Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 20, 2014

CLAIM NO. 201200214

ALFREDO DIAZ-NEVAREZ PETITIONER

VS. **APPEAL FROM HON. CHRISTOPHER DAVIS, ADMINISTRATIVE LAW JUDGE**

MASCO
and HON. CHRISTOPHER DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Alfredo Diaz-Nevarez ("Diaz") appeals from of the December 17, 2013 Opinion and Order on Remand and the January 27, 2014 Order overruling his petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). On appeal, Diaz argues the ALJ erred by not making additional findings of fact

regarding entitlement to temporary total disability ("TTD") benefits after October 5, 2011, and request the Board to reverse its previous decision regarding the issue of TTD benefits for that period. For the reasons set forth herein, we affirm.

The ALJ initially awarded Diaz TTD benefits from October 29, 2010 through December 6, 2010 and from May 27, 2011 through February 27, 2012. Masco appealed, challenging the award of TTD benefits after June 21, 2011. The Board vacated and remanded for additional findings regarding the period from June 21, 2011 until October 5, 2011. On October 3, 2013, the Board ruled as follows concerning the remaining periods:

> The second period in question is from October 5, 2011 through October 28, 2011. On October 5, 2011, Dr. Kilambi provided an unrestricted release to work. Diaz then began working at the bottling facility. This return to work ended on October 28, 2011, when Dr. Kilambi reinstated restrictions.
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> Considering Diaz's uncontroverted testimony regarding the physical demands of this job and that he had been released to work without restrictions, it is readily apparent this work is not "minimal employment" and, as a matter of law, Diaz would not be entitled to TTD benefits during the time he maintained that employment. We therefore reverse the award of TTD benefits during the period Diaz worked at the whiskey bottling facility.

> The final period in question is from October 28, 2011 until February 27, 2012. During this time, Diaz owned and operated a business installing gutters and drywall, earning $700.00 to $800.00 per week. This is the same type of work he performed at Masco. The fact Diaz hired employees to perform certain physical aspects of the job is immaterial. He certainly used his training and experience installing gutters to operate his business. For this reason, Diaz's self-employment constitutes a return to his customary work, and TTD benefits should not have been awarded during any period Diaz was self-employed.

On remand, the ALJ found Diaz entitled to TTD benefits for the period from June 21, 2011 through October 5, 2011 and rescinded the award of TTD benefits after October 5, 2011.

Diaz filed a petition for reconsideration asking the ALJ to once again consider entitlement to TTD benefits from October 5, 2011 through February 27, 2012, arguing that despite the Board's decision, the ALJ's original determination was legally correct. Alternatively, Diaz indicated the ALJ should state he did not feel he could make additional findings of fact as to that period in light of the Board's decision. The ALJ denied the petition for reconsideration on January 27, 2014, noting the Board had

already determined, as a matter of law, Diaz was not entitled to TTD benefits from and after October 5, 2011.

Because the Board reversed the ALJ's determination regarding TTD benefits, holding as a matter of law Diaz did not qualify for TTD benefits from October 5, 2011 through February 27, 2012, there was no need for the ALJ to make additional findings regarding that period. Rather, the ALJ's only action on remand was to enter an amended decision denying TTD benefits for that period. The ALJ did so. The ALJ carried out the Board's directive on remand and accordingly his decision is affirmed.

The Board previously ruled on the issue of entitlement to TTD benefits for the period from October 5, 2011 through February 27, 2012. That ruling is now the law of the case and may not be revisited. In Inman v. Inman, 648 S.W. 2d 847 (Ky. 1982) the Supreme Court instructed as follows:

> The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions and law and not questions of fact. "As the term 'law of the case' is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the case to the court below

> for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court." 5 Am. Jur. 2d, Appeal and Error, Sec. 744.

Id. at 849.

In its responsive brief, Masco requests that the Board sanction Diaz pursuant to KRS 342.310 for allegedly bringing the appeal without reasonable grounds. We decline to impose sanctions. The Workers' Compensation Board has consistently utilized the standard set forth by the Kentucky Supreme Court in Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993), *i.e.* whether it can be reasonably conceived the object of the proposed costs was acting in good faith in bringing the action. Although Diaz did not prevail on appeal, we do not believe it is inconceivable that he was acting in good faith in bringing the appeal; hence, we decline to impose sanctions.

Accordingly, the December 17, 2013 Opinion and Order on Remand and the January 27, 2014 order overruling Diaz's petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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