

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-002185-WC
AND
NO. 2005-CA-002375-WC

TOMMY THOMAS

APPELLANT/CROSS-APPELLEE

PETITION AND CROSS-PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-97969

KWIK SET

APPELLEE/CROSS-APPELLANT

AND

GRANT S ROARK,
ADMINISTRATIVE LAW JUDGE;
AND THE WORKERS'
COMPENSATION BOARD

APPELLEES/CROSS-APPELLEES

OPINION
AFFIRMING

** **

BEFORE: COMBS, CHIEF JUDGE; KNOPF, JUDGE; BUCKINGHAM, SENIOR
JUDGE.¹

KNOPF, JUDGE: Tommy Thomas petitions from an opinion of the
Workers' Compensation Board, entered October 14, 2005, rejecting

¹ Senior Judge David C. Buckingham sitting as Special Judge by
assignment of the Chief Justice pursuant to Section 110(5)(b) of
the Kentucky Constitution and KRS 21.580.

his claim seeking an enhancement to his award of disability benefits pursuant to the multiplier provision of KRS 342.730(1)(c)(1) (1996). Thomas contends that the Administrative Law Judge and the Board disregarded compelling evidence that a 1999 work-related shoulder injury rendered him incapable of returning to the sort of warehouseman's work in which he had engaged prior to the injury. We agree with the Board, however, that the evidence does not compel the result Thomas seeks. Thomas also contends that he was wrongfully denied benefits for a work-related neck injury, and his employer, Kwik Set Fasteners, contends that Thomas's award was wrongfully based on insufficient evidence of the alleged shoulder injury. These later two contentions are not properly before us, having been waived. Accordingly we affirm.

Kwik Set is a retailer of construction and industrial supplies. It is headquartered in Louisville. It hired Thomas in 1993 to help maintain its Louisville warehouse and to make deliveries. While making a delivery in January 1999, Thomas was involved in a motor vehicle accident. He was treated at Audubon Hospital for lacerations of the face, scalp, and left hand and then released. X-rays of Thomas's left shoulder and jaw were normal. He missed one week of work following the accident, performed light duty for about two weeks, and then resumed his regular warehouse and driving duties, although Thomas maintains

that even after his return to the warehouse he pulled only small orders and made only light deliveries.

In February and March 1999, Thomas began seeking treatment for pain in his right arm and pain and numbness in his right hand. He was diagnosed as having carpal tunnel syndrome and prescribed physical therapy. The pain persisted, however, and in November 1999, Thomas saw Dr. Scott Kuiper of the Louisville Orthopedic Clinic. He complained primarily of pain in his right shoulder. Dr. Kuiper diagnosed a possible traumatic injury to Thomas's acromioclavicular (AC) joint as a result of the January accident. He performed arthroscopic surgery on that joint in January 2000. Thomas received temporary total disability benefits from January 24 until February 6, when he returned to light duty work. In early March Dr. Kuiper released Thomas to return to work without restrictions.

In July 2000 Thomas was promoted from the warehouse/delivery position to a sales position in the company's show room. He performed that job without incident, apparently, until January 2001 when he tested positive for marijuana in a random drug screen. Company policy required that he be suspended for thirty days, but rather than accept the suspension Thomas resigned. Shortly after his resignation he returned to Dr. Kuiper and complained of continuing shoulder and elbow pain.

Dr. Kuiper diagnosed post-operative pain, assessed a 3% permanent impairment rating, and recommended permanent work restrictions of no heavy, repetitive overhead lifting of greater than thirty pounds and no jackhammer use.

At about this time it appears that Thomas hired counsel to prepare for a permanent disability claim and thereafter he underwent several medical exams. In June 2001 he complained to Dr. Patrick Murphy, a pain management specialist, of severe pain in his neck radiating into the mid-back and to either side of the back of the head. Dr. Murphy referred Thomas to Dr. John Harping, a neurosurgeon, who diagnosed chronic cervical pain and right upper extremity radiculopathy secondary to a herniated disc at C5-6. He recommended surgery. When Kwik Set denied liability for this surgery, Thomas brought the matter before ALJ Riggs, who was then assigned to the claim. On April 22, 2002, ALJ Riggs issued a preliminary finding that Thomas's cervical condition was work-related and was not yet at maximum medical improvement. He ordered Kwik Set to pay for the surgery and to reinstitute temporary total disability benefits while Thomas underwent the operation. Dr. Harping performed the surgery on June 24, 2002 and released Thomas to return to work without restrictions as of February 12, 2004.

ALJ Riggs was succeeded by ALJ Roark, who conducted a final hearing of the matter in June 2004. Thomas claimed that

his 1999 accident had caused disabling injuries to both his shoulder and his neck. The ALJ rejected both claims. He agreed with the doctors who opined that the two-and-a-half year gap between the accident and Thomas's complaints of neck pain strongly indicated that Thomas's neck condition was not the result of the accident. In so doing ALJ Roark expressly disavowed the contrary finding by ALJ Riggs and explained that he thought ALJ Riggs's reliance upon the history taken by Dr. Murphy had not been borne out by subsequent proof. He also agreed with Kwik Set that Thomas had failed to prove a harmful change to his shoulder as required by KRS 342.0011. In the ALJ's view, Dr. Kuiper's diagnosis was based on nothing more than Thomas's descriptions of his symptoms, not the objective evidence the statute requires.

Thomas appealed to the Board, which, by opinion entered July 25, 2005, affirmed the denial of Thomas's neck claim, but reversed the denial of his shoulder claim. The Board rejected Thomas's contentions that ALJ Roark had been bound by ALJ Riggs's prior ruling or that the evidence compelled a finding that his neck problems were work related. The Board did, however, find compelling evidence for the shoulder claim in the fact that every doctor who had been asked to give an opinion had agreed that Thomas had incurred a ratable shoulder disability. The Board acknowledged that most of those doctors

based their opinions on the arthroscopic surgery, which itself is disabling, apparently, under the AMA Guides. The Board also believed, however, that the motion tests, MRI, and temporarily successful treatment of Thomas's AC joint by injection, upon which Dr. Kuiper relied in reaching his diagnosis of AC joint abnormality, provided sufficiently objective justification for the surgery and thus brought any disability resulting from the surgery within the statute. Because the doctors had not agreed on the extent of Thomas's shoulder disability, the Board remanded the claim to the ALJ to choose the most suitable percentage from the record and to fashion a corresponding award. Neither Thomas nor Kwik Set appealed from the Board's opinion.

On remand, the ALJ awarded Thomas benefits based upon a 6% impairment rating. He rejected Thomas's claim for an enhanced benefit under KRS 342.730(1)(c)(1), however, because in his view the medical and other evidence did not support Thomas's claim that his shoulder disability prevented him from returning to the sort of warehouse and delivery work he had performed at the time of the injury. Thomas again appealed to the Board, and Kwik Set cross-appealed. In addition to challenging the ALJ's enhancement ruling, Thomas again argued that both ALJ Riggs's finding and compelling evidence entitled him to benefits for his neck condition. Kwik Set sought to revisit the shoulder claim and again argued that Thomas was not entitled to benefits for an

injury caused by the arthroscopic surgery rather than the accident. By opinion entered October 14, 2005, the Board affirmed the denial of Thomas's claim for an enhanced benefit and dismissed the parties' other contentions under the law-of-the-case doctrine. It is from that opinion that Thomas and Kwik Set have both petitioned for review.

In their briefs to this Court neither party addresses the law of the case, but we agree with the Board that that doctrine applies and precludes review of all but Thomas's enhancement claim. Related to the doctrine of *res judicata*, which precludes in certain circumstances the raising in a subsequent action of claims or issues decided in a prior action, the law-of-the-case doctrine is concerned with the extent to which a decision applied at one stage of litigation becomes the governing principle in later stages of the same litigation.² As the Board correctly noted, in Davis v. Island Creek Coal Company³ and Whittaker v. Morgan,⁴ our Supreme Court held that the law-of-the-case doctrine applies to Board decisions. Under that doctrine, a party aggrieved by an adverse Board opinion on the merits of a claim "must determine whether he objects to any part

² Write, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4478 (2002).

³ 969 S.W.2d 712 (Ky. 1998).

⁴ 52 S.W.3d 567 (Ky. 2001).

of it and if he does, petition for rehearing or modification or move for discretionary review. Upon failure to take such procedural steps, a party will thereafter be bound by the entire opinion.”⁵ In this context, of course, the aggrieved party’s remedy is an appeal. Absent extraordinary and compelling circumstances, such as, perhaps, an intervening change in the law, this Court, too, is bound by what in effect is the aggrieved party’s waiver of his right to challenge the Board’s decision.⁶

In this case, the Board’s July 25, 2005, opinion addressed the full merits of Thomas’s appeal and aggrieved both parties: Thomas by denying his neck claim and Kwik Set by mandating an award for the shoulder claim. When neither party appealed, the Board’s rulings became the law of the case, binding on the parties at all subsequent stages of the litigation. No reason to depart from the law-of-the-case doctrine having been suggested, the Board did not err by dismissing the parties’ attempts to relitigate those issues in the second appeal, and we too must decline to address them.

With respect to Thomas’s enhancement claim, the version of KRS 342.730(1)(c) in effect at the time of his accident provided that

⁵ Williamson v. Commonwealth, 767 S.W.2d 323, 326 (Ky. 1989).

⁶ Hampton v. Commonwealth, 133 S.W.3d 438 (Ky. 2004).

[i]f, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be one and one-half (1 ½) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

Thomas seeks such an enhanced benefit because, he claims, his shoulder impairment has rendered him incapable of his pre-injury sort of employment. Thomas concedes that the only permanent work restrictions due to his post-operative shoulder condition were those of Dr. Kuiper limiting him to no heavy, repetitive overhead lifting of greater than thirty pounds and no jackhammer use. Not only was Thomas's warehouse job with Kwik Set within these restrictions, but, as the ALJ noted, Thomas actually returned to his warehouse job after the surgery without incident. We agree with the Board, therefore, that substantial evidence supports the ALJ's conclusion that Thomas is not entitled to an enhanced benefit due to his inability to return to his pre-injury type of employment.

Against this conclusion, Thomas argues that the ALJ gave insufficient weight to Thomas's testimony that his ability to work was severely restricted after his shoulder surgery and that although he returned to the warehouse he never resumed the full scope of his pre-injury duties. Not only was this

testimony at odds with the facts just mentioned, but it was directly contradicted by Thomas's supervisor. As the Board noted, "where the evidence is conflicting, the ALJ is free to pick and choose whom and what to believe."⁷ Because we cannot say, notwithstanding Thomas's testimony, that the Board grossly mis-assessed the evidence, that testimony does not entitle him to relief.⁸

In sum, the Board's July 2005 denial of Thomas's neck claim and its reinstatement of his shoulder claim have become the law of the case and thus are no longer subject to our review. And because substantial evidence indicates that Thomas's shoulder injury did not render him incapable of returning to his pre-injury employment, the Board did not err by affirming the denial of his claim for an enhanced award. Accordingly, we affirm the October 14, 2005, opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Wayne C. Daub
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BRIEF FOR APPELLEE, KWIK SET:

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⁷ Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122, 124 (Ky.App. 2000).

⁸ Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992).