker's condition fails to improve following an interlocutory TTD award does not compel a finding that the worker's permanent disability is total.

The fact that Dr. Kriss conducted only a medical records review was a matter for an ALJ to consider when weighing the evidence. At the time of the interlocutory decision, Dr. Kriss thought that the claimant could not return to work as a horse groom but that he retained the physical capacity to perform sedentary or light work despite his pain. Like Dr. Becherer, Dr. Kriss thought that the claimant was at MMI unless he received pain management therapy. Among other things, Dr. Kriss recommended a trial of Neurontin, the same medication that Dr. Ballard proposed. However, nothing indicates that the claimant returned to Dr. Ballard after April 27, 2004, or attempted the therapy that she suggested. Under the circumstances, it was reasonable for the ALJ to conclude that his permanent disability was partial.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Cunningham, Minton, Noble, Schroder and Scott, JJ. concur.
McAnulty, J., not sitting.

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