Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 9, 2011

CLAIM NO. 200879740

LAURENA THOMPSON PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

SUPER SERVICE INC./GAINEY CORP.
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman; COWDEN and STIVERS, Members.

ALVEY, Chairman. Laurena Thompson ("Thompson"), pro se, seeks review of the opinion on remand rendered August 22, 2011, by R. Scott Borders, Administrative Law Judge ("ALJ"), dismissing her claim against Super Service Inc./ Gainey Corp. ("Super Service"). No petition for reconsideration was filed.

The ALJ previously dismissed Thompson's claim by opinion and order rendered December 15, 2010. We vacated and remanded that decision by the ALJ due to the fact he relied, in part, upon a deposition which had not been filed as evidence. On remand, we directed the ALJ to render a decision based upon the facts in evidence. The underlying facts of this claim will not again be reviewed.

On appeal Thompson again argues essentially the ALJ's decision is not supported by substantial evidence. In our previous opinion, we determined the ALJ committed no procedural irregularities in denying Thompson's motion to introduce evidence after the formal hearing. We likewise found no merit in Thompson's argument she was deprived of the opportunity to attend a benefit review conference ("BRC"). Thompson again raises those issues on appeal.

We turn first to Thompson's arguments regarding the ALJ's ruling on her attempt to introduce evidence after the hearing and being deprived the opportunity to attend a BRC. We previously ruled as follows:

> We do not agree with Thompson's argument of procedural irregularities, other than the ALJ's consideration of her deposition which was not filed of record. We likewise do not believe she was improperly deprived of the ability to introduce evidence on her behalf.

Jurisprudence has long recognized pursuant to the "law of the case" doctrine, an appeal settles all errors which were or might have been relied upon by a reviewing court or administrative appellate tribunal. Under the "law of the case" doctrine, if an appellate body passes on a legal question and then remands the cause to the fact-finder below for further proceedings, all outstanding legal questions that formerly might have been appealed from in the original decision but were not perfected cannot, as a matter of law, be raised later following remand in the same case. Whittaker v. Morgan, 52 S.W.3d 567, 569-570 (Ky. 2001). Moreover, the legal questions thus determined by the appellate body, once final whether correctly or incorrectly decided, cannot be decided differently on subsequent appeal in the same case. Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982). Rather, all prior rulings by that appellate body become law for the limited purposes of that particular case. *Id*.

The "law of the case" doctrine is founded upon the policy of ending litigation and preventing cases from being presented piecemeal. It is an iron rule universally recognized a decision of an appellate court or administrative appellate tribunal once final and not subject to further appellate review becomes the "law of the

case" for purposes of a subsequent determination on appeal, however erroneous the initial appellate decision may be. Williamson v. Com., 767 S.W.2d 323, 325 (Ky. 1989); Union Light, Heat & Power Co. v. Blackwell's Adm'r, 291 S.W.2d 539 (Ky. 1956); Sowders v. Coleman, 4 S.W.2d 731 (Ky. App. 1928).

The Board's May 6, 2011 opinion was final and appealable because it arrived at a determination detrimental to Thompson and authorized the entry of a different decision on remand. Whittaker v. Morgan, *supra*; Davis v. Island Creek Coal Company, 969 S.W.2d 712 (Ky. 1998). For that reason, the Thompson's failure to appeal the Board's original decision caused it to become "the law of the case." Id. Consequently, the decision is controlling at all subsequent stages of the litigation. Inman v. Inman, *supra*.

Previously, the Board vacated the ALJ's original determination because he had relied, in part, upon a deposition which was not in evidence. Specifically, the Board held:

> Based upon the procedural facts of this case, we *sua sponte* determine the ALJ improperly considered Thompson's deposition in rendering his decision. Therefore, we vacate the December 15, 2010 opinion and order, on grounds other than those raised by Thompson on

> appeal, and remand this matter with instructions the ALJ issue a decision based only upon the facts in evidence.
>
> . . .
>
> On remand, after reconsideration of only the evidence of record, the ALJ may well arrive at the same conclusions as in his previous decision. We are not directing he arrive at any particular result. We certainly are not attempting to substitute our judgment for that of the ALJ. The final result of this action may well result in a dismissal as previously decided by the ALJ. This decision is distinguishable from the situation decided by the Kentucky Court of Appeals in Wal-Mart Stores, Inc. v. Blankenship, 2010-CA-001097-WC wherein we directed a particular result despite the fact information outside the record was considered in reaching a final determination.

On remand, after weighing the evidence, absent the deposition impermissibly relied upon previously, the ALJ again dismissed Thompson's claim. On remand, the ALJ specifically found:

> **THEREFORE IN ACCORDANCE WITH THE DIRECTIVES OF THE WORKERS COMPENSATION BOARD IT IS HEREBY FOUND AND RULED AS FOLLOWS:**
>
> The undersigned Administrative Law Judge has once again reviewed the proof submitted in this claim, both by the Plaintiff, Laurena Thompson, and the Defendant Employer, Super Service Inc./ Gainey Corporation, with the exclusion of the Plaintiff's discovery

deposition. The undersigned Administrative LawJjudge [sic] erroneously considered the Plaintiff's discovery deposition, a copy of which was in his file that apparently was not properly submitted into the record with the Department of Worker's Claims, and therefore the Board is correct that the deposition transcript does not constitute evidence of record.

The Administrative Law Judge having [sic] reviewed the depositions of Cpl. Tim Bradley of the Montgomery Alabama Police Department, the records from Barlow Trucking, the transcript from the Final Hearing held on October 20, 2010 the medical report of Dr. Thomas Johnson, chiropractor medical records from Dr. McCain, medical records from the Spine Institute, the medical report of Dr. Pierce Nunley, medical records from the Texas Medical Clinic, and the medical records of Dr. Karl Bilderback. These records were summarized by the undersigned Administrative Law Judge in the December 15, 2010, Opinion and Order and the findings are incorporated herein by reference.

In this specific instance, after careful review of the lay and medical testimony the Administrative Law Judge is still not persuaded that the Plaintiff suffered injury as defined by the Act as she alleges on June 5, 2008. There is not a functional impairment rating in this case assessed by any of the physicians testifying entitling the Plaintiff to permanent partial disability benefits.

If anything, the record reflects the Plaintiff suffered a minor strain/-sprain injury as a result of the motor vehicle accident on June 5, 2008, that

> has long since resolved and for which she was fully compensated. Therefore, the Plaintiff's claim for additional permanent partial disability benefits shall be dismissed.
>
> In addition, the Administrative Law Judge specifically finds that the Plaintiff did not meet her burden of proving entitlement to additional medical treatment. Mindful of the holding of the Supreme Court in the case of FEI Installation vs. Williams, 214 SW 3d 313 (KY 2007).
>
> The Administrative Law Judge specifically finds, based on the testimony of Dr. Bilderback, that the Plaintiff does not suffer from any level of disability as a result of the June 5, 2008, motor vehicle accident that would entitle her to additional medical benefits.
>
> The Administrative Law Judge finds her symptoms resulting from the June 5, 2008, motor vehicle accident have long since resolved and if she is suffering from any current symptoms, they are due to other motor vehicle accidents she suffered while driving for Barlow or the result of not work-related factors.

Because the ALJ's ruling was in conformity with the Board's December 30, 2009 opinion, we may not now disturb that decision on appeal.

A claimant in a workers' compensation claim bears the burden of proving each of the essential elements of the cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). After reviewing only the evidence in the

record, the ALJ dismissed Thompson's claim a second time. Therefore, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). We conclude it does not. Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995).

The ALJ, as fact-finder, may 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. Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require

reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 v. Rowland, *supra*.

We acknowledge the existence of conflicting evidence. However, the ALJ, as fact-finder, is free to pick and choose whom and what to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003). For that reason, we cannot say the ALJ's conclusions were unreasonable based

upon the evidence. Speedway/Super America v. Elias, 285 S.W.3d 722, 730 (Ky. 2009); Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003).

In this instance, we remanded Thompson's claim to the ALJ to decide the claim based upon the evidence of record without consideration of Thompson's discovery deposition. After reviewing only the evidence of record, the ALJ again determined Thompson had sustained only a temporary injury, and dismissed both her claim for permanent income benefits and for future medical benefits. The ALJ sufficiently explained the basis for his conclusions. It therefore cannot be said the evidence compels a different result. Special Fund v. Francis, *supra*.

In Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), the Kentucky Supreme Court held it is possible for a claimant to submit evidence of a temporary injury for which temporary income and medical benefits may be awarded, yet fail in the burden to prove a permanent harmful change to the human organism for which permanent benefits are appropriate.

In line with Robertson, we do not believe the ALJ erred in finding Thompson sustained only a temporary injury and is not entitled to future income and medical benefits.

The ALJ's findings are supported by substantial evidence and in conformity with the Act. Likewise, we believe the ALJ performed an appropriate analysis pursuant to FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007) in determining Thompson was entitled to no additional medical benefits for her temporary injury which occurred on June 5, 2008.

Accordingly, the decision on remand rendered August 22, 2011 by Hon. R. Scott Borders, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

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