

RENDERED: FEBRUARY 17, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001166-WC

FEDERICO PANTOJA-LOPEZ

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-66411

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

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.<sup>1</sup>  
McANULTY, JUDGE: Federico<sup>2</sup> Pantoja-Lopez (hereinafter appellant)  
appeals the opinion of the Workers' Compensation Board which  
affirmed the determination of an Administrative Law Judge (ALJ)  
that appellant was partially disabled by his work-related back

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

<sup>2</sup> Although appellant's first name is listed in the Board opinion and in the record at various places as Federico, his original Application for Resolution of Injury Claim and his signature upon that form make clear that his first name is Federico.

injury in the course of his employment with Elk Hill Farm. Appellant argues that he was found by a previous ALJ to be totally disabled, and this determination was "the law of the case." The Board affirmed the ALJ, and we affirm the Board.

Appellant's case was originally assigned to Hon. Bonnie Kittinger, ALJ. Following a Benefit Review Conference, ALJ Kittinger concluded that appellant was "not at maximum medical improvement, inasmuch as efforts have not been exhausted with regard to his pain management." She concluded that she was:

reluctant to award a total disability benefit when efforts have not been exhausted on both sides to attempt to heal this injured worker and assist him in returning to an active life, including being able to work. Dr. Yamamoto and Dr. Becherer are in agreement that he cannot work until his pain is under control.

The ALJ ordered that arrangements be made for appellant to be treated by a qualified pain management specialist of his choice, and for the employer to resume payments of temporary total disability benefits until appellant reached maximum medical improvement. Finally, ALJ Kittinger ordered that the claim be placed in abeyance until appellant reached maximum medical improvement or until further orders were issued.

Approximately four months later, appellant moved to have the case removed from abeyance and for an order declaring

him to be totally disabled. He asserted that abating the claim and sending him to a pain management specialist was unsuccessful after the specialist only provided Neurontin and recommended against narcotics. Appellant reported that there were no changes in his condition nor in his treatment, so that the ALJ's finding that appellant was totally disabled should be made a final and appealable order. The case was reassigned to ALJ Hon. John Thacker. After reviewing appellant's motions and Elk Hill Farm's responses, the new ALJ set the case for a telephonic status conference. Thereafter, the case was removed from abeyance and the parties filed position memoranda.

The ALJ entered an Opinion, Award and Order in which he concluded that appellant had a 13% permanent partial disability as a result of the work-related injury. The ALJ detailed the evidence on which he relied. He found that appellant could not return to his former work due to restrictions imposed, but agreed with Dr. Kriss' assessment following an independent records review that appellant could do sedentary work and light duties that involve walking, although not constant or excessive walking. The ALJ found that appellant had reached maximum medical improvement based on the opinion of his pain management specialist, even though appellant did not continue treating with the specialist after the initial

appointment. The Board on appeal affirmed the ALJ's order of permanent partial disability benefits.

On appeal to this Court, appellant's sole argument is that the original ALJ who heard this case made a determination that he was totally disabled, so that is the "law of the case" which could not be changed or disregarded by the second ALJ following abatement. On review of an opinion of the Worker's Compensation Board, the sole purpose of our review 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 687-88 (Ky. 1992).

First, we note that "law of the case" is not the relevant principle of res judicata, since the "law of the case" doctrine refers only to former rulings by an appellate court. Scamahorne v. Commonwealth, 376 S.W.2d 686 (Ky. 1964). We believe appellant is attempting to invoke the doctrine of issue preclusion. Issue preclusion bars parties from relitigating any issue actually litigated and finally decided in an earlier action. Yeoman v. Commonwealth, Health Policy Bd., 983 S.W.2d 459 (Ky. 1998).

We agree with the Board's conclusion that the issue of the extent of disability was not an issue which had been finally

decided by the original ALJ. The ALJ's decision on which appellant relies was entered as an "Interlocutory Opinion, Award and Order." We feel the ALJ made clear that she was not making a final decision on the issue of disability at the time that she ordered additional treatment in order to have appellant reach maximum medical improvement. In fact, we do not read the Interlocutory Opinion as making a concrete determination as to disability at all. Thus, we agree that there was no final order as to this issue that would prevent it from being finally litigated by the succeeding ALJ following abatement. We find no error in the decision of the Board.

For the foregoing reasons, we affirm the order of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

David R. Marshall  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Kamp T. Purdy  
Ferreri & Fogle  
Lexington, Kentucky