



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

BRUCE KRYSL,	) No. ED108958
	)
Respondent,	)
	)
vs.	) Appeal from the Labor and
	) Industrial Relations Commission
TREASURER OF MISSOURI AS	)
CUSTODIAN OF SECOND INJURY FUND,	)
	)
Appellant.	) Filed: December 22, 2020

Factual and Procedural Background

The Second Injury Fund (the “Fund”) appeals the Labor and Industrial Relations Commission’s (the “Commission”) decision reinstating the decision of the Administrative Law Judge (“ALJ”) and awarding Bruce Krysl (“Claimant”) permanent partial disability benefits under section 287.220.2¹ upon remand after this Court’s decision in *Krysl v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 591 S.W.3d 13 (Mo. App. E.D. 2019) (“*Krysl I*”). The parties stipulated Claimant was injured at work on January 1, 2013. Claimant filed an occupational disease claim seeking permanent partial disability benefits from his employer and the Fund on July 5, 2016. Claimant settled his claim with his employer. On May 18, 2018, the ALJ awarded Claimant permanent partial disability benefits from the Fund, finding Claimant had

¹ All statutory references are to RSMo (2013), unless otherwise indicated.

a preexisting permanent partial disability that combined with his primary injury, causing him to be permanently and partially disabled.

The Fund appealed the ALJ's award to the Commission, arguing (1) section 287.220.3 barred Claimant's claim against the Fund because it was filed after January 1, 2014, and (2) Claimant was not entitled to benefits under section 287.220.2 because his preexisting disability had not reached permanency, or maximum medical improvement, before the date of his primary injury. The Commission reversed the decision of the ALJ, finding section 287.220.3 barred Claimant's claim because, although the parties stipulated Claimant's date of injury was January 1, 2013, Claimant did not file his claim until July 5, 2016. The Commission deemed all other issues raised by the Fund "moot" and did not decide whether Claimant's preexisting disability was permanent under section 287.220.2. The Commission attached the ALJ's award to its decision "solely for reference."

Claimant appealed the Commission's decision reversing the ALJ's award to this Court in *Krysl I*, arguing the Commission misapplied the law by holding section 287.220.3 barred his claim against the Fund. The Fund argued the Commission's decision regarding section 287.220.3 should be upheld. The Fund did not argue, in the event of reversal, this Court should remand the case to the Commission with instructions to consider its argument Claimant was not entitled to benefits under section 287.220.2. This Court reversed the Commission's decision with instructions "to reinstate the ALJ's award of permanent partial disability benefits" as requested by Claimant in his brief. The Fund filed an alternative motion for rehearing or to transfer the appeal to the Missouri Supreme Court with this Court under Rule 84.17² ("Rule 84.17 motion"). The Fund did not argue in its Rule 84.17 motion this Court's opinion instructing

² All rule references are to the Missouri Supreme Court Rules (2019), unless otherwise indicated.

the Commission “to reinstate the ALJ’s award of permanent partial disability benefits” was erroneous.³ This Court denied the Fund’s Rule 84.17 motion.

On November 19, 2019, the Fund applied for transfer with the Missouri Supreme Court under Rule 83.04 (“Rule 83.04 motion”). The Fund did not argue in its Rule 83.04 motion this Court’s opinion instructing the Commission “to reinstate the ALJ’s award of permanent partial disability benefits” was erroneous. The Missouri Supreme Court denied the Fund’s application for transfer on February 4, 2020. On February 13, 2020, the Fund asked this Court to recall and amend its mandate to allow the Commission to consider the Fund’s argument that Claimant was not entitled to benefits under section 287.220.2 because his preexisting disability had not reached permanency before the date of his primary injury. This Court denied the Fund’s request. The Fund then asked the Commission to consider its argument that Claimant was not entitled to benefits under section 287.220.2 on remand. The Commission denied the Fund’s request and reinstated the ALJ’s award of permanent partial disability benefits.

The Fund’s appeal follows.

Points on Appeal

In Point I, the Fund appeals the Commission’s reinstatement of the ALJ’s award of permanent partial disability benefits on remand. The Fund argues the Commission misinterpreted this Court’s mandate in *Krysl I* by refusing to consider its argument that Claimant was not entitled to benefits under section 287.220.2 because his preexisting disability had not reached permanency before the date of his primary injury. The Fund asserts our remand of *Krysl I* was a general remand which would allow the Commission to address the 287.220.2 issue. In

³ The purpose of a Rule 84.17 motion for rehearing “is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown in its opinion” Rule 84.17(a)(1); *Hankins v. Hankins*, 864 S.W.2d 351, 354 (Mo. App. W.D. 1993) (“This court invites [Rule 84.17] motions precisely for the purpose of correcting any errors or oversights”).

the alternative, in Point II, the Fund argues the Commission erred in following this Court's mandate in *Krysl I* because its reinstatement of the ALJ's award of benefits "stripped the Fund of its right to appeal." In Point III, the Fund argues the Commission erred in reinstating the ALJ's award of benefits because Claimant's preexisting disability was not permanent before the date of his primary injury, as required to be considered in an award of permanent partial disability benefits under section 287.220.2. The Fund's points relied on do not ask us to readdress the issue raised in its motion to recall the mandate, that our opinion and mandate in *Krysl I* was in error, or that by instructing the Commission to reinstate the ALJ's award this Court deprived the Fund of the Commission's review of its argument under section 287.220.2.

Standard of Review

We may "modify, reverse, remand for rehearing, or set aside" the Commission's award "upon any of the following grounds and no other:" (1) the Commission acted without or in excess of its powers; (2) the Commission's award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant making the award. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222 (Mo. banc 2003) (footnote omitted) (citing § 287.495.1). Whether the Commission followed the appellate court's mandate is a question we review *de novo*. *Gerken v. Mo. Dep't of Soc. Servs.*, 415 S.W.3d 734, 738 (Mo. App. W.D. 2013).

Discussion

Point I: The Commission Did Not Misinterpret Krysl I's Mandate

In its first point, the Fund argues the Commission misinterpreted this Court's mandate in *Krysl I* by refusing to consider whether Claimant's preexisting disability was permanent under section 287.220.2. The Fund argues *Krysl I*'s mandate and opinion allowed the Commission to

consider the Fund’s argument that Claimant was not entitled to benefits under section 287.220.2 and the Commission erred by not analyzing section 287.220.2 before issuing its award on remand.

Upon remand, a lower body must proceed “in accordance with the mandate and the result contemplated in the appellate court’s opinion.” *Motor Control Specialties, Inc. v. Labor and Indus. Relations Comm’n*, 323 S.W.3d 843, 853 (Mo. App. W.D. 2010). The lower body “retains its authority over all issues in a case upon remand unless the mandate or the opinion limits its authority by providing specific directives.” *Id.* *Krysl I*’s opinion and mandate instructed the Commission “to reinstate the ALJ’s award of permanent partial disability benefits.” This is a specific mandate with specific directions to the Commission. *Krysl I*’s mandate and opinion did not allow the Commission to consider whether Claimant was entitled to benefits under section 287.220.2 before issuing its award upon remand. The Commission did not misinterpret this Court’s mandate in *Krysl I*.

Point I is denied.

Point II: Krysl I’s Remand Instruction

In its second point, the Fund argues the Commission erred in following this Court’s mandate in *Krysl I* on remand because the Commission’s reinstatement of the ALJ’s award of benefits “stripped the Fund of its right to appeal” and its right to be heard on its argument under section 287.220.2. Claimant argues the Fund should be prevented from litigating the merits of its argument under section 287.220.2 on remand and subsequent appeal because the Fund should have cross-appealed this issue in *Krysl I* and failed to do so. Claimant argues the Fund was the aggrieved party regarding the permanency issue in *Krysl I* because Claimant “had already

received a favorable ruling from the [ALJ] on that issue which was not reversed by the Commission in its decision.”

Both the Fund’s and Claimant’s arguments are flawed. The Commission did not err in following this Court’s mandate in *Krysl I*. When an appellate court issues a remand with specific instructions, the lower body has no power to modify, alter, amend or deviate from the appellate court’s instructions. *State ex rel. City of St. Charles v. City of St. Peters*, 876 S.W.2d 46, 47-48 (Mo. App. W.D. 1994). “Proceedings that are contrary to the directions of the mandate are unauthorized and unenforceable.” *Motor Control Specialties, Inc.*, 323 S.W.3d at 853. Had the Commission proceeded contrary to this Court’s instructions, its actions on remand would have been “unauthorized and unenforceable.” *See id.*

The Fund had no duty to cross-appeal the merits of its argument under section 287.220.2 in *Krysl I*. In an appeal from a decision of the Commission, “we review the findings and award of the Commission rather than those of the ALJ.” *Harley-Davidson Motor Co., Inc. v. Jones*, 557 S.W.3d 328, 331 (Mo. App. W.D. 2018) (quotations omitted). Only where the Commission *affirms and adopts* the ALJ’s findings and conclusions do we review the ALJ’s findings and conclusions. *Id.* As explained, the Commission neither affirmed nor adopted the ALJ’s findings and conclusions regarding whether Claimant’s preexisting disability was permanent under section 287.220.2. Instead, the Commission declared the issue “moot.” Thus, no findings regarding whether Claimant’s preexisting disability was permanent under section 287.220.2 existed to review in *Krysl I*.

The Commission’s initial decision entered an award favorable to the Fund. “One who is awarded the relief prayed is not an aggrieved party and may not appeal from the judgment in its favor.” *Shoate v. State*, 529 S.W.3d 869, 876 (Mo. App. W.D. 2017) (alteration omitted); *see*

also § 512.020 (emphasis added) (“Any party to a suit *aggrieved* by any judgment of any trial court in a civil cause from which an appeal is not prohibited by the constitution, nor clearly limited in special statutory proceedings, may take his or her appeal to a court having appellate jurisdiction”). The Fund had no duty to cross-appeal in *Krysl I*.⁴

Even though the Commission did not err in following this Court’s mandate, our analysis does not end there. We have a duty to “re-examine our own errors on the second appeal in the same case” where an “injustice to the rights of the parties would be done by adhering to the first opinion.” *Laclede Inv. Corp. v. Kaiser*, 596 S.W.2d 36, 41 (Mo. App. E.D. 1980). We re-examine our own errors because “an appellate court is a court for the correction of errors[,] its own as well as others. In correcting the errors of lower courts we do not proceed on the theory we make none of our own” *Id.*

The Commission’s initial award in this case reversed the decision of the ALJ, finding section 287.220.3 barred Claimant’s claim because, although the parties stipulated Claimant’s date of injury was January 1, 2013, Claimant did not file his occupational disease claim until July 5, 2016. The Commission deemed all other issues raised by the Fund “moot” and did not decide whether Claimant’s preexisting disability was permanent under section 287.220.2, as challenged by the Fund. The Commission attached the ALJ’s award to its decision “solely for reference.” By deeming all other issues raised by the Fund “moot,” the Commission did not adopt the ALJ’s findings and conclusions regarding whether Claimant’s preexisting disability was permanent under section 287.220.2. *See Poarch v. Treasurer of State Custodian of Missouri-Custodian of*

⁴ Claimant moved to dismiss the Fund’s appeal in this case arguing dismissal was proper because the Fund failed to cross-appeal the merits of its section 287.220.2 argument in *Krysl I*. Claimant’s motion was taken with the case. For the reasons stated, Claimant’s motion is denied.

Second Injury Fund, 365 S.W.3d 638, 641 (Mo. App. W.D. 2012) (finding the Commission did not adopt the ALJ's discussion when the Commission found those issues were moot).

Because the Commission's initial award neither adopted nor addressed the findings and conclusions of the ALJ regarding whether Claimant's preexisting disability was permanent under section 287.220.2, that issue remained to be addressed and determined by the Commission on remand. See *Gleason v. Treasurer of State of Missouri-Custodian of Second Injury Fund*, 455 S.W.3d 494, 503 n.7 (Mo. App. W.D. 2015). We ordered the Commission "to reinstate the ALJ's award of permanent partial disability benefits" even though the Commission did not reach whether Claimant's preexisting disability was permanent under section 287.220.2 and declared all issues beyond its resolution of section 287.220.3 "moot."

This instruction to the Commission to reinstate the award without determining the second issue denied the Fund its statutory due process. "Section 287.480 provides a method for review of an ALJ's award by the Commission." *Mell v. Biebel Bros., Inc.*, 247 S.W.3d 26, 31 (Mo. App. E.D. 2008). Section 287.480.1 provides that, after a party files a timely application for review with the Commission, the full Commission "shall review the evidence, or if considered advisable, as soon as practicable hear the parties at issue, their representatives and witnesses and shall make an award and file it in a like manner as specified in section 287.470." Section 287.470 requires "due notice to the parties interested," or due process. "Due process, in Missouri workers' compensation cases and elsewhere, contemplates the opportunity to be heard at a meaningful time and in a meaningful manner." *Nolan v. Degussa Admixtures, Inc.*, 246 S.W.3d 1, 5 (Mo. App. S.D. 2008) (citing *Stonecipher v. Poplar Bluff R1 Sch. Dist.*, 205 S.W.3d 326, 333 (Mo. App. S.D. 2006)).

The remand instructions in an opinion and mandate fall within the rule that the appellate decision is the law of the case in subsequent proceedings in the same cause. *See Missouri Bd. of Pharmacy v. Tadrus*, 926 S.W.2d 132, 137 (Mo. App. W.D. 1996) (holding remand instructions rendered in the mandate and opinion of the appellate court constitute the law of the case in subsequent proceedings in the same cause). “The doctrine of law of the case, however, is not absolute.” *Smith v. Capital Region Med. Ctr.*, 458 S.W.3d 406, 415 (Mo. App. W.D. 2014). “[A]n appellate court on a second appeal has discretion to refuse to apply the [law-of-the-case] doctrine where the first opinion arose from mistake or resulted in a manifest injustice.” *Student Loan Marketing Ass’n v. Raja*, 914 S.W.2d 825, 830 (Mo. App. W.D. 1996) (alterations and internal quotation marks omitted); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (“A court has the power to revisit prior decisions of its own . . . where the initial decision was ‘clearly erroneous and would work a manifest injustice.’”); *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) (“Under the law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice”).

We hold, *sua sponte*, our opinion and mandate in *Krysl I* instructing the Commission “to reinstate the ALJ’s award of permanent partial disability benefits” was incorrectly decided out of inadvertence arising from inadequate briefing.⁵ Adherence to this remand instruction will cause manifest injustice, the loss of statutory due process, to the Fund. *See id.* We, therefore, remand this case to the Commission to allow the Fund to be heard on its challenge to the permanency of

⁵ The Fund’s failure to alternatively request its desired relief upon reversal in its *Krysl I* brief and its failure to argue the opinion in *Krysl I* was erroneous in its Rule 84.17 motion has resulted in superfluous administrative and appellate proceedings. We admonish the Fund to include all arguments in its briefings and draft Rule 84.17 motions carefully to include *all* perceived errors with this Court’s opinions in the future. Had this appeal involved an issue less sacrosanct than due process the outcome may have been different.

Claimant's preexisting disability under section 287.220.2. *See Kaiser*, 596 S.W.2d at 41 (holding that, where a prior opinion was incorrectly decided and results in manifest injustice, the appellate court may decline to follow the law of the case and correctly decide the issue on second appeal).

Point II is granted.

Point III: The Fund's Argument Under Section 287.220.2

In its third point, the Fund argues the Commission erred in reinstating the ALJ's award of benefits because Claimant's preexisting disability was not permanent before the date of his primary injury, as required to award permanent partial disability benefits under section 287.220.2. Because we remand the case to the Commission to set aside its final award reinstating benefits awarded by the ALJ to consider the Fund's challenge to the permanency of Claimant's preexisting disability under section 287.220.2, we do not address the Fund's third point.⁶

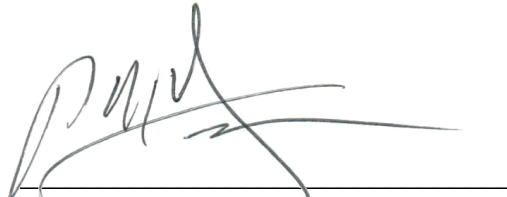
Point III is denied.

Conclusion

The Commission did not misinterpret this Court's mandate in *Krysl I* or err in following it. *Krysl I*'s mandate instructed the Commission "to reinstate the ALJ's award of permanent partial disability benefits," as the Commission had no power to depart from that mandate. *See City of St. Peters*, 876 S.W.2d at 47-48. However, our opinion in *Krysl I* was inadvertently erroneous because it ordered the Commission "to reinstate the ALJ's award of permanent partial disability benefits." We did not allow the Commission to address whether Claimant's preexisting disability was permanent under section 287.220.2. We, therefore, remand the case to

⁶ We express no opinion on the viability of the Fund's assertion Claimant's diabetes was not a "permanent" condition before the primary injury given the medical and expert evidence in the record.

the Commission to set aside its final award reinstating benefits awarded by the ALJ to consider the Fund's challenge to the permanency of Claimant's preexisting disability under section 287.220.2 and for further proceedings in accordance with this opinion.



Philip M. Hess, Judge

Gary M. Gaertner, Jr., P.J. and
Michael E. Gardner, J. concur.