Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 29, 2011

CLAIM NO. 201000107

RIVERSIDE CEMETERY PETITIONER

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

CURTIS JOSLIN
HON CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION VACATING AND REMANDING

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

ALVEY, Chairman. Riverside Cemetery ("Riverside") seeks review of a decision on remand rendered June 27, 2011, by Hon. Chris Davis, Administrative Law Judge ("ALJ"), awarding Curtis Joslin ("Joslin") temporary total disability ("TTD") benefits, permanent total disability benefits, and medical benefits. Riverside also appeals

from the order entered August 8, 2011 denying its petition for reconsideration. We vacate and remand.

This is the second time this claim has been appealed. On the first appeal, we reversed the ALJ's dismissal of the claim due to Joslin's failure to provide due and timely notice pursuant to KRS 342.185. Specifically we ordered:

> We also note as a preliminary matter the ALJ made no finding as to whether a work-related traumatic event in fact occurred. Before a decision can be rendered regarding whether appropriate notice was provided, as a threshold issue, the ALJ must first determine whether a work event, or work-related injury occurred. KRS 342.0011(1) defines "injury" as being a work-related traumatic event "arising out of and in the course of employment" that is the proximate cause producing a harmful change in the human organism. With reference to that definition, it has long been established that "in the course of employment" refers to the time, place, and circumstances of an accident, while "arising out of" refers to the cause or source of the accident. AK Steel Corp. v. Adkins, 253 S.W.3d 59, 63 (Ky. 2008) *citing* Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S.W. 152, 159 (1918).
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> 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). Since the ALJ deemed Joslin unsuccessful in his claim for a work-related injury based upon inadequate notice, the

question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, supra. 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, supra. In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Having asserted the claim was barred by failure to provide proper notice, once Joslin testified he informed his "boss" he injured himself at work within three to four days of the alleged accident, the burden shifted to Riverside to prove the elements of the defense. Lizdo v. Gentec Equipment, 74 S.W.3d 703 (Ky. 2002). Since Riverside presented no evidence contradicting Joslin's testimony, it failed in that burden and it was error as a matter of law for the ALJ to rule otherwise. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, supra.

The ALJ found Joslin did not provide due and timely notice of an accident despite the complete lack of evidence to the contrary. Our appellate courts have explained a fact finder is free to reject even uncontradicted evidence of record if the fact finder provides a sufficient explanation for the rejection. Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W. 2d 540 (Ky. App. 1991); Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W. 2d 184 (Ky. App. 1981); Collins v. Castleton

Farms, 560 S.W. 2d 830 (Ky. App. 1977). We do not believe the ALJ in this instance adequately specified grounds to reject the testimony of both Joslin and his wife regarding whether appropriate notice was provided. Joslin's testimony may have been inconsistent whether notice was provided on the day of the work event, the day after, or up to four days later. However, no evidence exists which would support a dismissal on failure to provide notice. As the Courts have previously held, notice should be liberally construed so as not to unjustly defeat compensation and to effectuate the beneficent purposes of this law. Bates & Rogers Const. Co. v. Allen, 183 Ky. 815, 210 S.W. 467 (Ky. 1919), Hay v. Swiss Oil Co., 249 Ky. 165, 60 S.W.2d 385 (Ky. 1933), Bartley v. Bartley, 274 S.W.2d 48 (Ky. 1954).

The testimony of record not only supports timely notice was provided to Riverside, but also demonstrates Kevin Wolfe, secretary/treasurer for Riverside, advised Joslin to seek medical treatment. Riverside submitted no evidence refuting such allegation which corroborates Joslin's position he provided notice, and the delay, if any, of up to four days had no deleterious effect upon Riverside.

While there exist issues including but not limited to whether a work event, or injury occurred, and whether the claim was timely filed, which certainly may exist to support dismissal of this claim, those issues are not before us.

Accordingly, the decision rendered September 24, 2009, and the order ruling on the petition for reconsideration rendered November 22, 2010, by Hon. Chris Davis,

> Administrative Law Judge is hereby **REVERSED** and **REMANDED** to the ALJ to address all remaining contested issues.

No appeal was taken from that opinion. On remand, the ALJ, in the opinion, award and order rendered June 27, 2011, awarded TTD benefits, permanent total disability benefits, and medical benefits to Joslin. In the opinion, award and order, the ALJ stated the following on page 10:

> The Administrative Law Judge notes that this matter is on Remand from the Kentucky Workers' Compensation Board, specifically regarding notice. ***The Board found that the Plaintiff was injured on January 7, 2007*** and provided notice of his injury on January 8, 2007 and therefore notice was adequate. This is now the law of the case. ***Even though the Board only remanded this claim for notice, and specifically found that other defenses may or may not be applicable the factual finding that the Plaintiff's date of injury was January 7, 2007 is now the law of the case.***
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> The undersigned, in his prior opinion, noted the various possible other dates of injury for the Plaintiff because adequate notice is inextricably tied to the date of injury. ***The Board, in finding that the date of injury is January 7, 2007, as a precursor to finding that notice the next day was adequate, has also made a binding finding that the date of injury is January 7, 2007***, for all relevant purposes. All subsequent arguments and findings must be predicated on the

> legal fact that the Plaintiff's date of injury is January 7, 2007. The undersigned is not persuaded that any other conclusion would be logical.
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> (Emphasis added)

Jurisprudence has long recognized pursuant to the "law of the case" doctrine, an appeal settles all errors that 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 for further proceedings, all outstanding legal questions that formerly might have been appealed in the original decision but were not perfected cannot, as a matter of law, be raised later following remand. 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 decided correctly or incorrectly, 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 cases may not be presented piecemeal. It is an iron rule universally

recognized that a decision of an appellate court or administrative appellate tribunal once final and not subjected 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 "law of the case doctrine" is inapplicable to the case *sub judice* except as it pertains to the notice issue previously decided by this Board. As pointed out by Riverside, the ALJ's statement the Board determined Joslin sustained an injury on January 7, 2007 is erroneous. We made no such finding as we are not a fact-finding body. As noted previously, this Board previously reversed the ALJ's determination Joslin failed to provide due and timely notice, and set forth the reasons for making that determination. Nothing else was decided. We specifically stated we were making no determination regarding any other issues, including whether a work-related injury actually occurred. We simply do not have authority to do so. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

KRS 342.285 designates the ALJ, not the Board, as the fact-finder. In that role, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Therefore, we are compelled to vacate and remand this matter to the ALJ to determine whether Joslin sustained a work-related injury on January 7, 2007, and if so, the benefits to which he is entitled. It is the responsibility of the ALJ, not this Board, to make such determination.

Accordingly, the decision rendered June 27, 2011, and the order ruling on the petition for reconsideration rendered August 8, 2011, by Hon. Chris Davis, Administrative Law Judge are hereby **VACATED** and **REMANDED** to the ALJ to address all remaining contested issues.

ALL CONCUR.

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