Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 29, 2013

CLAIM NO. 201178928

ROBERT BARKER PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

W.A. KENDALL & COMPANY
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Robert Barker ("Barker") appeals from the April 9, 2013, "Order Dismissing With Prejudice" of Hon. Steven Bolton, Administrative Law Judge ("ALJ") in which the ALJ dismissed Barker's claim with prejudice due to his failure to submit to an independent medical examination ("IME") scheduled four times. No petition for reconsideration was filed. On appeal, Barker asserts the

ALJ did not have the authority to dismiss his claim for his failure to submit to medical examinations.

The Form 101 alleges on July 8, 2011, Barker sustained an injury while working for W.A. Kendall & Company ("Kendall") in the following manner: "Plaintiff was walking off of a hill in the rain and fell. He caught himself on his right side injuring his low back and right shoulder with numbness into the shoulder."

On March 8, 2012, Kendall filed a "Motion to Compel and Motion to Hold in Abeyance" asserting Barker was a "no-call, no-show" for an orthopedic examination with Dr. Daniel Primm scheduled on March 6, 2012. By order dated April 2, 2012, Hon. Joseph Justice, Administrative Law Judge ("ALJ Justice"), sustained Kendall's motions. ALJ Justice also ordered Barker to file, within twenty days of the date of the order, a "notarized statement as to whether he had good cause for not attending the evaluation of March 6, 2012."

On April 23, 2012, Barker filed an affidavit stating that on his way to the March 6, 2012, appointment, the transmission went out in his vehicle.

On May 15, 2012, Kendall filed a "Motion for Show Cause Order" in which it argued Barker was once again a "no-call, no-show" for a second appointment with Dr. Primm

on March 30, 2012. Kendall asserted the issuance of a show-cause order is appropriate, and Barker's violation of its rights under KRS 342.205 warrants dismissal.

On June 6, 2012, ALJ Justice entered the following order:

> This matter is before the ALJ on motion of the Defendant/Employer for a show cause order. As grounds, Defendant/Employer states that Plaintiff has missed two medical evaluations with physicians of its choosing;
>
> IT IS HEREBY ORDERED that Plaintiff attend a subsequently scheduled IME.
>
> Plaintiff is cautioned that if he shows good cause for missing the second medical evaluation, that unreasonable failure to comply with Defendant/Employer's right to a continuing medical evaluation, as provided by KRS 342.205, may result in the imposition of sanctions including but not limited to dismissal. Defendant's motion for sanctions is reserved until final hearing.

By order dated July 10, 2012, the case was reassigned to the ALJ.

On October 4, 2012, Kendall filed a "Motion to Dismiss" based on Barker's failure to attend a third scheduled medical examination. On October 16, 2012, Barker filed a response indicating the third examination was

missed because he had car trouble on his way to the scheduled appointment and was forced to have his car towed.

In an order dated October 23, 2012, the ALJ set forth the history of Barker's failure to appear at the scheduled examinations. The ALJ noted that by order dated April 2, 2012, ALJ Justice placed the claim in abeyance, and the order has not been rescinded. The ALJ further stated as follows:

> However, pursuant to 803 KAR 25:010, Section 24, the ALJ hereby determines that the Plaintiff has prosecuted this matter without reasonable grounds by failing to comply with the mandate of KRS 342.205 and 803 KAR 25:010, Section 8.

Still, the ALJ overruled Kendall's motion to dismiss and ordered the claim to remain in abeyance until Barker appears at the medical examination. The ALJ stated as follows:

> No further proceedings shall take place herein until the Plaintiff has taken such steps as are necessary through his attorney to guarantee that he will appear for an IME at the time and place appointed for him by the Defendant/Employer and such IME is completed and a medical report therefrom filed in the record.

The ALJ further ordered Kendall is no longer responsible for Barker's travel expenses, as Barker "has already had at least one set of travel expenses issued to him."

On March 15, 2013, Kendall filed a "Renewed Motion to Dismiss," asserting Barker failed to appear at a fourth scheduled examination on February 22, 2013. On March 18, 2013, Barker filed a response claiming he failed to appear at the fourth examination because of an ice storm. Barker alleged as follows:

> Plaintiff does not deny that he has missed the Independent Medical Examination scheduled for him on February 22, 2013. On that particular morning, there was an ice storm which prohibited the Plaintiff driving two (2) hours for the scheduled Independent Medical Examination. The Plaintiff did contact the doctor's office and asked that the appointment be moved until later in the day. However, the doctor's office indicated that defense counsel could 'just reschedule the appointment.'

In the April 9, 2013, "Order Dismissing With Prejudice," the ALJ reasoned as follows:

> The matter comes before the administrative law judge on the renewed motion of the Defendant/Employer to dismiss Plaintiff’s claim for his failure to attend a fourth independent medical evaluation in violation of the provisions of KRS 342.205 and the ALJ Orders of April 2, 2012, June 6, 2012 and October 23, 2012.
>
> Plaintiff has filed a Response to said motion objecting to dismissal and offering justification for Plaintiff’s failures.

The record reflects that a benefit review conference had been scheduled in this matter for March 7, 2012. It was cancelled by the ALJ with a notation that the Plaintiff had missed an IME. By motion of March 8, the Defendant/Employer asked that the case be held in abeyance and the Plaintiff be compelled to submit to an IME. The motion had attached to it a tendered order and a notice of the IME scheduled for March 6, 2012.

There was apparently no response filed to Defendant/Employers motion and the tendered order was entered by the ALJ on April 2, 2012.

That may or may not have been precipitated by the fact that the Plaintiff also missed the second scheduled IME on March 30, 2012.

On April 23, 2012 Plaintiff's affidavit was filed with the Department in which he states under oath that he missed the 3/6/12 examination because "the transmission went out of his vehicle".

Subsequently, on May 15, 2012, the Defendant/Employer filed a "Motion for Show Cause Order" noting the failure to attend on both dates and requesting the issuance of an order directing the Plaintiff to show cause why his claim should not be dismissed. Plaintiff filed a Response alleging that he had not shown for the second scheduled IME because he thought he would not have to appear because he thought a settlement demand was made. Thereafter, on June 6, 2012, the ALJ issued an Order that Plaintiff attend a third IME, cautioning him that further failures to comply "…may result in the imposition

of sanctions including but not limited to dismissal."

Thus, Plaintiff was scheduled for another IME with the same physician on August 10, 2012 at 1:15 p.m.. Travel expenses were advanced and the check for same negotiated by the Plaintiff. Once again he failed to appear. In response to Defendant/Employers Motion to Dismiss, Plaintiff stated that he had car trouble on the way to the appointment. The ALJ Order of April 2, 2012 already holds the case in abeyance. That order has not been rescinded and the case remains in abeyance pending the further orders of the ALJ.

However, pursuant to 803 KAR 25:010, Section 24, the ALJ further determined that the Plaintiff has prosecuted this matter without reasonable grounds by failing to comply with the mandate of KRS 342.205 and 803 KAR 25:010, Section 8.

Thus, on October 23, 2012, the ALJ issued a third order continuing the case in abeyance, overruling the motion of the Defendant/Employer to Dismiss the claim, freezing the proceedings until there was a guarantee that the Plaintiff would appear for a IME and suspending the requirement of the further issuance of travel expenses on the grounds that the Plaintiff had already cashed the checks and spent those expenses without submitting himself to the examinations for which they had been issued.

The Defendant/Employer now asserts, and the Plaintiff does not disagree, that a fourth IME was scheduled for February 22, 2013 at 11:00 a.m., which the Plaintiff failed

to attend. Plaintiff responds that on the morning of the scheduled examination, there was an ice storm which prohibited him from driving two hours for the scheduled IME (The ALJ notes that the Plaintiff resides at Denton, Carter County, Kentucky, while the examining physician is located in Lexington, Fayette County, Kentucky, which two locations are connected in greater part by I-64, an all-weather interstate highway).

Plaintiff responds also that he called the doctor's office and asked that the appointment be moved until later in the day, but was allegedly told by the doctor's office that the defense counsel could "just reschedule the appointment".

Plaintiff once again cites the ALJ to the case of *B.L. Radden & Sons, Inc. v. Copley*, 891 S.W.2d 84 (Ky.App., 1995) which holds that the penalties for failing to appear for a scheduled medical examination are limited to those in KRS 342.205 (3), which limit the ALJ's discretion to placing the claim in abeyance until the Plaintiff appears for an IME.

Here, the ALJ notes that the Plaintiff's apparently cavalier disregard for the numerous orders by the ALJ to cooperate in the discovery process demonstrates an unwillingness on the part of the Plaintiff to seasonably prosecute his claim. Why this should be so is a mystery, but the independent medical examination is such a fundamental part of the process that one would think the Plaintiff would embrace it so that his claim could proceed in a timely fashion.

The record reflects that there have been no steps taken by the Plaintiff to prosecute his claim in over a year. Further, despite the directives of two different ALJ's, the Plaintiff has failed to take any steps to guarantee his appearance at an IME.

ALJ Justice' [sic] order of April 2, 2012 ordered the Plaintiff to attend an IME to be scheduled by the Defendant. A supplemental order was entered on June 6, 2012 also ordering Plaintiff to attend an IME. This ALJ's order of October 23, 2012, ordered the Plaintiff to take such steps as were necessary to "guarantee" his appearance at an IME. By virtue of his failure to cooperate in the discovery process for over a year, as well as his failure to take any affirmative steps to prosecute his claim during the same period and his failure to abide by the lawful orders of the ALJ as cited herein above, it appears to the ALJ that the provisions of CR 37.02 as adopted by 803 KAR 25:010, Section 17 (1) apply in the instant case.

Thus, on motion of the Defendant-Employer, having considered the Plaintiff's failure to prosecute this action, Plaintiff's consistent disregard for the Orders of the tribunal as well as his failures to submit to four (4) IME's scheduled by the Defendant Employer, and the ALJ having been otherwise sufficiently advised,

IT IS HEREBY ORDERED that this claim be, and it is hereby **DISMISSED** with prejudice.

Barker failed to file a petition for reconsideration. On appeal, Barker asserts as follows:

> Certainly placing the case in abeyance and ordering cessation of temporary benefits, if any, are the only appropriate sanctions available to the Administrative Law Judge for a claimant's failure to appeal at a scheduled medical exam.

KRS 342.205(3) holds as follows:

> If an employee refuses to submit himself to or in any way obstructs the examination, his right to take or prosecute any proceedings under this chapter shall be suspended until the refusal or obstruction ceases. No compensation shall be payable for the period during which the refusal or obstruction continues.

In the April 9, 2013, "Order Dismissing With Prejudice," the ALJ implicates CR 37.02, a general rule of procedure pertaining to a party's failure to comply with discovery orders or to permit discovery. CR 37.02 permits certain sanctions in the event a party fails to permit discovery, including dismissal of the action.

In the April 9, 2013, order dismissing Barker’s claim, the ALJ also implicates 803 KAR 25:010, Section 17(1). However, 803 KAR 25:010, Section 17(1) is a general regulation regarding the taking of discovery and

depositions that wholly fails to speak to the sanction for a missed medical examination.

In the October 23, 2012, order overruling Kendall's motion to dismiss, the ALJ references 803 KAR 25:010, Section 8 and 24. In this order, the ALJ stated as follows:

> However, pursuant to 803 KAR 25:010, Section 24, the ALJ hereby determines that the Plaintiff has prosecuted this matter without reasonable grounds by failing to comply with the mandate of KRS 342.205 and 803 KAR 25:010, Section 8.

We note, however, that 803 KAR 25:010, Section 24 speaks to sanctions that may be assessed against a party "upon a determination that the proceedings have been brought, prosecuted, or defended without reasonable grounds." Again, this general provision fails to speak to the sanction in the event of a missed medical examination. Additionally, we note that nowhere in 803 KAR 25:010, Section 24, is dismissal specified as a sanction. The sole sanction is the assessment of costs. 803 KAR 25:010, Section 24(1). Additionally, 803 KAR 25:010, Section 8 speaks to discovery, evidence, and the exchange of records. This regulation does not, in any manner, speak specifically to the sanction for a missed medical examination.

KRS 342.205(3) is unambiguous on its face, and a rule of statutory construction long accepted by Kentucky courts is unambiguous statutes must be applied as written. "[A]bsent an ambiguity, 'there is no need to resort to the rules of statutory construction in interpreting it.'" Hall v. Hospitality Resources, Inc., 276 S.W.3d 775, 784 (Ky. 2008). Citing Stewart v. Estate of Cooper, 102 S.W.3d 913, 915 (Ky. 2003) the legislature's intent must be inferred "from words used in enacting statutes rather than surmising what may have been intended but was not expressed." Id. Neither the ALJ nor this Board are at liberty to interpret a statute at variance with its stated language. McDowell v. Jackson Energy RECC, 84 S.W.3d 71, 77 (Ky. 2002).

Additionally, an established rule of statutory construction is where both a specific statute and a general statute are potentially applicable to the same subject matter, the specific statute controls. Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005). The Kentucky courts have held: "One of the established rules of statutory construction is that when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails." Land v. Newsome, 614 S.W.2d 948, 949 (Ky. 1981). While this Board acknowledges that what is at issue is a specific statute,

KRS 342.205(3), and more general regulations and a civil rule, CR 37.02, the rule regarding specific versus general statutory construction is still persuasive and decisive. Equally persuasive and decisive is the following language from CR 1(2) which states as follows:

> These Rules govern procedure and practice in all actions of a civil nature in the Court of Justice ***except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over an inconsistent procedures set forth in the Rules.***

(emphasis added).

Thus, CR 37.02 and the above-cited regulations are fully trumped by the specific statute regarding missed medical examinations, KRS 342.205(3). KRS 342.205(3) does not permit the ALJ to dismiss a claimant's claim for failure to show at a medical examination. The only sanctions available to the ALJ for Barker's repeated failure to submit to a medical examination are the sanctions articulated in KRS 342.205(3). While this Board believes Barker's continued obstruction is unfortunate and may demonstrate a reluctance to move forward with his claim, the ALJ does not have the discretion to dismiss Barker's claim.

We also note that in the April 9, 2013, "Order Dismissing With Prejudice," the ALJ determined Barker had demonstrated an "unwillingness...to seasonably prosecute his claim" during the same period as the missed medical examinations. However, we note that during this time Barker filed status reports dated March 7, 2013, and April 16, 2013, in which he indicated he was waiting for Kendall to reschedule the medical examination. Additionally, Barker filed an April 23, 2012, affidavit, a May 21, 2012, "Response to Defendant's Motion for Show Cause," an October 16, 2012, "Response to Defendant's Motion to Dismiss," and a March 18, 2013, "Response to Defendant's Motion to Dismiss." While we are not condoning Barker's behavior in repeatedly failing to show up for the scheduled medical examination, Barker has not been silent throughout.

Finally, since the issue on appeal is an issue of law and not one of fact, Barker's failure to file a petition for reconsideration is irrelevant.

The ALJ's dismissal of Barker's claim in the April 9, 2013, "Order Dismissing With Prejudice" is **VACATED** and this case is **REMANDED** to the ALJ for entry of an amended order in which the ALJ imposes only the sanctions set forth in KRS 342.205 in response to Barker's failure to

submit to the medical examination scheduled on February 22, 2013.

ALL CONCUR.

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