

OPINION ENTERED: JUNE 21, 2012

CLAIM NO. 200899189

JERRY GARRETT

PETITIONER

VS. APPEAL FROM HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

MEINERS ELECTRIC,
DR. AKBAR NAWAB,
and J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
DISMISSING AND REMANDING

* * * * *

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

SMITH, Member. Jerry Lee Garrett ("Garrett") appeals the August 4, 2011, post judgment order rendered by J. Landon Overfield, Chief Administrative Law Judge ("CALJ") denying his motion to reopen his claim for temporary total disability ("TTD") benefits filed July 7, 2011. Garrett argues the CALJ overlooked/misconstrued controlling precedent and erred in utilizing an incorrect standard to

determine whether Garrett had established a prima facie case for reopening his claim against Meiners Electric ("Meiners"). Garrett also appeals from the CALJ's order on reconsideration dated November 17, 2011. This appeal concerns only post judgment issues of law, however a brief summary of the original litigation is necessary for a complete understanding of the issues.

Garrett filed a Form 101 on December 11, 2009, alleging he sustained a work-related injury at Floyd Memorial when he stepped off a ladder causing injury to his left knee which subsequently developed into compensatory symptoms with his right knee. The claim was assigned to Hon. Edward Hays, Administrative Law Judge ("ALJ") and a hearing was conducted on January 5, 2011. The ALJ rendered an Opinion, Order and Award on March 7, 2011, finding that Garrett had sustained a compensable work injury to his left knee resulting in a 6% whole person impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), 5th Edition. He also found Garrett qualified for the three multiplier provision of KRS 342.730(1)(c)1. However, the ALJ rejected Garrett's claim of work injuries to his right knee, right hip and low back.

Both parties timely filed petitions for reconsideration. The ALJ clarified his findings that

Garrett failed to maintain his burden of proving the right knee, right hip and low back conditions were work-related. He denied both petitions in all other respects.

On July 7, 2011, Garrett filed a motion for temporary total disability ("TTD") benefits asserting that his treating physician, Dr. Navin Kilambi, restricted him to "sit down" work only and "if [sic] none then off." Attached to his motion was a handwritten form from Ellis & Badenhause Orthopedics. Meiners responded objecting to Garrett's motion, pointing out that the only evidence in support of the motion was a one-page barely legible off work statement dated July 6, 2011. Meiners argued there was no indication on the statement that the basis for the recommended work restrictions had any relationship to the December 11, 2009 work injury, and therefore failed to provide sufficient proof to reopen the claim for additional TTD benefits. The CALJ, on the Frankfort motion docket, overruled Garrett's motion on August 9, 2011, stating as follows:

This matter comes before the Frankfort Motion Docket upon Plaintiff's motion to reopen the above styled claim on the grounds of a 'worsening' [sic] of physical condition and/or an increase in occupational disability. The motion was filed July 7, 2011. Plaintiff has supported the motion with an affidavit and a

photocopy of a July 6, 2011 work status sheet from Ellis & Badenhausen Orthopedics, PSC, signed by an unknown person diagnosing plaintiff with left knee chondromalacia restricting plaintiff to work that was "sit down only if none then off". Defendant employer has responded.

It is noteworthy that none of the physicians listed as practicing with Ellis & Badenhausen Orthopedics, PSC, are mentioned by the ALJ in the March 7, 2011, Opinion as having seen and/or evaluated plaintiff. It is further noteworthy that the work status slip [sic] contained no information concerning causation or whether or not the person signing the work status slip [sic] was of the opinion that plaintiff had any kind of changes in his physical/occupational condition since the opinion four months earlier.

Being fully and sufficiently advised, the undersigned Administrative Law Judge concludes that Plaintiff has failed to establish a prima facie case for reopening this claim.

Therefore, IT IS HEREBY ORDERED the plaintiff's motion to reopen is OVERRULED.

On August 10, 2011, Meiners moved to reopen the claim for a medical fee dispute challenging Dr. Akbar Nawab's request for Synvisc injections. In a utilization review report, Dr. Peter Kirsch determined the Synvisc injections were not medically necessary.

On October 4, 2011, Garrett filed a petition for

reconsideration of the CALJ's August 4, 2011 order. Garrett attached medical records from Ellis & Badenhausem dated June 8, 2011 and July 6, 2011. The June 8, 2011 medical note stated:

DIAG: Early chondrosis of the medial compartment and possible medial meniscal tear, left knee.

CC: Left knee pain.

P.I. Jerry is here today regarding his left knee. He has had a long history of knee pain. He states this started several years ago. He was found to have a work-related injury which had resulted in the meniscus tear. He subsequently several months later underwent an arthroscopy and meniscal debridement with Dr. Kilambi. He also had a chondroplasty performed. His pain in his knee has continued to wear [sic] he has pain on a pretty consistent basis. He has not been able to return back to work since 2009. He states his pain occurs regularly. He notes it mostly over the medial side. He has little bit of anterior knee pain but by and large the book of his pain is medial. He notes difficulty with his activities of daily living. He notes difficulty with any sort of squatting/twisting activities. He states the pain has been associated with an intermittent catching. He has not been able to return back as an electrician.

The July 6, 2011 medical note states:

Jerry comes for a follow-up regarding his knee and his MRI.

MRI: Shows post discectomy changes in some mild degenerative changes noted across the medial compartment. There is a small subchondral cyst at the anterior aspect of the medial plateau. There is no meniscal displacement or full thickness meniscal tears.

ASSESS/PLAN: Post meniscectomy chondrosis. We will start within unloader brace which I think would be good for step for him. I do not see this as being an operative situation at this point in time. We will see him back after he has tried to brace and I think the next step should be more for his chondral thinning which has resulted since his injury which we will plan Synvisc-One. He will follow up when things have been approved. (Nawab) East

Meiners responded to Garrett's petition for reconsideration arguing it was not timely filed since it was mailed on August 22, 2011 which is beyond the 14 days set forth in KRS 342.281. Secondly, Meiners argued that Garrett had failed to cure the deficiencies in his initial motion to reopen. Meiners specifically argued Garrett had not filed any evidence that he was temporarily totally disabled as defined by the statute. Meiners argued Dr. Nawab's work restrictions did not completely restrict Garrett from any work. Finally, Meiners asserts that Garrett had failed to show that the restrictions were related to his work injury.

Garrett objected to the response by Meiners, noting that 803 KAR 25:010, Section 19(1) provides "a party shall file a petition for reconsideration within fourteen (14) days of the filing of a final order or award of an administrative law judge." The regulation also provides final orders and opinions of administrative law judges shall be deemed filed three days after the date set forth on the final order or opinion. Accordingly, Garrett argues the CALJ's order was filed on August 8, 2011 and his petition for reconsideration must be viewed as timely filed on or before August 22, 2011.

The CALJ, on August 26, 2011, again on the Frankfort motion docket, noted deficiencies in the motion to reopen filed by Meiners and granted it 30 days to supplement the Form 112 with the required documentation.

On the September 22, 2011 Frankfort motion docket, the CALJ entered the following order denying Garrett's petition for reconsideration:

This matter comes before the Chief Administrative Law Judge on plaintiff's Petition for Reconsideration of the Order dated August 4, 2011.

Review pursuant to a Petition for Reconsideration is limited by KRS

342.281 and 803 KAR 25:010 §19 to the correction of errors patently appearing on the face of an award, order, or decision and does not allow reconsideration of the merits of a claim or defense. A review of the above order indicates no error patently appearing on the face thereof. In addition, as pointed out by the defendant employer's response to the petition for reconsideration, the petition for reconsideration is not timely. The order from which plaintiff seeks reconsideration was rendered August 4, 2011. Pursuant to 803 KAR 25:0101 .(4)(A)1., Final orders shall be deemed "filed" three days after the date set forth on the order. Therefore, the order overruling plaintiff's motion to reopen was filed August 7, 2011. Pursuant to KRS 342.281, a petition for reconsideration must be filed within 14 days from the date of the order from which relief is sought, in this case, filed on or before August 21, 2011. Plaintiff's petition for reconsideration was filed on August 24, 2011.

Regarding Meiners's motion to reopen, the CALJ determined Meiners had made a prima facie showing and sustained the motion to the extent "Plaintiff, Dr. Nawab and Ellis & Badenhausen Orthopedic, PSC must respond or present evidence which rebuts defendant employer's prima facie showing of non-compensability of the contested medical expenses." The CALJ then reassigned the claim to himself and further instructed:

3. Plaintiff, Dr. Nawab and Ellison &

Badenhausen Orthopedic, PSC are granted 30 days from and after this order in which to submit evidence or otherwise file a response to defendant employer's motion and Form 112. All responses or evidence must include a certificate of service stating that a copy of the response or evidence has been provided to all parties.

4. If a response or evidence is received the claim may be assigned to ALJ for further proceedings.

5. If no response or evidence is received, this matter may be submitted on the record to the CALJ and may result in this dispute being resolved based upon the pleadings and evidence in the record.

On October 4, 2011, Garrett filed a combination "Petition for Reconsideration, Motion to Set Aside August 4, 2011 Order and Renewed Motion for Temporary Total Disability Benefits." He argued the CALJ considered the motion to reopen to be a worsening of physical condition and/or an increase in occupational disability pursuant to 342.125 (1). After reviewing the litigation history, Garrett noted his motion to reopen was only for TTD benefits pursuant to KRS 342.125 (3). In addition, Garrett argued it was highly prejudicial for him to be denied an opportunity to supplement his motion to reopen when Meiners was granted an additional 30 days to supplement its motion contrary to the

requirements of the statute.

Garrett filed an appeal to the Workers' Compensation Board on October 5, 2011. Meiners moved to dismiss the appeal and the Board by order of November 9, 2011, held the appeal in abeyance and remanded the claim to the ALJ for an order ruling on the merits of the petition for reconsideration filed October 4, 2011.

The CALJ issued the following order on November 17, 2011 on the Frankfort Motion Docket:

This matter comes before the Chief Administrative Law Judge (CALJ) on the Frankfort motion docket upon plaintiff's October 4, 2011 Petition for Reconsideration of the Order dated August 4, 2011, plaintiffs motion to set aside the CALJ's August 4, 2011 order and a renewed motion for temporary total disability benefits. Some history is in order.

On July 7, 2011 plaintiff filed a motion to reopen for increased benefits (temporary total disability benefits). The CALJ determined on August 4, 2011 that plaintiff failed to make a prima facia showing of entitlement to reopen and overruled plaintiffs [sic] motion to reopen. Plaintiff subsequently filed a petition for reconsideration of that order which the CALJ determined was not timely filed. The petition for reconsideration was denied. Plaintiff apparently appealed that decision to the Kentucky Worker's Compensation Board (WCB) and simultaneously filed a second petition for reconsideration of the August 4, 2011 order together with the motion to set aside the CALJ's

August 4, 2011 order and a renewed motion for temporary total disability benefits. As a petition for reconsideration of the August 4, 2011 order, the petition was not timely filed. The WCB placed plaintiff's appeal in abeyance and partially remanded the matter for a determination on plaintiff's petition for reconsideration.

The October 4, 2011 petition for reconsideration is, in essence, either a second petition for reconsideration or a petition for reconsideration of the order denying the first petition for reconsideration as not being timely filed. As a petition for reconsideration of the August 4, 2011 order, it is not timely. As a petition for reconsideration of the September 22, 2011 order denying the first petition for reconsideration has not been timely, there are no allegations of errors patently appearing on the face of the September 22, 2011 order. Review pursuant to a Petition for Reconsideration is limited by KRS 342.281 and 803 KAR 25:010 §19 to the correction of errors patently appearing on the face of an award, order, or decision and does not allow reconsideration of the merits of a claim or defense. A review of the above order indicates no error patently appearing on the face thereof.

Accordingly, the Petition for Reconsideration shall be and is hereby DENIED and the motion to set aside the August 4, 2011 order and for a reopening based on the same facts previously resented are OVERRULED. (Errors in original.)

On December 1, 2011, Garrett filed a petition for

reconsideration of the CALJ's order of November 17, 2011.

The Board removed the appeal from abeyance on December 7, 2011 and issued a briefing order on December 15, 2011. On December 16, 2011, the Board placed the appeal in abeyance once again partially remanding it to the CALJ for a ruling on Garrett's latest petition for reconsideration.

On January 4, 2012, Garrett again moved to reopen his original claim for TTD benefits. On January 9, 2012, the CALJ overruled Garrett's latest petition for reconsideration.

The Board issued three orders in January relating to the appeal. On January 19, 2012, the Board ordered Garrett's motion to reopen for TTD benefits passed to the merits. On January 24, 2012, the Board removed the appeal from abeyance and established a briefing schedule. On March 7, 2012, the Board issued a show cause order granting Garrett 15 days to show cause why the appeal should not be dismissed for failure to file a brief. Finally, on March 27, 2012, the Board accepted the petitioner's tendered brief with an amended briefing schedule.

On appeal, Garrett submits the CALJ overlooked/misconstrued controlling precedent and erred in utilizing an incorrect standard to determine whether a *prima facie* case had been established for reopening his claim. Garrett

argues that the standard first requires the moving party provide sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. Garrett argues that *prima facie* evidence is evidence which if unrebutted or unexplained is sufficient to maintain the proposition, and warrants conclusion in support of that which is being introduced. If the moving party prevails in making a *prima facie* showing of all the essential elements, additional proof time is scheduled so the merits of the reopening can be fully and finally adjudicated. Garrett argues that he met those standards by submitting the off work statement of Ellis & Badenhausen containing the seven words "sit down only if none then off." That statement, submitted with Garrett's verified motion to reopen and the designation filed in the prior litigation should have been sufficient to establish a *prima facie* claim for TTD. Garrett also argues he has been diligent in pursuing a workers' compensation injury which has already been found compensable and he should not be denied the opportunity to pursue statutory benefits.

Next, Garrett argues the notice of appeal should not be dismissed as not timely filed. His counsel had completed and mailed a petition for reconsideration of the CALJ's August 4, 2011 order and was under the mistaken

belief the petition for reconsideration and medical records had been sent via registered mail as required by 803 KAR 25:010 Section 1(4)(b).

Finally, Garrett argues the CALJ's order overruling his petition to reopen, petition for reconsideration and motion to set aside was arbitrary or capricious especially considering that several days after the CALJ denied Garrett's motion to reopen for TTD, he granted Meiners 30 days to correct its deficient motion to reopen.

On October 14, 2011, Meiners filed a motion to dismiss Garrett's appeal arguing the notice of appeal was untimely. By order dated October 11, 2011, the Board passed ruling on the motion, directing the parties to address the issue in their briefs. In his brief, Garrett argued only that he reasonably believed the petition for reconsideration was timely filed since he believed the petition was sent via registered mail. However, the certificate of service on the petition for reconsideration does not indicate it was sent by registered mail and the record shows the petition was not received by the Department of Workers' Claims until August 24, 2011.

It is well noted that in appeals to the Board, a timely notice of appeal is mandatory and jurisdictional. See Workers' Compensation Board v. Siler, 840 S.W.2d 812 (Ky.

1992), Rainwater v. Jasper & Jasper Mobile Homes, Inc., 810 S.W.2d 63 (Ky.App. 1991); Burchell v. Burchell, 684 S.W.2d 296 (Ky.App. 1984). Failure to file a timely notice of appeal is a jurisdictional defect that is fatal to the appeal. Rainwater v. Jasper & Jasper Mobile Homes, Inc., supra; Burchell v. Burchell, supra; See also City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990).

KRS 432.281 provides:

Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make any correction within ten (10) days after submission.

KRS 342.285(1) provides:

An award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the

executive director appeal to the Workers' Compensation Board for the review of the order or award.

803 KAR 25:010 § 21(1) of the administrative regulations controlling review of ALJ decisions by the Board further provides:

(1) General.

(a) Pursuant to KRS 342.285(1), decisions of administrative law judges shall be subject to review by the Workers' Compensation Board in accordance with the procedures set out in this administrative regulation.

* * *

(2) Time and format of notice of appeal.

(a) Within 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.

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

The filing of a timely petition for reconsideration pursuant to KRS 342.281 stays the 30 day time period for the filing of an appeal to the Board. However, where the petition is filed more than 14 days after the date the

original decision was rendered, it has no tolling effect. See Tube Turns Division of Chemetron v. Quiggins, 574 S.W.2d 901 (Ky.App. 1978). In those instances, the 30 day period for filing an appeal runs from the date of the original order and not from the date of an order ruling on an untimely petition for reconsideration. Accordingly, Garrett's appeal was not filed timely, and the Board is without jurisdiction to rule on the merits of his arguments. The fact that, by order issued September 22, 2011, the ALJ ruled on the petition for reconsideration, or that Garrett filed his notice of appeal within 30 days of that order, does not resurrect the Board's jurisdiction over this matter.

That having been said, had the issues been properly preserved, we would nonetheless have affirmed the ALJ's decision below. It is well established the procedure for reopening a prior workers' compensation claim pursuant to KRS 342.125 is a two-step process. Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 216 (Ky. 2006). The first step is the *prima facie* motion, which requires the moving party to provide sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972). "*Prima facie* evidence" is evidence

which "if un rebutted or unexplained is sufficient to maintain the proposition, and warrant the conclusion [in] support [of] which it has been introduced ... but it does not shift the general burden" Prudential Ins. Co. v. Tuggle's Adm'r., 254 Ky. 814, 72 S.W.2d 440, 443 (1934). The burden during the initial step is on the moving party and requires that party to establish the grounds for which the reopening is sought under either KRS 342.125(1) or (3). Jude v. Cabbage, 251 S.W.2d 584 (Ky. 1952); W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (Ky. 1946). It is only after the moving party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening that the adversary party is put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001).

Here, the ALJ determined Garrett failed to make a *prima facie* case for reopening the claim. The ALJ did not find the status sheet from Ellis & Badenhausen sufficient evidence to support reopening, noting the provider was not mentioned in March 7, 2011 opinion as a provider who evaluated or treated Garrett. The CALJ could not read the signature and noted the status slip contained no information regarding causation or a change in Garrett's condition. We cannot say the CALJ's assessment of the status form is

clearly erroneous. Accordingly, we would have affirmed the CALJ's determination in the August 4, 2011 order.

We would also have affirmed the CALJ's September 22, 2011 order denying Garrett's petition for reconsideration. As found by the CALJ, the petition for reconsideration filed August 24, 2011 was untimely since it was filed more than 14 days from the date of the order overruling Garrett's motion to reopen. Additionally, as noted by the CALJ, a petition for reconsideration is limited to the correction of errors patently appearing on the face of the order and may not reargue the merits of the claim.

For the foregoing reasons, the motion to dismiss filed by Meiners Electric is hereby **GRANTED** and the appeal filed by Garrett is hereby **DISMISSED**. It is further **ORDERED** this matter is **REMANDED** to the CALJ for consideration of Garrett's January 4, 2012 motion to reopen for temporary total disability benefits.

ALL CONCUR.

LAWRENCE F. SMITH, MEMBER
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