Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 23, 2015

CLAIM NOS. 201300144 & 201300659

INTERNATIONAL COAL GROUP PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

ATWOOD DEZARN
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING

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BEFORE: ALVEY, Chairman, and RECHTER, Member.

RECHTER, Member. International Coal Group ("ICG") appeals from the August 21, 2014 Opinion and Order on Remand and the September 15, 2014 Order on Reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"). This claim was previously considered by the Board in an Opinion dated June 6, 2014. The award was partially vacated and was

remanded to the ALJ for clarification of the award of benefits for Atwood Dezarn's ("Dezarn") neck condition. On appeal, ICG argues the ALJ failed to follow this Board's directions on remand. For the reasons set forth herein, the matter must be remanded to the ALJ.

Dezarn filed two claims, one alleging a cumulative trauma and another alleging a traumatic right shoulder injury occurring on February 14, 2011, which were consolidated. The underlying facts were set forth in our original opinion:

> Dezarn is a 59-year old miner who has worked 35 years in the coal mining industry. He alleged an injury to his right shoulder, occurring on February 14, 2011 while employed by ICG. Dezarn testified the injury occurred when he slipped and fell while exiting the bulldozer he typically operated. He continued working, but sought medical treatment the following morning. An MRI revealed a partial torn rotator cuff. Injections and physical therapy proved beneficial and, after a brief period on light duty restrictions, Dezarn returned to work.
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> Dezarn also alleged cumulative trauma injuries to his low back, shoulders, neck, upper extremities and knees, with a manifestation date of February 28, 2013. Dezarn has worked at the same mine site since 1992, nearly exclusively as a heavy equipment operator. He provided testimony regarding the constant arm and neck movement required to operate heavy machinery, in addition to the continual

vibration. He began experiencing pain 10 years ago, which has progressively worsened.

Dezarn presented the medical records of several providers. Records from Family Medical Care of Clay County indicate Dezarn presented with sharp shoulder pain four days after the February 14, 2011 fall. After the MRI revealed a torn rotator cuff, he was referred to a specialist.

Dezarn visited Family Medical Care again on May 16, 2012 complaining of back pain and headaches. He periodically treated with Family Medical Care for the remainder of 2012, for treatment of back, neck, arm and shoulder pain. In a November 20, 2012 office note, the treating physician identified "years of operating heavy machinery" caused Dezarn's back, neck, shoulder and arm pains. Dezarn continued to treat with Family Medical Care until June, 2013. Several office notes reflect that Dezarn's work-related activities caused and/or exacerbated his back, shoulder, neck and arm conditions.

In April, 2013, Dezarn began treating with Dr. Chad Morgan, a chiropractor. Dr. Morgan's records document treatment for back, neck, shoulder and knee problems. In a July 30, 2013 report, Dr. Morgan attributed Dezarn's shoulder, upper back and low back conditions to his work-related activities. Additionally, Dr. Morgan found accelerated degenerative condition in Dezarn's knees, which he also attributed to his work activities.

Three physicians evaluated Dezarn for purposes of these claims. Dr. Gregory Snider diagnosed right shoulder sprain/strain with a partial rotator

> cuff tear as a result of the February 14, 2011 fall. Referring to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assigned a 2% permanent impairment rating. His report does not address Dezarn's cumulative injury claim.
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> Dr. David Jenkinson evaluated Dezarn and found no evidence of cumulative trauma. Finding an injury to Dezarn's shoulder, he also assigned a 2% impairment rating pursuant to the AMA Guides, but imposed no work restrictions. He considered Dezarn's neck and back pain, but assessed a 0% impairment rating for these complaints.
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> Dr. Arthur Hughes attributed Dezarn's right shoulder and neck pain to the February 14, 2011 fall. He further believed Dezarn developed left shoulder and lower back pain and neuropathy as a consequence of repetitive injury from working as a heavy equipment operator. Dr. Hughes assessed a 12% impairment rating pursuant to the AMA Guides, apportioning 5% to the neck, 2% to the right shoulder, 1% to the left shoulder, 0% to the lower back, 3% for right carpal tunnel, and 1% for left ulnar neuropathy.

The ALJ determined Dezarn suffered cumulative trauma injuries to his low back, neck, left shoulder, right upper extremity and right wrist. She further determined he injured his neck and right shoulder as a result of the February 14, 2011 fall. On appeal, this Board affirmed the ALJ's determination Dezarn suffered no work-related knee injury, and that he is not permanently totally disabled.

However, we concluded the ALJ erred in awarding benefits for a neck injury attributable to the February 14, 2011 work-related accident. We explained:

> ICG contends the ALJ erred in finding Dezarn injured his neck as a result of the February 14, 2011 fall. Dezarn's Form 101 and the Benefit Review Conference Order reference only a shoulder injury occurring due to the 2011 accident. In his deposition and final hearing testimony, Dezarn stated he injured only his shoulder in the 2011 fall. When asked about his neck pain, he stated it had developed some 12 years earlier and gradually worsened. He further stated his belief that the neck pain was due to the constant turning required when operating a bulldozer. In his brief before the ALJ, Dezarn discussed his various conditions, including neck pain, and stated "all his problems (other than the specific right shoulder injury that resulted in a partial thickness rotator cuff tear) are the direct result of cumulative trauma injuries".
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> While Dr. Hughes' report may support a finding Dezarn injured his neck in the 2011 fall, as he asserts on appeal, only issues identified at the Benefit Review Conference as contested can be the subject of further proceedings. 803 KAR 25:011 §13 (14). As detailed above, there is no evidence to suggest a neck injury as a result of the 2011 fall was tried by consent. Rather, it is apparent all parties considered Dezarn's neck complaints to be a part of his cumulative trauma claim. As such, that portion of the ALJ's order attributing Dezarn's neck injury to the February 14, 2011 work-related accident must be vacated.

> …
> Accordingly, on remand, the ALJ is asked to clarify her findings with respect to Dezarn's neck condition. For the reasons stated above, benefits for the neck condition may not be awarded as part of his February 14, 2011 injury claim. Because this portion of the award has been vacated, the ALJ must also recalculate the benefits awarded for the specific injury claim, including reconsideration of the appropriate multiplier. Additionally, if the ALJ intended to award benefits for the neck condition as part of the cumulative injury claim, as stated in her opinion, she must amend the cumulative trauma award accordingly.

Neither party appealed the decision. On remand, the ALJ resummarized the evidence relating to Dezarn's neck condition, particularly emphasizing the medical proof which indicates he received treatment for a neck injury immediately following the February 14, 2011 fall. This proof included Dezarn's testimony at two depositions and at the final hearing. At the depositions, he twice testified he injured only his shoulder as a result of the fall, and that his neck condition had been an ongoing problem for at least a decade. In describing his treatment following the February 14, 2011 accident, he recounted only treatment to his right shoulder. At the final hearing, he testified he injured only his right shoulder as a result of the fall. However, in response to leading questions on direct, counsel

asked Dezarn whether he injured his "shoulder and the back of [his] neck" as a result of the February 14, 2011 fall. Dezarn answered, "yes." After this response, Dezarn again recounted the treatment provided for the shoulder injury.

The ALJ also emphasized the medical records of Dr. Gregory D'Angelo, who treated Dezarn's shoulder after the February 14, 2011 incident. It is important to note that Dr. D'Angelo's records were not admitted into the record. However, it appears Drs. Hughes, Snider and Jenkinson reviewed Dr. D'Angelo's records in preparing their reports. Dr. Hughes' report indicated Dr. D'Angelo suspected a "cervical issue" caused by the February 14, 2011 accident. Dr. Snider also noted Dr. D'Angelo suspected a neck injury.

The ALJ relied upon this proof, which was admitted without objection, to conclude that the parties had tried the issue of a neck injury resulting from the February 14, 2011 incident by consent:

> Kentucky case law makes it clear that the issue of whether the parties tried a particular issue by "consent" is for the fact-finder to determine. It is also well established that an ALJ may consider and decide an issue or claim tried by consent of the parties, even when an issue or claim is never formally incorporated as part of an injured worker's application for benefits. *See* CR 15.02; Kroger Co. vs. Jones, 125 SW3d 241 (Ky. 2004); Nucor Corp. vs. General Electric Co., 812 SW2d 136 (Ky. 1991);

Collins vs. Castleton Farms, Inc., 560 SW2d 830 (Ky. App. 1977).

The Kentucky Supreme Court held whether an issue has been tried by consent is within the sound discretion of the trial court and such a finding will not be reversed absent clear abuse. Nucor at 145. The Court went on to state in order to preserve an objection to a deficient pleading is by way of objecting to the introduction of evidence on an unpleaded issue. *Id*. The Court further stated, "[t]he theory of **implied consent does not turn on actual consent but on actual prejudice.** The concept of actual prejudice is not related to winning or losing, but to being **unable to present a defense which would have been otherwise unavailable."** (Emphasis ours). Id. at 146.

The undersigned finds the Defendant(s) were not prejudiced in any way by Plaintiff's failure to formally amend his [Form] 101, they presented evidence and arguments that clearly indicate that both of the Defendant's evaluating physicians were well aware of the medical treatment for the neck and shoulder injury in 2011. Underscoring this finding is the Defendant Arch Coal's first argument in its' Brief to the ALJ entitled: *"I. Plaintiff's Neck and Right Shoulder are the Result of the February 14, 2011 Fall."* Even if this is the attempt of one defendant to "put the onus on the other defendant" it is clear evidence of the awareness of the party(s) that the Plaintiff was claiming injury to his neck as a result of the February 14, 2011 injury.

The Defendant ICG was aware of Dr. Hughes' opinion (filed in the record on June 13, 2013 and again on July 15, 2013) that the Plaintiff not only

injured his neck but had assigned impairment to the neck pain as a result of the February 14, 2011 injury. ICG argued that the February 14, 2011 injury only applied to the right shoulder. The Defendant did not object to Dr. Hughes' report nor did it make the issue of a "non-pleaded" claim a contested issue. It simply argued Plaintiff did not hurt his neck in the 2011 injury (pointing to his testimony in the depositions).

Both of the expert physician evaluators for the Defendants stated they had read Dr. D'Angelo's records. Dr. Snider (ICG's evaluator) even specifically noted x-rays and MRI were taken of the cervical spine as a result of Dr. D'Angelo's suspecting "a cervical component" to Plaintiff's February 14, 2011 work injury. It is assumed that the carrier for the Defendant, ICG, paid for those diagnostic tests. Certainly, the Defendant(s) cannot claim "prejudice" or inablility to present a defense.

In the case at bar, Plaintiff filed two Form 101(s), Application for Resolution of Injury Claim. The first alleged injuries to his "right shoulder" but did not specifically allege an injury to his cervical spine. The second 101 alleged a February 28, 2013 injury date to his "low back, neck, right arm and shoulders, left leg". The ensuing medical evidence filed by all parties, noted the diagnosis and treatment of the cervical spine by Dr. D'Angelo as a result of the February 14, 2011 injury. Dr. Hughes noted the involvement of the neck/cervical spine stemming from the February 14, 2011 work injury and essentially adopted Dr. D'Angelo's opinion related to the neck/cervical spine. Importantly, Dr. Snider, ICG's expert evaluator, also considered the

evidence of Dr. D'Angelo's treatment of the neck/cervical spine injury, but only assessed impairment to the right shoulder.

The Defendants failed to object to Plaintiff's submission of evidence regarding the alleged neck injury. Likewise, the Defendants did not object to evidence regarding the neck at the hearing. Finally, it is noted while several contested issues were listed on the BRC order and Hearing Order, the Plaintiff's failure to amend his Form 101 was not made a contested issue. 803 KAR 25:010, Section 13(14).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of the evidence. Square D Co. vs. Tipton, 862 SW2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson vs. General Refractories Co., 581 SW2d 10 (Ky. 1979); Caudill vs. Maloney's Discount Stores, 560 SW2d 15 (Ky. 1977). Magic Coal Co. vs. Fox, 19 SW3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud vs. Beth-Elkhorn Corp., 514 SW2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund vs. Francis, 708 SW2d 641 (Ky. 1986). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting

> other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker vs. Rowland, 998 SW2d 479 (Ky. 1999).
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> Although Plaintiff failed to formally amend his initial the Form 101, Application for Resolution of Injury Claim, after reviewing the pleadings and the above-stated facts, I find the issue of the cervical spine injury of February 14, 2011 was tried by the consent of the parties.

The ALJ again awarded Dezarn permanent partial disability benefits as a result of the February 14, 2011 accident for injuries to both his right shoulder and neck. ICG petitioned for reconsideration, arguing the ALJ had failed to follow this Board's directives on remand in awarding benefits based on the cervical injury. The petition was denied. ICG now appeals, again arguing the ALJ failed to follow the directives of this Board's prior opinion. It also contests the finding Dezarn's cervical injury was tried by consent.

On remand, the ALJ did not adhere to the directives contained in our prior opinion. We determined the issue of a cervical injury as a result of the February 14, 2011 fall had not been tried by consent. For this reason, we vacated in part that portion of the ALJ's Opinion attributing Dezarn's neck injury to the February 14, 2011 accident and plainly stated "benefits for the neck condition

may not be awarded as part of his February 14, 2011 injury claim." On remand, though not asked to make this specific finding, the ALJ determined the issue had, in fact, been tried by consent. She again awarded benefits relating to a neck injury as a result of the February 14, 2011 accident.

The law of the case doctrine refers to several rules relating to whether a court addressing later phases of litigation should reopen questions previously decided by that court or a higher court. Incorporated in the law of the case doctrine is the mandate rule. "[T]he so-called mandate rule, provides that on remand from a higher court a lower court must obey and give effect to the higher court's express or necessarily implied holdings and instructions." Brown v. Com., 313 S.W.3d 577, 611 (Ky. 2010). "It is fundamental that when an issue is finally determined by an appellate court, the trial court must comply with such determination. The court to which the case is remanded is without power to entertain objections or make modifications in the appellate court decision." Williamson v. Com., 767 S.W.2d 323, 325 (Ky. 1989). "The scope of a lower court's authority on remand of a case is not measured in terms of its jurisdiction, but by the direction or discretion contained in the appellate court's mandate." Hutson v. Com., 215 S.W.3d 708, 713-4 (Ky. App. 2006).

The ALJ did not follow this Board's prior mandate in this case, instead concluding Dezarn's neck condition had been tried by consent. For this reason, the case must again be remanded to the ALJ with directions to enter an Opinion and Award in conformity with this Board's prior opinion.

We also feel compelled to address the implication contained in the ALJ's Order on Remand that this Board is without authority to determine whether an issue has been tried by consent. In determining that the issue of Dezarn's neck condition had been tried by consent, the ALJ cited to Nucor Corp. v. General Electric Co., 812 S.W.2d 136 (Ky. 1991) for the proposition that the determination is solely one of fact left exclusively to the discretion of the fact-finder. Certainly, when the issue *is raised* before the ALJ or the trial court, as in Nucor, that determination is within the ALJ's discretion. Here, however, the ALJ was never asked to determine whether the neck condition was tried by consent, as Dezarn never moved to amend his Form 101 and the issue was not raised before the ALJ. In such a circumstance, Kentucky appellate courts have repeatedly made a determination, based on the record, of whether an issue has been tried by consent. *See e.g.* Parrish v. Ky. Bd. of Medical Licensure, 145 S.W.3d 401 (Ky.

App. 2004)(based on the appellate record, Court of Appeals determined which issues were tried by consent before the lower court); Kentucky County Public Parks Corp. v. Modlin, 901 S.W.2d 876, 880 (Ky. App. 1995); Allied Machinery, Inc. v. Wilson, 673 S.W.2d 728, 730 (Ky. App. 1984); St. Elizabeth Healthcare v. Genter, 2013 WL 5603802 (Ky. App. 2013).

Though often described as an "iron-clad" rule, the law of the case doctrine is not without exceptions, though rare. Under certain circumstances, a court may choose to correct an error made in a previous appeal of the case.[1] We have reviewed our prior decision, and the ALJ's findings on remand. In again reviewing the question of whether Dezarn's neck condition was tried by consent, which is a mixed question of law and fact, we reach the same decision.

As we acknowledged in our prior Opinion, and the ALJ emphasized on remand, Dr. Hughes' opinion provides an

[1]"[W]hether from grace or right when cogent and convincing reasons appear, such as lack of harmony with other decisions and where no injustice or hardship would flow from a change, or where by inadvertence principles of law have been incorrectly declared the first time, or mistake of fact has been made, or injustice to the rights of parties would be done by adhering to the first opinion, then the exceptions to the rule have play, and it is our duty to re-examine and correct our own errors on the second appeal in the same case." Union Light, Heat & Power Co. v. Blackwell's Adm'r, 291 S.W.2d 539, 542 (Ky. App. 1956) *quoting* Mangold v. Bacon, 141 S.W. 650, 654 (Mo. 1911). *See also* Brooks v. Lexington-Fayette Urban County Housing Authority, 244 S.W.3d 747 (Ky. App. 2007)(applying factors adopted in Blackwell's Adm'r).

evidentiary basis to conclude Dezarn suffered a cervical injury in the accident. ICG did not object to the admission of this evidence, which also contained Dr. Hughes' opinion of Dezarn's shoulder injury. However, this circumstance alone does not signal submission of this issue for determination, particularly in a consolidated case in which Dezarn alleged a cumulative trauma to his neck and evidence of his neck condition was, naturally, presented.

Dezarn never alleged a cervical injury in his Form 101. He did not move to amend his Form 101 at any time. He did not admit the records of Dr. D'Angelo who, according to the records of Drs. Hughes and Snider, suspected and treated a cervical injury at the time of the February 14, 2011 accident. Save for a single response to a leading question on direct, he repeatedly testified at two depositions and at the final hearing that he injured only his right shoulder as a result of the fall. He specifically pled, in his brief before the ALJ, that the accident caused only a right shoulder injury. We also note that Dezarn did not appeal this Board's prior decision, in which we concluded the issue had not been tried by consent. Under these factual circumstances, we are again compelled to the same conclusion.

For the foregoing reasons, the August 21, 2014 Opinion and Order on Remand and the September 15, 2014 Order on Reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge are hereby **REVERSED** and **REMANDED** with instructions to enter an Opinion on Remand in accordance with this Opinion.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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