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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000114-WC

JERRY MCGUIRE — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2007-CA-002554-WC
WORKERS' COMPENSATION BOARD NO. 05-00468

COAL VENTURES HOLDING COMPANY, INC.;
HONORABLE SHEILA C. LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Chief Administrative Law Judge (CALJ) dismissed the claimant's February 8, 2007, application for pneumoconiosis benefits based on the law of the case doctrine because the employer's liability for a coal dust exposure that ended in 2002 was fully litigated previously. The Workers' Compensation Board (Board) affirmed and the Court of Appeals affirmed the Board. Appealing, the claimant argues that the Court of Appeals erred because his previous claim was dismissed without prejudice.

We affirm. A 2006 decision by the Board rejected the claimant's argument that his initial claim was dismissed without prejudice. He failed to

appeal the decision. Thus, the res judicata and law of the case doctrines precluded both a new claim and a re-filed claim against the employer based on the same exposure.

The claimant filed his initial application for benefits on March 25, 2005, alleging a last exposure to coal dust on February 9, 2002. KRS 342.316 and KRS 342.732 base a pneumoconiosis award on an original chest x-ray and B-reader interpretation thereof showing at least category 1/0 pneumoconiosis. Although the claimant submitted a report from Dr. Baker, who classified a September 22, 2003, x-ray as category 1/0, he failed to submit the original x-ray. He also submitted a March 29, 2004, x-ray and a report from Dr. Baker that classified it as category 0/1. The employer submitted a June 1, 2005, x-ray and Dr. Broudy's report that classified it as category 0/0.

On the CALJ's own motion, the claimant was informed that he had filed multiple B-reader interpretations, including an interpretation of an x-ray that was not filed. The CALJ placed the claim in abeyance and ordered him to file the correct x-ray for the interpretation on which he intended to rely or vice versa. For reasons unexplained, he notified the CALJ that he intended to rely on the March 29, 2004, x-ray, which Dr. Baker classified as category 0/1, and failed to submit another interpretation of the x-ray.

The CALJ removed the claim from abeyance, after which the Office of Workers' Claims issued a notice of party consensus. As required by KRS

342.316, the employer filed a Form 111-OD in which it denied the claim. The matter was assigned to ALJ Smith and a benefit review conference scheduled for January 2006.

On November 15, 2005, the claimant filed a motion to withdraw the previously-submitted evidence and to submit in its place an October 31, 2005, x-ray and a report by Dr. Baker that classified the x-ray as category 1/2. Objecting, the employer asserted that no statute or regulation permitted proof to be substituted after the consensus process was complete and that such a practice would obviate the purpose of the process. ALJ Smith passed the motion to the benefit review conference, at which point the parties were directed to brief the matter.

The employer's brief objected to the withdrawal of evidence, noting that what the claimant sought differed fundamentally from an extension of time to submit additional evidence. The employer argued that due process did not require permitting him to substitute evidence after a consensus was declared and the benefit review conference was held and that no statute or regulation authorized it. Moreover, a substitution of evidence at that point amounted to permitting him to re-litigate the claim.

ALJ Smith denied the motion to substitute, after which the claimant moved to dismiss the claim without prejudice in order to file a corrected application and support it with a qualifying x-ray and B-reader report. The ALJ granted the motion summarily, but the employer's petition for

reconsideration pointed out that CR 41.01 and Sublett v. Hall[1] require a voluntary dismissal without prejudice to be based on an analysis of certain factors and requested an appropriate order.[2] Having considered the petition, ALJ Smith entered an order on May 2, 2006, stating as follows:

> [I]t appears that the defendant-employer engaged in full litigation of the claim before the motion was filed, [that] the Motion to dismiss was not filed until after the Benefit Review Conference, and that the defendant-employer may indeed suffer prejudice as the consensus of the parties own experts in the claim are negative which may not be the result if the claim is re-litigated and subjected to a panel of B readers.
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> Wherefore, for the foregoing reasons the Petition for Reconsideration is SUSTAINED.

The claimant appealed. He asserted that the ALJ "erred by reversing her earlier ruling," which had allowed him to dismiss his claim without prejudice. He argued that the employer would suffer no prejudice because nothing would prevent it from using its previously-obtained evidence to litigate a re-filed claim. He also argued that fairness, equity, and the beneficent purpose of the Workers' Compensation Act supported permitting him to withdraw his previous application and file a corrected application.

Affirming in an opinion rendered on September 15, 2006, the Board noted that no statute or regulation prohibited a worker from supporting his

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[1] 589 S.W.2d 888, 893 (Ky. 1979).

[2] The factors include: 1.) the amount of preparation by the opposing party; 2.) the amount of time between the filing of the claim and the motion to dismiss; 3.) the amount of prejudice the opposing party may suffer; 4.) the adjudicative effect of a voluntary dismissal on the merits of the case; 5.) the need for terms and conditions to govern the dismissal; and 6.) the prejudice that the moving party may suffer due to such terms and conditions.

application with an x-ray or B-reader report that failed to prove his entitlement to benefits. The Board determined that although nothing prevents a worker from substituting proof or seeking a voluntary dismissal before the employer submits proof, a failure to submit a qualifying x-ray and B-reader report before the claim is submitted for the consensus process amounts to a substantive failure of proof. Noting the claimant's statement to the ALJ that he did "indeed rely" on the March 29, 2004, x-ray and corresponding B-reader report, the Board concluded that he waived any allegation of error that might have occurred to that point and that the ALJ did not abuse her discretion by dismissing the claim with prejudice. No appeal was taken from the decision.

The claimant filed the present pneumoconiosis claim on February 8, 2007, without having sustained any additional exposure to coal dust. After the claim was assigned to the CALJ, the employer filed a special answer and motion to dismiss. The employer argued that the doctrine of res judicata barred re-litigation of the claim, which had been adjudicated previously and dismissed with prejudice. To support the motion, the employer cited the ALJ's order of May 2, 2006, and the Board's decision of September 15, 2006, which interpreted the order as a decision to dismiss the claim with prejudice and affirmed. The CALJ determined that the law of the case doctrine precluded a re-interpretation of the May 2, 2006, order and, thus, dismissed the re-filed claim with prejudice. The claimant appealed.

The doctrines of res judicata and the law of the case relate to the preclusive effect of previous judicial decisions. Res judicata, a Latin term

meaning "a matter adjudged," stands for the principle that a final judgment on the merits is conclusive of causes of action (claim preclusion) and facts or issues (issue preclusion/collateral estoppel) thereby litigated as to the parties and their privies.[3] The law of the case doctrine concerns the preclusive effect of judicial determinations in the course of a single litigation before a final judgment.[4] As applied to workers' compensation cases, a final decision of law by an appellate court[5] or the Board[6] establishes the law of the case and must be followed in all later proceedings in the same case.

The claimant asserts that the CALJ erred because the Board misinterpreted ALJ Smith's May 2, 2006, order as granting a dismissal with prejudice when, in fact, it did no more than sustain the employer's petition for reconsideration. He argues that the petition requested the previous order dismissing without prejudice to be set aside and the matter to be reconsidered under the proper legal standard but did not request the claim to be dismissed with prejudice. He also argues that the Board's characterization of the order as a dismissal with prejudice was mere dictum to which the law of the case doctrine is inapplicable. Finally, he argues that an initial consensus determination by the Office of Workers' Claims is not an adjudication on the merits and should not have preclusive effect.

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[3] Yeoman v. Com., Health Policy Board, 983 S.W.2d 459, 464 (Ky. 1998).

[4] 20 Am. Jur. 2d Courts § 130.

[5] Dickerson v. Commonwealth, 174 S.W.3d 451 (Ky. 2005); Scamahorne v. Commonwealth, 376 S.W.2d 686 (Ky. 1964).

[6] Whittaker v. Morgan, 52 S.W.3d 567 (Ky. 2001); Davis v. Island Creek Coal Co., 969 S.W.2d 712 (Ky. 1998).

The claimant's arguments in his initial appeal to the Board contradict his present assertions. They made clear that he interpreted the May 2, 2006, order as dismissing the claim with prejudice and that he requested it to be reversed. The order sustained the employer's petition for reconsideration and contained findings that the employer engaged in full litigation of the claim before the claimant filed a motion to dismiss without prejudice; that the claimant did not file the motion until after the Benefit Review Conference; and that the employer might indeed be prejudiced if the claim were re-litigated.

The Board determined in the initial appeal that no present statute or regulation makes positive evidence of pneumoconiosis a jurisdictional requirement[7] and that the claimant's failure to support his application with an x-ray and report showing his entitlement to benefits constituted a substantive failure of proof. Thus, although the May 2, 2006, order failed to state specifically that the claim was dismissed with prejudice, the Board interpreted it as doing so and affirmed.[8] Having failed to appeal the Board's decision, the claimant was bound by it in subsequent litigation under both the res judicata and law of the case doctrines.

The claimant filed a new application for benefits in 2007 with a new x-ray and report thereof but named the same defendant-employer and alleged the same date of last exposure as in the previous claim. As a consequence, the

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[7] See Scorpio Coal Co. v. Harmon, 864 S.W.2d 882 (Ky. 1993) (applicable statutes and regulations prohibited a 1990 claim from being filed without specific evidence).

[8] In the present appeal the Board rejected the claimant's argument that the statement was mere dictum.

Office of Workers' Claims gave it the same claim number as his previous application. The CALJ did not err under the circumstances by concluding that the claimant was bound by the Board's 2006 decision and by dismissing the 2007 claim with prejudice.

All sitting. All concur.

COUNSEL FOR APPELLANT,
JERRY MCGUIRE:

Miller Kent Carter
Miller Kent Carter & Michael Lucas, PLLC
131 Division Street
P.O. Box 852
Pikeville, KY 41502

COUNSEL FOR APPELLEE,
COAL VENTURES HOLDING COMPANY, INC.:

Jeffrey Dale Damron
Baird & Baird, PSC
P.O. Box 351
Pikeville, KY 41502