Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 30, 2015

CLAIM NO. 201301234

BAHJI ADAMS PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, ADMINISTRATIVE LAW JUDGE**

COMAIR HOLDINGS, INC. and
HON. OTTO DANIEL WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

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

ALVEY, Chairman. Bahji Adams, *pro se*, ("Adams") appeals from the June 30, 2014 Order of Dismissal rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") dismissing her claim against Comair, and from the November 10, 2014 Order on Remand denying her petition for reconsideration.

The ALJ determined Adams repeatedly failed to follow specific discovery orders. Because Adams indeed participated in her claim based upon the assertions by Comair and her responses, we vacate the ALJ's orders dismissing the claim, and remand for additional proceedings, the allowance of proof time, the scheduling of a benefit review conference ("BRC"), if necessary, and the scheduling of a hearing.

Adams filed a Form 101 on August 13, 2013 alleging she sustained a right ankle injury on August 12, 2011 while working for Comair in Erlanger, Boone County, Kentucky. Adams filed medical documentation supporting her claim consisting of the August 18, 2011 treatment note of Michelle Machesky, PA-C of Burlington, Vermont. Ms. Machesky noted Adams experienced a pop in the right ankle while squatting and complained of subsequent instability with intermittent numbness and tingling in the foot. She diagnosed a possible peroneal tendon injury.

Comair did not enter an appearance, file a Form 111 claim denial, or participate in defending the claim. A BRC was held on January 14, 2014, which Adams attended telephonically. Comair did not appear at the BRC. On January 27, 2014, Comair filed a notice of representation, Form 111, and request for production of documents. Comair

also filed a special answer alleging Adams unreasonably failed to follow medical advice, failed to comply with safety laws, was voluntarily intoxicated (or her injury was self-inflicted) and her claim was barred by the applicable statute of repose/limitations.

On February 3, 2014, the ALJ entered an order deeming all allegations in the Form 101 admitted due to Comair's failure to timely file a claim denial. The ALJ found Comair responsible for medical benefits. He also scheduled a telephonic conference.

On February 14, 2014, the ALJ entered an order finding the only issues remaining for resolution were jurisdiction, and extent and duration. The ALJ ordered Adams to provide dates for taking her deposition within five days after the date of the order. Proof time was granted for sixty days solely regarding the jurisdiction issue. On February 28, 2014, Adams filed a notice of correction of clerical errors, and a notice of appeal to the "Superior Court of Kentucky". The record contains no acknowledgment of the notice of appeal.

On March 10, 2014, the ALJ entered an order advising the parties to abide by the order entered February 14, 2014. On March 20, 2014, Comair filed an unverified motion to dismiss alleging Adams failed to provide dates for

taking her deposition. Adams responded on March 24, 2014 denying the allegation. She stated she called counsel for Comair, but was advised there was no proper place to take her deposition. On March 24, 2014, Adams again filed a notice of appeal to the "Superior Court of Kentucky". The record contains no acknowledgment of the second notice of appeal. On March 27, 2014, Comair filed a motion to dismiss arguing Adams failed to attend her deposition. Adams responded she had not been properly notified of the deposition.

On June 30, 2014, the ALJ entered an order dismissing the claim. The ALJ noted his previous orders were interlocutory, and no right of appeal existed. In dismissing the claim, the ALJ stated as follows:

> This dismissal is based upon three findings, first Plaintiff has failed to allow the reasonable and timely litigations of her claim by disobeying the statutory discovery process; second, Plaintiff has failed to abide by the two specific discovery orders of the undersigned; and, lastly, Plaintiff's failure to attend and participate in the properly noticed discovery deposition.
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> These determinations and the ordered dismissal of Plaintiff's claim are made and rendered pursuant to the law as set forth in *Michael K. Ennis v. David Cobler* [sic]*, d/b/a D & A Painting, et al.* Claim No. 2007-01308 rendered by the Board on July 26, 2010, and Matthew *Ingram v. M.P. Kelly Construction*, Claim

No. 2007-71173 rendered by the Board on February 23, 2012.

In her petition for reconsideration filed July 15, 2014, Adams alleged the ALJ had erred in determining she had received the notice of deposition. She also argued the ALJ erred in holding her to the same standard as an attorney. She requested the ALJ vacate the orders entered on March 10, 2014, and June 30, 2014. She requested attorney fees and expenses. She also requested the punitive damages in the amount of $100,000.00. Adams filed a notice of appeal on August 1, 2014. On August 13, 2014, this Board placed the appeal in abeyance, and partially remanded the claim to the ALJ to rule on the petition for reconsideration.

On November 10, 2014, the ALJ entered an order denying the petition for reconsideration. He noted the discovery difficulties. The ALJ noted Comair had accepted the claim, but challenged based upon jurisdiction. The ALJ acknowledged Adams filed a notice of appeal on March 10, 2014, but stated, "With this filing it was unclear who had jurisdiction over this claim – the undersigned, the Board, or the Kentucky Supreme Court?"

It is well settled an ALJ has broad discretion to control the taking and presentation of proof in a worker's compensation proceeding. New Directions Housing Authority v.

Walker, 149 S.W.3d 354 (Ky. 2004). Thus, as a general proposition, any purported error by the fact-finder must be reviewed under the abuse of discretion standard. Abuse of discretion by definition "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945).

This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). However, clearly Adams filed a claim alleging an injury occurring in Kentucky. Therefore, absent evidence to the contrary, it would appear Kentucky has jurisdiction over the claim. The ALJ, although acknowledging all allegations contained in the Form 101 were deemed admitted, dismissed Adams' claim for failure to comply with discovery requests. This result is not only harsh, but also constitutes an abuse of discretion.

There is no evidence in the record regarding Adams' lack of compliance except for unverified motions from Comair, and unverified responses from Adams. Adams clearly stated she had contacted counsel for Comair regarding dates for her deposition, as directed by the ALJ, and was advised she would be contacted once a proper venue was secured. She

stated she received no calls from counsel for Comair, and only received written notice. She stated she did not receive the written notice until after the date of the deposition because she had been out of town. She also stated she received no telephone calls from counsel for Comair regarding the scheduling of the deposition. We deem the dismissal of Adams' case was an unwarranted abuse of discretion by the ALJ.

In support of dismissing the claim, the ALJ cites to Ennis v. David Cobbler D/B/A D & A Painting, et al., Claim No. 2007-01038, entered July 26, 2010. While we do not cite our opinions as authority, we do strive for consistency. In the Ennis case, the claim was dismissed due to the claimant's repeated failure to participate in the discovery process. In the Ennis case, we stated as follows:

> Here, the ALJ did not dismiss Ennis' claim based solely on the continued failure to attend scheduled IMEs. Ennis' reliance on B. L. Radden & Sons, Inc. v. Copley, supra, is misplaced. That case stands for the proposition that KRS 342.205(3) is the only sanction for failure to attend IMEs. It has no application here since the ALJ's dismissal was based upon additional grounds, i.e., failure to prosecute and failure to abide by the ALJ's orders. The ALJ's October 7, 2008 order placing the claim in abeyance and the ALJ's May 18, 2009 order overruling Cobbler's motion to dismiss make it clear the ALJ understood the sanction for failing to

attend an IME was not dismissal but rather suspension of the right to take or prosecute any proceeding and the suspension of benefits during the time the claimant failed to comply. Again, we stress Ennis made no argument concerning the issues of failure to prosecute and failure to abide by the ALJ's orders.

803 KAR 25:010, Section 17 (1) sets forth that:

> (1) Discovery and the taking of depositions shall be in accordance with the provisions of Civil Rules 26 to 37, inclusive, except for Civil Rules 27, 33, and 36 which shall not apply to practice before the administrative law judges or before the board.

Specifically, CR 37.02 permits a court to render an order striking pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against a disobedient party.

Pursuant to 803 KAR 25:010 Section 17 (1), Civil Rules 26 - 37 apply to discovery and the taking of depositions in workers' compensation actions. CR 37.02 permits a court to render an order striking pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Our review of a dismissal based upon failure to comply with discovery orders, in this instance the failure to provide a Form 105 and medical information, is based on the standard

> of whether the ALJ's decision constituted an abuse of discretion. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). Again, it is important to note Ennis provided no explanation for his failure to abide by the ALJ's orders regarding the Form 105 and medical information. Ennis failed to provide evidence from the time of the January 10, 2008 BRC order through the date his claim was dismissed, a period of over 22 months. Given the lengthy failure to comply with discovery and repeated failure to abide by the ALJ's orders, it cannot be said the ALJ abused his discretion.

In Matthew Ingram v. M.P. Kelly Construction, et. al. Claim No. 2007-71173, rendered February 23, 2012, Hon. Grant Roark, Administrative Law Judge ("ALJ Roark") dismissed the claim due to failure to cooperate with the prosecution of his claim. In affirming the ALJ, this Board held as follows:

> The above rationale applies in the case *sub judice* and mandates the ALJ's September 29, 2011, order be affirmed. The record reflects Ingram missed six IMEs and one FCE. Ingram repeatedly refused to comply with the ALJ's orders. The June 17, 2011, order reflects Ingram was warned he must appear at the September 8, 2011, BRC, yet he failed to attend. Based on the fact Ingram

> disregarded the orders of two ALJs, failed to submit to six IMEs and one FCE, and did not attend the September 18, 2011, BRC, the ALJ concluded Ingram "has established a pattern of failing to participate in the claim." Significantly, Ingram did not file a response to M.P. Kelly's renewed motion to dismiss. In addition, Ingram did not file a response to M.P. Kelly's "Motion to Compel Attendance at IME/Suspend Benefits and Assess Costs."
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> The September 19, 2011, order reflects Ingram's counsel argued Ingram should be allowed the opportunity to explain his absence before the matter was dismissed. However, the record reflects Ingram's counsel failed to provide an explanation for his absence. Further, no reason was provided establishing why sanctions pursuant to CR 37.02, including dismissal, were not appropriate.
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> As the ALJ's conclusion that Ingram's conduct establishes a pattern of failing to participate in his claim is supported by the record and we find no abuse of discretion, the September 19, 2011, order dismissing Ingram's claim is **AFFIRMED**.

In the case *sub judice*, the ALJ fails to point to any pattern of failing to participate which would rise to the level of that displayed in the foregoing cases. At most, the record establishes a lack of communication between the parties for which Comair appears to be equally at fault. It is clear Adams did not abandon her claim. Likewise, except for unsubstantiated allegations, there is no

establishment of her unwillingness to be deposed. Although great deference is afforded ALJ's in the procedural aspects of a claim, it is apparent here the activities of the parties, in particular that of Adams, do not rise to the level of the instances reflected in the above decisions of this Board. In this instance, the ALJ abused his discretion in dismissing the claim. Therefore, the ALJ's dismissal of the claim reflected in the June 30, 2014 order, and the order on reconsideration issued November 10, 2014 are vacated, and the claim is remanded to the ALJ to enter a scheduling order, conduct a BRC, and conduct a hearing, if necessary.

The June 30, 2014 Order of Dismissal by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, and the Order on Remand issued November 10, 2014 denying Adams petition for reconsideration are **VACATED.** This claim is **REMANDED** to the ALJ for additional proceedings as outlined above.

ALL CONCUR.

PETITIONER, PRO SE:

BAHJI ADAMS
733 NORTH AVENUE
BURLINGTON, VT 05408

COUNSEL FOR RESPONDENT:

HON H DOUGLAS JONES
PO BOX 0095
FLORENCE, KY 41042

ADMINISTRATIVE LAW JUDGE:

HON OTTO DANIEL WOLFF
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601