

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001817-WC

STEVE HEIL

APPELLANT

PETITION FOR REVIEW OF A DECISION OF  
v. THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-94-07756

WINN-DIXIE; HON. DONALD SMITH,  
ADMINISTRATIVE LAW JUDGE;  
HON. MARCEL SMITH, ADMINSTRATIVE  
LAW JUDGE; WORKERS' COMPENSATION FUNDS,  
SUCCESSOR TO SPECIAL FUND;  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

McANULTY, JUDGE: At the reopening of the claimant, Steve Heil's (Heil), workers' compensation award, an Administrative Law Judge (ALJ) awarded certain medical benefits and temporary total disability (TTD) benefits for a specified period beginning on

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

October 22, 2002, and continuing through December 1, 2003. After receiving notification of the period for which the ALJ awarded TTD, Heil filed two motions for reconsideration on the ground that he was not at maximum medical improvement, therefore he should have received an open-ended TTD award. In addition to the motions for reconsideration, Heil filed a second motion to reopen under KRS 342.125 on the same ground. The ALJ denied all three motions. Heil appealed, and the Workers' Compensation Board (the Board) affirmed the orders of the ALJ. In this petition for review, we are asked to determine if the ALJ erred in denying Heil's second motion to reopen. Because we conclude the evidence supported the TTD award, we affirm.

On February 11, 1994, while shoveling snow and ice in a parking lot, Heil sustained a work-related injury to his back and groin. He filed an application for workers' benefits.

On January 18, 1996, an ALJ issued an opinion and award granting benefits for a 75% occupational disability beginning June 21, 1995, and continuing for a period not to exceed 425 weeks. The award included provisions pertaining to vocational rehabilitation and medical treatment. Between 1996 and October 2002, Heil held a number of different jobs including driving a truck, driving a bus and selling cars. Heil last worked on October 22, 2002.

A little over six years after Heil received his award, he filed his first motion to reopen under KRS 342.125. In his motion, he alleged that he was more disabled, either temporarily or permanently, than he was at the time of the original decision in his claim.

In an opinion issued November 10, 2003, the ALJ awarded Heil TTD benefits for the period of October 22, 2002, to December 1, 2003. In addition, the ALJ ordered that Heil shall recover such medical, surgical and hospital expenses as may be reasonably required for the treatment of his occupational injury including epidural blocks and possible surgery.

Both Heil and Winn-Dixie filed petitions for reconsideration of the November 10, 2003 order. The ALJ denied both motions. As to Heil's motion, the ALJ reasoned that the medical evidence took Heil off work until December 1, 2003. But there was no medical evidence that he was temporarily totally disabled after that date. The ALJ characterized the majority of Heil's motion for reconsideration as merely a re-argument of the merits of the claim.

Heil filed a motion for reconsideration of the ALJ's denial. In support of his second motion, Heil attached a document that he had not previously submitted in his claim. The ALJ denied the second motion for reconsideration. In its order denying the motion, the ALJ stated he was not permitted to

consider new evidence, but was bound by the evidence in the file at the time of the Opinion and Award.

Before the ALJ had decided Heil's second motion for reconsideration, Heil filed another motion to reopen. In his motion to reopen, Heil alleged that there had been a change of condition and that Winn-Dixie refused to authorize additional medical treatment and/or refused to pay for medical treatment. In addition, Heil asserted that there had been a change of condition in that he was more disabled, either temporarily or permanently, than he was at the time of the decision in his claim. In support of his motion to reopen, Heil attached his affidavit in which he stated that his doctor had not released him to return to work as of December 18, 2003, yet the award only granted him TTD benefits through December 1, 2003.

The ALJ denied the second motion to reopen. The ALJ held that Heil had failed to demonstrate a change in condition since the matter was last litigated.

Heil appealed the series of orders denying his various motions to the Workers' Compensation Board. The Board affirmed the ALJ. In so doing, the Board reasoned that Heil presented no evidence in the first reopening proceeding that would permit the ALJ to extend a TTD award beyond December 1, 2003. The Board held that the ALJ did not err in not designating the award in

the November 10, 2003 order as interlocutory because TTD is, by definition, payable for a finite period.

In its opinion, the Board noted that KRS 342.281, which establishes the reconsideration procedure, limits the scope of the ALJ's authority on reconsideration to "the correction of errors patently appearing upon the face of the award, order, or decision." The Board went on to state that under Kentucky case law, the ALJ does not have the authority on reconsideration to (1) decide anew a factual issue that was decided in his or her original opinion or (2) consider evidence presented for the first time in a second reconsideration motion.

On the issue of the denial of the second motion to reopen, the Board held that the ALJ did not err in denying Heil's second motion to reopen. The Board stated that Heil had failed to explain why he did not present evidence in the first reopening proceeding to support a TTD award beyond December 1, 2003. In the Board's opinion, the second motion to reopen was not a motion to reopen the claim to prove a new period of TTD, but rather a motion to reopen the November 10, 2003 opinion and award to modify the length of the TTD period already adjudicated. The Board held that the *res judicata* doctrine applied; therefore the ALJ did not abuse its discretion in overruling Heil's second motion to reopen.

In his petition for review of the Board's decision, Heil argues that on November 24, 2003, his doctor took him off work until February 23, 2004. Based on this fact, he asserts that the ALJ erred in not making the opinion and award an award of interlocutory relief and therefore not a final and appealable order. Moreover, Heil contends that the ALJ erred in denying Heil's second motion to reopen.

Winn-Dixie argues that the ALJ's opinion is supported by substantial evidence of probative value, thus it must be affirmed by this Court. Winn-Dixie further contends that the employee has the burden of proof and the risk of non-persuasion.

The Workers' Compensation Fund, which is the successor to the Special Fund, filed a brief to assert that it has no legal interest in this appeal since Heil's motions to reopen concern TTD and medical benefits only, and the Workers' Compensation Fund is not liable for either of these benefits.

This Court's function when reviewing the Board's affirmance of the ALJ's rulings is to correct the Board only where we perceive that 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). This case turns on the evidence presented by Heil.

After reviewing that evidence, we conclude that the Board's assessment was correct.

Heil points to no evidence in the record at the time the ALJ issued its opinion and made an award that would have supported an award of open-ended TTD benefits. In lieu of taking the depositions of his doctors, Heil submitted slips from his doctors taking him off work. The last record Heil submitted was a doctor's off-work slip, which provided that Heil could return to work on December 1, 2003.

A couple of weeks after Heil filed the off-work slip that provided that he could return to work on December 1, 2003, the ALJ conducted a hearing for the purpose of receiving an update on Heil's current condition. When asked about this off-work slip, Heil acknowledged that the slip said he could return to work on December 1, 2003. Other than this slip, there was no medical testimony pertaining to the duration of time that Heil would be off work. Nor was there any medical testimony that Heil should remain off work after this date. The ALJ's decision on the period of TTD was in accordance with Heil's evidence.

We agree with the Board that Heil's second motion to reopen was a motion to reopen the November 10, 2003 opinion and award to modify the length of the TTD period already adjudicated. Because the reopening involved the same parties and the same cause of action, the doctrine of *res judicata* is

applicable. See Whittaker v. Cecil, 69 S.W.3d 69, 72 (Ky. 2002). Under the doctrine, "a final judgment precludes subsequent litigation not only of those issues upon which the court was required to form an opinion and pronounce judgment but also of matters . . . that, with the exercise of reasonable diligence, might have been raised at the time." Id.

The decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Wayne C. Daub  
Louisville, Kentucky

BRIEF FOR APPELLEE, WINN-DIXIE:

Allan Weiss  
Ferreri & Fogle  
Louisville, Kentucky

BRIEF FOR APPELLEE, WORKERS' COMPENSATION FUNDS, SUCCESSOR TO SPECIAL FUND:

Robert L. Whittaker  
Frankfort, Kentucky