

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 19, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2006-SC-000445-WC

DATE 5-10-07 EJA/Groun P.C.

TOMMY THOMAS

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-2185-WC
WORKERS' COMPENSATION NO. 99-97969

KWIK SET,
WORKERS' COMPENSATION BOARD
AND ADMINISTRATIVE LAW JUDGE,
HON. GRANT S. ROARK

APPELLEES

AND

2006-SC-000458-WC

KWIK SET

CROSS-APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-2185-WC
WORKERS' COMPENSATION NO. 99-97969

TOMMY THOMAS,
WORKERS' COMPENSATION BOARD
AND ADMINISTRATIVE LAW JUDGE,
HON. GRANT S. ROARK

CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On remand from the Workers' Compensation Board (Board) to determine the permanent impairment rating and award income benefits for the claimant's work-related

shoulder injury, an Administrative Law Judge (ALJ) found that the injury did not render the claimant incapable of performing the type of work that he had performed at the time of injury. The Board affirmed the decision and determined that the law of the case doctrine barred consideration of either the claimant's argument that he was entitled to benefits for a cervical spine injury or the employer's argument that there was insufficient evidence of a shoulder injury. The Court of Appeals affirmed, and we affirm.

The claimant worked for the defendant-employer, helping to maintain a warehouse and to make deliveries. In January, 1999, he was involved in a motor vehicle accident while making a delivery and taken to the hospital. X-rays of the left shoulder and jaw and were normal. After being treated for lacerations of the face, scalp, and left hand, he was released. The claimant missed work for a week and was then placed on light duty for about two weeks.

In February and March, 1999, the claimant sought treatment for right arm pain and for pain and numbness in his right hand. He was diagnosed with carpal tunnel syndrome for which physical therapy was prescribed. In November, 1999, he saw Dr. Kuiper, complaining of persistent right shoulder pain since the accident. He reported that it limited his ability to reach, lift, and work with his right arm. Dr. Kuiper diagnosed a possible traumatic acromioclavicular (AC) injury due to the accident. In January, 2000, he performed a diagnostic arthroscopy in the course of which he shaved a portion of the right distal clavicle and excised a portion of the meniscus that appeared to be frayed and degenerating. The employer paid a period of temporary total disability (TTD) benefits voluntarily until the claimant returned to light-duty work. Dr. Kuiper released him to work without restrictions in March, 2000.

The claimant was later promoted to a position in sales and worked in that

capacity until a January, 2001, random drug screen was positive for marijuana. He resigned rather than accepting a mandatory 30-day suspension and found work elsewhere. Shortly thereafter, he returned to Dr. Kuiper, again complaining of right shoulder and elbow pain. He indicated to Dr. Kuiper that he could not do the heavy work that he was able to do the year before, that he could not jackhammer, use a heavy hammer, or lift, push, or pull with the right arm. Dr. Kuiper assigned a 3% permanent impairment rating that was based on the prior surgery and restricted the claimant from heavy, repetitive overhead lifting of more than 30 pounds and from the use of a jackhammer.

In June, 2001, the claimant sought treatment for severe neck pain that radiated into his back and the back of his head. He was taken off work and treated with epidural injections. The employer paid TTD benefits through August, 2001, at which time Dr. Goldman performed an independent medical evaluation. He concluded that no further treatment was required and that the claimant could return to work. A subsequent MRI revealed a herniated disc at C5-6 causing spinal cord compression. Although Dr. Harpring recommended surgery, the employer refused to approve the procedure.

The claimant filed an application for benefits, alleging that he had injured his neck, back, shoulder, and hands in the work-related accident. Proof was submitted and the claim was heard, after which the ALJ noted that all of the claimant's difficulties originated with the work-related accident and that cervical disc surgery was recommended. The ALJ reinstated TTD benefits from the date they were discontinued and placed the claim in abeyance pending the claimant's recovery from surgery. It was performed in June, 2002, and the claimant was released to return to work without restrictions as of February 12, 2004.

The claim was later reassigned to a different ALJ, and the parties took additional proof and had a second hearing. At issue were the alleged injuries to the claimant's cervical spine, right shoulder, and right hand as well as a psychological injury. The ALJ awarded medical expenses for the hand injury and dismissed the psychological claim. Neither is presently at issue. The ALJ dismissed the cervical spine claim based on medical evidence that the lapse in time between the accident and complaints of neck pain indicated that the condition was not work-related. The ALJ also dismissed the shoulder injury claim, stating that no physician had diagnosed an identifiable shoulder condition and that Dr. Kuiper had performed the surgery only to determine what caused the claimant's symptoms. The claimant appealed.

Although the Board affirmed the dismissal of the cervical spine claim, it found the evidence of causation in the shoulder claim to be compelling. Noting that motion tests, MRI, and the temporary success of injections provided objective medical findings of a harmful change, it reversed that portion of the decision and remanded for the entry of an award. Neither party appealed. On remand, the ALJ entered a partial disability award but refused to enhance it under KRS 342.730(1)(c)1 because the restrictions that Dr. Kuiper assigned for the shoulder condition did not preclude the type of work that the claimant had performed at the time of injury. Both parties appealed.

In his second appeal to the Board, the claimant asserted that the evidence compelled a finding that he could no longer perform the type of work that he had performed when injured. He also asserted that the interlocutory finding and other compelling evidence required the ALJ to determine that the accident caused a cervical spine injury. The employer's cross-appeal asserted that the accident did not cause a shoulder injury.

Having failed to convince the Board and the Court of Appeals, the claimant continues to assert that the evidence compelled an enhanced award for his shoulder injury. He points to Dr. Kuiper's records from February 5, 2001, which prefaced the work restrictions with a note indicating that although the claimant's present work in sales did not involve heavy lifting or use of his arm, restrictions should be imposed because of his continued symptoms. He also points to his deposition testimony, which indicates that that he was reassigned to work in sales because of his complaints due to the injury.

When rejecting the claimant's argument that he did not retain the physical capacity to return to his work in the warehouse and making deliveries, the ALJ stated as follows:

The only restrictions found in the record specifically tailored to plaintiff's post-surgery shoulder condition come from Dr. Kuiper who restricted plaintiff from heavy, repetitive overhead lifting of greater than 30 pounds and jackhammer use. Plaintiff testified his job with the defendant often involved heavy lifting, pulling, squatting, crawling and driving, but there is no indication in the record that his job with the defendant required repetitive, heavy overhead lifting or jackhammering. As such, the [ALJ] finds no basis for enhancing the plaintiff's award by the 1.5 multiplier found in the applicable version of KRS 342.730(1)(c)1.

It was the claimant's burden to prove his entitlement to an enhanced income benefit. Because he failed to convince the ALJ, his burden on appeal is to show that the favorable evidence was so overwhelming that the decision was unreasonable. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). The favorable evidence in this case was not so overwhelming as to render the ALJ's decision unreasonable and compel the finding that the claimant sought. He continued to perform his job after the injury, and nothing indicated that his duties at the time of the injury included the

activities from which Dr. Kuiper restricted him at his own suggestion. Despite his present assertions that he was given the inside sales job due to his complaints of symptoms, he acknowledged when testifying that it was a promotion.

The law of the case doctrine concerns the extent to which a judicial decision made at one stage of litigation is binding at a subsequent stage. As explained in Scamahorne v. Commonwealth, 376 S.W.2d 686 (Ky. 1964), and Dickerson v. Commonwealth, 174 S.W.3d 451 (Ky. 2005), the doctrine applies only to former rulings of an appellate court. Consistent with the principle that an interlocutory ruling does not preclude the fact-finder from reaching a different conclusion when finally deciding the claim, the court reiterated in KI USA Corp. v. Hall, 3 S.W.3d 355 (Ky. 1999), and Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995), that an interlocutory award of TTD is not final and appealable. See also Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1989). An employer must wait until after the entire claim has been decided to appeal an interlocutory TTD award.

Davis v. Island Creek Coal Co., 969 S.W.2d 712 (Ky. 1998), and Whittaker v. Morgan, 52 S.W.3d 567 (Ky. 2001), explain that the law of the case doctrine applies to the Board's decisions because its jurisdiction is appellate. A party who wishes to appeal an adverse decision of the Board must do so at the time the decision is rendered. To raise the issue on appeal from the decision on remand would amount to an attempt to re-litigate an issue that the Board decided previously. See Williamson v. Commonwealth, 767 S.W.2d 323, 325 (Ky. 1989). Absent a change in the issues or evidence on remand, the doctrine limits the questions on appeal to whether the trial court properly construed and applied the Board's order.

Contrary to the claimant's assertion, the law of the case doctrine did not apply to

the interlocutory TTD award for the cervical condition, nor did it bar the subsequent finding that the condition was not work-related. It did, however, apply to the Board's decisions to affirm regarding the cervical injury and to reverse and remand regarding the shoulder injury. The claimant's failure to appeal the adverse decision regarding the cervical injury barred re-litigation of the issue following the remand. Likewise, the employer's failure to appeal the adverse decision regarding the shoulder injury barred re-litigation of the issue following the remand.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT,
TOMMY THOMAS:

WAYNE C. DAUB
600 WEST MAIN STREET
SUITE 300
LOUISVILLE, KY 40202

COUNSEL FOR APPELLEE,
KWIK SET:

WAYNE J. CARROLL
RONALD C. BAKUS
MACKENZIE & PEDEN, P.S.C.
7508 NEW LAGRANGE ROAD
NO. 3
LOUISVILLE, KY 40222