Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 16, 2013

CLAIM NO. 201201863 & 200301371

RONNIE PENNY PETITIONER

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

MANALAPAN MINING COMPANY
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
SETTING ASIDE ORDER
PLACING APPEAL IN ABEYANCE,
AND DISMISSING APPEAL AND REMANDING
* * * * * *

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

STIVERS, Member. Brickstreet Mutual Insurance Company ("Brickstreet"), has filed a Motion to Remove from Abeyance and Renewed Motion to Dismiss. In support of its motion, Brickstreet asserts that its previous motion to dismiss was filed on April 8, 2012, when the claim was pending before Hon. J. Landon Overfield, Chief Administrative Law Judge

("CALJ"). At that time, Brickstreet moved to be dismissed as the responsible insurer because its coverage for Manalapan Mining Company ("Manalapan") did not become effective until August 1, 2010. In response to the motion, Brickstreet states the CALJ issued a July 19, 2013, order requiring the Department of Workers' Claims to certify coverage for Manalapan as of November 12, 2002. Brickstreet states the July 19, 2013, order indicated its motion to dismiss was passed pending certification of the coverage. Brickstreet represents on that same date the Commissioner certified that as of November 12, 2002, Manalapan was insured by Kentucky Employer's Mutual Insurance ("KEMI"). Since certification has occurred, Brickstreet asserts it should be dismissed as the responsible insurer. Brickstreet notes the Petitioner, Ronnie Penny ("Penny") appealed the CALJ's July 19, 2013, order and on August 14, 2013, this Board placed the appeal in abeyance.

Because this Board improperly granted Penny's motion to hold the appeal in abeyance and the CALJ's July 19, 2013, order is not a final and appealable order, we set our order abating the appeal, dismiss the appeal and remand to the ALJ. Our reasoning follows.

On December 26, 2012, Penny filed a Form 102-CWP alleging a coal workers' pneumoconiosis ("CWP") claim. Penny alleged on November 12, 2002, he became affected by CWP arising out of and in the course of his employment. Significantly, in the Form 104, Plaintiff's Employment History, Penny states his last date of employment with Manalapan was November 2002.

Manalapan filed a notice of representation, request for production of documents, and a Form AWW-1 average weekly wage certification. Manalapan also filed the chest x-ray interpretation by Dr. Bruce Broudy and the chest x-ray dated February 27, 2013.

In an order dated March 29, 2013, the CALJ stated the parties had met the requirements of KRS 342.316 by filing an x-ray and an x-ray interpretation with the Department of Workers' Claims; however, due to the Kentucky Supreme Court's decision in Jesse Gardner v. Vision Mining, 2010-SC-000311-WC and Joe Martinez v. Peabody Coal Co., 2010-SC-000438-WC, the CALJ *sua sponte* ordered the claim placed in abeyance pending finalization by the Department of Workers' Claims of the proper evidentiary procedures for CWP claims.

Thereafter, Manalapan filed a special answer asserting Penny's CWP claim was barred by notice and the statute of limitations.

On May 8, 2013, Bricksteet filed a motion to dismiss asserting Penny's Form 102 alleges a last date of exposure of November 12, 2012, which it believed was in error. It noted the work history indicates Penny was last employed by Manalapan in 2002 as opposed to 2012. It represented its records indicate Penny was last employed on November 12, 2002. Manalapan noted Penny had previously filed a CWP claim against Manalapan, claim number 2003-01371, listing his last date of exposure as November 12, 2002. Manalapan stated that in an opinion and order rendered May 25, 2006, an ALJ found the consensus was that the x-ray evidence was negative for CWP and the consensus had not been overcome. Accordingly, the claim was dismissed. Manalapan posited Penny has refiled his claim and will most likely argue he is entitled to do so because the consensus process has now been determined to be unconstitutional. That fact aside, Brickstreet contended it should not be compelled to accrue any additional costs associated with litigating the claim since it is not the responsible insurer as its coverage for Manalapan did not become effective until October 1, 2010.

On May 16, 2013, Penny filed a pleading styled "Response to Motion to Dismiss, Motion to Correct Form 102, Motion to Reopen and Consolidate, and Motion to Allow Claim to Remain in Abeyance." Penny requested his Form 102 be corrected to reflect the date of last exposure to be November 12, 2002, rather than November 12, 2012. He also requested the current claim be considered a motion to reopen and consolidated with his previous claim, Claim Number 2003-01371, which was dismissed on May 25, 2006, "based upon a consensus process which has now been found to be unconstitutional by the Kentucky Supreme Court." Penny also requested the CALJ to note that in 2002 the legislature enacted KRS 342.792 which made provisions for coal miners who were subject to a university evaluation and had their claims dismissed, to be able to reopen those claims. Penny stated the legislature also made provisions for coal miners with a date of last exposure between December 12, 1996, and July 15, 2001, to file original claims on or before December 12, 2003, or within the time frame prescribed by KRS 342.316(4)(a) whichever was later. Penny contended the Kentucky Supreme Court's recent decision that the consensus process in effect at the time his prior claim was dismissed is unconstitutional, will cause the legislature, in the near future, to make

provisions for coal miners, such as him, to reopen their previously dismissed claim. Penny requested Manalapan's motion be overruled, his Form 102 be amended to reflect the date of last exposure is November 12, 2002, and this claim be considered a motion to reopen and ordered consolidated with his previous claim which had been dismissed. He also requested the claim remain in abeyance.

On July 19, 2013, the CALJ ordered as follows:

> 1. Defendant-Employer's Motion to Dismiss Brickstreet Mutual Insurance Company is **passed** pending certification of coverage;
>
> 2. Plaintiff's Motion to Correct Form 102 is **sustained**; the last date of exposure on Plaintiff's Form 102 is corrected to reflect November 12, 2002;
>
> 3. The Department of Workers' Claims shall **certify coverage** for Manalapan Mining Company, with an alleged date of last exposure of November 12, 2002, and it shall be made part of the record, and if no workers compensation insurance coverage is found, the Department of Workers' Claims shall so indicate;
>
> 4. Plaintiff's Motion to Reopen and Consolidate is **overruled**;
>
> 5. This claim shall **remain in abeyance**.

In response to the July 19, 2013, order, the Commissioner certified Manalapan had workers' compensation

insurance on the date of the alleged injury of November 12, 2002, and the carrier at risk was KEMI.

On July 24, 2013, Brickstreet renewed its motion to dismiss noting its coverage did not become effective until October 1, 2010. It referenced the July 19, 2013, order which reflects the date of last exposure on the Form 102 had been corrected to reflect November 12, 2002. Since the Department of Workers' Claims' certification revealed, as of November 12, 2002, Manalapan was insured by KEMI, Brickstreet requested the CALJ to enter an order dismissing it as the responsible insurer.

Before an order could be entered ruling on Brickstreet's motion, on August 2, 2013, Penny filed a Notice of Appeal. Thereafter, Penny filed a motion to place the appeal in abeyance pending a final appellate decision in Donald Ealy v. RC Trucking, Inc., Claim No. 2012-00487, asserting it involved the same issue as in this appeal. No response was filed by Manalapan or Brickstreet to Penny's motion.

On August 14, 2013, this Board entered an order granting Penny's motion and directing the parties to notify the Board once a decision had been rendered in Donald Ealy v. RC Trucking, Inc., Claim No. 2012-00487.

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 CALJ's July 19, 2013, order merely amended the Form 102 to reflect the date of last exposure to be November 12, 2002, passed Brickstreet's motion to be dismissed as the responsible insurer pending certification, overruled Penny's motion to reopen and to consolidate, and directed the claim remain in abeyance. By no stretch of the imagination does the July 19, 2013, order meet the definition of a final and appealable order.

Penny's claim has not been resolved and is still pending. Clearly, the July 19, 2013, order 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 an ALJ once and for all of the authority to decide the overall merits of the claim.

Accordingly, for the reasons enumerated above, it is ordered the August 14, 2013, order placing the appeal in abeyance is **SET ASIDE** and the above-styled appeal seeking review of the July 19, 2013, order by Hon. J. Landon Overfield, Chief Administrative Law Judge, is **DISMISSED**. Further, it is ordered this claim is **REMANDED** to the CALJ for a ruling on Brickstreet's pending motion.

ALL CONCUR.

_____
FRANKLIN STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

COPIES MAILED TO:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON KY 40741

HON A STUART BENNETT
P O BOX 2150
LEXINGTON KY 40588

HON J LANDON OVERFIELD
CHIEF ADMINISTRATIVE LAW JUDGE
657 CHAMBERLIN AVE
FRANKFORT KY 40601