

OPINION ENTERED: AUGUST 31, 2012

CLAIM NO. 200601247

FAMILY DOLLAR

PETITIONER

VS.

APPEAL FROM HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

STEPHEN BAYTOS
and HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
DISMISSING

* * * * *

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

ALVEY, Chairman. Family Dollar seeks review of the Opinion and Order rendered June 19, 2012 by Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") finding the claim by Mamie Baytos ("Mamie") for widow's benefits was not barred by her husband Stephen Baytos' ("Stephen") settlement of his claim for benefits which was approved on July 10, 2008. Family

Dollar also appeals from the order denying its petition for reconsideration entered July 10, 2012.

A benefit review conference ("BRC") was held on February 8, 2012. In the BRC order and memorandum, the ALJ noted the following:

The issues are bifurcated such that the legal question of whether Mamie Baytos can make this claim in view of the prior proceedings. The parties are allowed until March 15, 2012 to file simultaneous briefs. After briefs are filed, the ALJ may conduct a telephone conference before ordering the case submitted for decision.

In the opinion and order rendered June 19, 2012, the ALJ found Mamie Baytos could proceed with her claim for widow's benefits. Specifically the ALJ found as follows:

This case has been bifurcated such that the only issue for me to determine is whether the claimant Mamie Baytos may proceed in view of the prior claim and settlement by Stephen Baytos. In my judgment she may. KRS 342.730 provides for income benefits for injuries. There is a provision in KRS 342.730, KRS 342.730(3) that provides for income benefits awarded to an employee to continue to certain dependents in the event of his death during the period of an award. This is not what we are dealing with here.

KRS 342.750 provides for income benefits for death. In order for a dependent to qualify for death benefits as a result of a work-related death of an employer, the claimant must demonstrate his or her status as an

eligible claimant under KRS 342.750(1). The claimant must show that the decedent died as a result of a work related condition or injury. The claim must be made within two years of the date of death. The death must occur within four years of the date of the injury in order for the additional death benefits provided in KRS 342.750(6) to be payable. This involves a payment to the deceased employee's estate as opposed to a payment to a statutory dependent. This benefit is not claimed here. What is claimed here is that Stephen Baytos died as a result of the injury for which compensation had previously been granted. For purposes of the bifurcation, the parties and I assume this is true. **Additional proof time will be permitted to allow the parties to present evidence on that question.**

The employer asserts the prior settlement with the employee as a bar to the widow's claim. Ordinarily, an award would have been made granting the deceased income benefits on a weekly basis. Upon the death of the injured employee, the widow would make her claim and, if she can establish that the death was due to the injury then a continuation of benefits would be awarded under KRS 342.730(3). This type of claim would be entirely derivative of the employees[sic] claim and would be subject to being barred if the type of lump sum settlement had been entered into as was entered into here.

The widow's claim, however where she has to establish that the death was caused by the injury is not barred by the settlement. This claim is entirely the widow's and cannot be waived by the employee.

. . .

It is hereby ORDERED AND ADJUDGED by the Administrative Law Judge as follows:

1. The plaintiff, Mamie Baytos (widow), is eligible for widow's benefits pursuant to KRS 342.750 if she can establish that Stephen's death was caused by the injury of February 9, 2006. **She may have 60 days from the date of this decision within which to present evidence on the issue of causation. The defendant may have 30 days thereafter to present its' proof. The plaintiff may have 15 days after that for rebuttal. After these time periods have expired, the case shall be set for another benefit review conference.**

(Emphasis added)

Because we conclude the ALJ's ruling is interlocutory and does not represent a final and appealable order, we dismiss Family Dollar's appeal. 803 KAR 25:010 Sec. 21 (2)(a) provides as follows:

"[w]ithin thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers' Compensation Board."

803 KAR 25:010 Sec. 21 (2)(b) defines a final award, order or decision as follows: "[a]s used in this

section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2)."

Civil Rule 54.02(1) and (2) states as follows:

(1) When more than one claim for relief is presented in an action, . . . the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to re-adjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Hence, an order of an ALJ is appealable only if:

1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and 3) operates to determine all the rights of the parties so as to divest the

ALJ of authority. Tube Turns Division vs. Logsdon, 677 S.W.2d 897 (Ky. App. 1984); *cf.* Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228 (1939); *and* Transit Authority of River City vs. Sailing, 774 S.W.2d 468 (Ky. App. 1980); *see also* Ramada Inn vs. Thomas, 892 S.W.2d 593 (Ky. 1995).

In this instance, the ALJ's opinion of June 19, 2012 specifically acknowledges an aspect of Mamie's claim remains undecided, and requires additional evidence, necessitating additional findings and a subsequent decision on the merits. Not only did the ALJ acknowledge the need for additional evidence, he issued a proof schedule. As such, the June 19, 2012 order does not meet the above requirements.

Because there remain issues yet to be decided, the ALJ's opinion does not operate to terminate the action. Additionally, the ALJ's ruling does not act to finally decide all outstanding issues, nor does it operate to determine all the rights of the parties so as to divest the ALJ once and for all of the authority to decide the overall merits of the claim.

Accordingly, for the reasons enumerated above, the appeal of the decision rendered June 19, 2012, and the order ruling on the petition for reconsideration rendered

July 10, 2012 by Hon. Richard M. Joiner, Administrative law
Judge, is hereby **DISMISSED**.

MICHAEL W. ALVEY, CHAIRMAN
WORKERS COMPENSATION BOARD

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MELANIE GABBARD
P O BOX 34048
LEXINGTON, KY 40588

COUNSEL FOR RESPONDENT:

HON CARL E GRAYSON
504 ERLANGER ROAD
ERLANGER, KY 41018

ADMINISTRATIVE LAW JUDGE:

HON. THOMAS G POLITES
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511