

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002391-WC

LLOYD POLSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-04522

ARCH OF KENTUCKY, INC.;
DR. GALEN SMITH, SPECIAL FUND
(NOW WORKERS' COMPENSATION FUNDS);
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: This is an appeal from a decision of the Administrative Law Judge on remand that certain EMG/NVC studies of the claimant's lower back were non-compensable under KRS 342.020. In affirming that determination, the Workers'

¹ 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.

Compensation Board relied upon Whittaker v. Morgan² in support of its conclusion that its review was limited to a determination of whether the ALJ's decision on remand properly construed and applied the directive contained in the March 4, 2005, order of remand. Finding no error in the Board's decision, we affirm.

In March 2005, the Board vacated a ruling of the ALJ that EMG/NCV studies of appellant Polson's right lower extremity were compensable under KRS 342.020. The Board's opinion explained that it appeared that the ALJ's decision in the medical fee dispute had been based upon an incorrect view of the evidence. Noting that the work-related injuries for which appellee Arch of Kentucky was responsible had been sustained on April 5, 1994, and February 8, 1995, the Board concluded that there was no medical opinion of record expressly relating Polson's current right leg radicular complaints to those injuries. On remand, the ALJ amended his findings to reflect his view that the employer had sustained its burden of demonstrating that the contested EMG/NCV study was non-compensable as the medical evidence indicated that the claimant's current right leg radicular complaints stemmed from a February 1993, back injury unrelated to the work injuries at issue in the present dispute.

² 52 S.W.3d 567 (Ky. 2001).

The claimant appealed the ALJ's decision on remand to the Board alleging that the February 1993 back injury was in fact exacerbated by the April 5, 1994, and February 8, 1995, injuries and thus there was sufficient evidence to support the previous finding of compensability. Because the claimant did not appeal the Board's initial decision to remand the case to the ALJ, the Board ruled that its prior opinion was the "law of the case" precluding the claimant from raising the issue again after remand. We agree with the Board's analysis and affirm.

In Whitaker v. Morgan,³ the Supreme Court of Kentucky reaffirmed the principle that the only questions subject to appeal following remand are issues related to whether the ALJ properly construed and applied the order of remand:

In *Williamson v. Com.*, Ky., 767 S.W.2d 323, 325 (1989), we explained that a party who is aggrieved by an adverse appellate determination must appeal at the time the decision is rendered because an objection on remand is futile, and an appeal from the implementation of the appellate decision on remand amounts to an attempt to relitigate a previously-decided issue.

Because the claimant failed to appeal the Board's March 5, 2005, ruling and there is no question that the ALJ properly construed and applied the remand order contained in that decision, the Board properly refused to allow him to relitigate in this appeal matters finally concluded by that opinion.

³ Id. at 569.

The opinion of the Worker's Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edmond Collett
Monica Rice Smith
Hyden, Kentucky

BRIEF FOR APPELLEE:

Ralph D. Carter
Hazard, Kentucky