

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 30, 2015

CLAIM NO. 201201278

CORNETTE'S LLC

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

EVAN DELOACH and  
HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

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

**ALVEY, Chairman.** Cornette's LLC ("Cornette's") appeals from the Amended Opinion and Order on Remand rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") on September 12, 2014 and the October 17, 2014 order denying the petition for reconsideration. The ALJ found Evan Daniel DeLoach ("DeLoach") permanently totally disabled due to a

March 16, 2011 lifting injury, and awarded temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits and medical benefits.

This is the third time this claim has been appealed to this Board. The facts of the case were clearly outlined in the decision entered by this Board on August 15, 2013. In that decision, the Board vacated the ALJ's opinion rendered March 1, 2013 and the April 8, 2013 order denying Cornette's petition for reconsideration awarding DeLoach TTD benefits and PTD benefits for a cumulative trauma injury. We specifically stated the evidence did not support the finding of a cumulative trauma injury.

On remand, the ALJ was directed to make a determination of whether DeLoach sustained an acute injury, and if so, the date of injury. This determination was to be based upon the evidence as it existed on August 15, 2013, the date of the Board opinion. He was also directed to determine the extent of any disability he may have sustained due to that injury. The ALJ was further directed to provide a clear basis for any award of occupational disability benefits. The ALJ was not directed, or permitted, to allow for further proceedings, or to allow the introduction of additional evidence. This is consistent with the decisions of the Kentucky Supreme Court in T. J. Maxx v. Blagg, 274

S.W.3d 436 (Ky. 2008); Nesco v. Haddix, 339 S.W.3d 465 (Ky. 2011); and UEF v. Pellant, 396 S.W.3d 292 (Ky. 2012) which prohibit "a second bite of the apple", or the introduction of additional evidence on remand.

In the August 15, 2013 decision, we specifically noted the records from Dr. Sirinibasim Periyanyagam did not support an award of PTD benefits because he addressed only a recommendation for surgery. He did not address or impose any restrictions upon DeLoach's ability to work. We noted the ALJ must provide a specific basis for any award, not merely provide a recitation as to the identity of the evidence he relied upon. The Board's decision was not appealed and therefore became the law of the case.

In Inman v. Inman, 648 S.W. 2d 847, 849 (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 of 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.

In McGuire v. Coal Ventures Holding Company, Inc., 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published, the Kentucky Supreme Court described the law of the case doctrine as follows:

The law of the case doctrine concerns the preclusive effect of judicial determinations in the course of a single litigation before a final judgment. [footnote omitted] As applied to workers' compensation cases, a final decision of law by an appellate court [footnote omitted] or the Board [footnote omitted] establishes the law of the case and must be followed in all later proceedings in the same case.

Slip Op. at 6.

Here, on remand, the ALJ was granted the limited authority to determine whether DeLoach had sustained an acute work-related injury, and if so the date of injury, and the extent of the injury. The ALJ was further directed to

provide a basis for his decision rather than a vague reference as to which witness he relied upon. The ALJ was not granted authority to conduct additional proceedings, allow the introduction of additional evidence, entertain motions to reopen, or grant interlocutory relief.

Rather than following the directives of this Board, the ALJ allowed additional evidence, allowed the parties to file additional briefs, allowed a reopening of the claim due to a worsening of condition when DeLoach's condition had never been established, awarded interlocutory relief, and impermissibly conducted a second hearing where he inexplicably engaged in direct examination of DeLoach. Additionally, the ALJ made multiple awards of attorney fees to counsel for DeLoach which could be construed to exceed the limits set forth in KRS 342.320.

This claim was again appealed to this Board subsequent to the ALJ's award of Interlocutory Relief dated November 18, 2013, and the December 27, 2013 order denying Cornette's petition for reconsideration. On February 26, 2014, this Board entered an Opinion and Order dismissing the appeal as being brought from an interlocutory order. Despite dismissing the appeal, this Board stated as follows:

Further this Board remanded with specific instructions to determine whether DeLoach sustained an acute

trauma injury. In the event the ALJ found DeLoach sustained a work-related injury and provided timely notice of the injury, the ALJ was to revisit the issue of DeLoach's occupational disability. As the ALJ previously relied upon the opinions of Dr. O'Brien who determined De Loach had already reached MMI, the ALJ was not permitted to enter an open-ended award of TTD benefits in the November 18, 2013 decision. In addition, if the ALJ determined DeLoach sustained a work-related injury and provided timely notice, the ALJ was also to determine, based on the records as it currently existed, the extent, if any, of DeLoach's permanent occupational disability. Even though we are compelled to dismiss the appeal, we have serious reservations about the propriety of the award of open-ended TTD benefits and conclude the ALJ did not comply with this Board's directives contained in the August 15, 2013 opinion.

Here, the ALJ has ignored the Board's explicit and clear directives. Because the ALJ exceeded his authority, all orders issued (including awards of attorney fees), evidence submitted, subsequent proceedings, and opinions issued (including those awarding interlocutory relief listed above), and any actions of the ALJ in this case conducted subsequent to the August 15, 2013 opinion entered by this Board are hereby vacated.

The September 12, 2014 Amended Opinion and Order on Remand by Hon. William J. Rudloff, Administrative Law Judge, finding Deloach permanently totally disabled and

awarding PTD benefits, and the order issued October 17, 2014 denying Cornette's petition for reconsideration are **VACATED**. We likewise **VACATE** any attorney fees awarded, orders granting reopening, and the November 18, 2013 order awarding interlocutory relief, and the December 27, 2013 order denying Cornette's petition for reconsideration of that award. This claim is **REMANDED** to the ALJ for entry of a decision in conformity with the opinion of this Board rendered August 15, 2013, and with the views expressed herein.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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