

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: September 9, 2013

CLAIM NO. 200684485

TIMOTHY HOWARD

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE

BASIN ENERGY COMPANY  
TERRY WRIGHT, M.D.  
and HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AND ORDER DISMISSING  
AND VACATING AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Timothy Howard ("Howard") seeks review of the January 4, 2013, opinion and order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") resolving a medical fee dispute in favor of Basin Energy Company ("Basin Energy"). Howard also appeals from the February 6, 2013, order denying his petition for reconsideration.

On appeal, Howard contends the ALJ's decision was not based on substantial evidence as Basin Energy did not provide any evidence his treatment with Dr. Terry Wright was not reasonable or necessary. Howard seeks remand and an award.

On May 22, 2012, Basin Energy filed a motion to reopen requesting the CALJ enter an order reopening the claim for the purpose of allowing it to file a Form 112 to contest certain medical treatment and billings. In the motion, it stated Howard filed a claim against Basin Energy seeking income and medical benefits as a result of a work injury occurring on May 11, 2006. It maintained Howard was diagnosed with cervical, lumbar, and right shoulder injuries. Basin Energy stated on July 30, 2009, Howard received a lump sum settlement in the amount \$85,000.00 and "future medicals" were preserved. Since that time Basin Energy had been receiving bills from "Dr. Terry Wright, Ira B. Potter, PSC," for monthly office visits and bills for prescriptions of Oxycodone. Basin Energy attached the utilization review report of Dr. Bart Olash representing he found the monthly follow-up visits and Oxycodone prescriptions were not medically necessary and appropriate. It represented Dr. Olash stated at most Howard needed to be seen three to four times per year for his work injury and

there was no indication for Oxycodone, a narcotic analgesic. Basin Energy attached a utilization review report of Dr. B. Frank Parker, representing he also concluded there was no indication for Oxycodone and monthly office visits. In addition, it attached a neurosurgical examination performed by Dr. Henry P. Tutt, representing he stated the medical billings were not reasonable and necessary for the cure and relief of Howard's work injury. As noted, Howard also filed a Form 112, medical fee dispute containing most of the same assertions. Basin Energy also attached various medical records from Dr. Wright.

On June 6, 2012, Howard filed a response to the motion to reopen requesting the matter be forwarded to an ALJ for a formal hearing.

On June 20, 2012, the CALJ entered an order sustaining Basin Energy's motion to reopen to the extent the matter would be referred to an ALJ for final adjudication. The CALJ also ordered Dr. Wright joined as a party in the medical fee dispute.

On July 16, 2012, the matter was assigned to the ALJ. Thereafter, the parties introduced medical records and reports. On November 14, 2012, a final hearing was conducted.

As previously noted, on January 4, 2013, the ALJ rendered an opinion and order finding Basin Energy had sustained its burden of proving the monthly office visits and Oxycodone are not reasonable and necessary for the cure and relief of the effects of Howard's work injury. The ALJ relieved Basin Energy from the responsibility for paying for this treatment.

In addition to Basin Energy's motion to reopen, the Form 112, and those records, pleadings, and orders generated thereafter, the record contains the Form 101 and attachments and the documents and orders relating to the settlement agreement.

Howard's Form 101 filed October 5, 2007, alleges on May 11, 2006, he was injured when he caught an EMT who fell crossing a ditch. Howard alleged an injury to his neck, back, right shoulder, and an emotional component.

The Form 110 agreement as to compensation entered into between Howard and Basin Energy indicates Howard testified he was injured on May 11, 2006, while attempting to resuscitate a co-worker who had suffered a heart attack. The nature of the injuries were "cervical and lumbar strains; right shoulder impingement syndrome; alleged depression and PTSD." The various impairment ratings provided by six different physicians were also listed in

the agreement. After setting out the amount of temporary total disability ("TTD") benefits paid, the settlement stated Howard is to receive \$85,000.00 in a lump sum and the following:

Settlement is for complete and total dismissal with prejudice of any and all claims, except that Plaintiff preserves and does not waive his right to future medical expenses that are reasonable and necessary and for his physical injuries. The open medical obligation of the Defendant/Employer is defined as a cervical and lumbar strain and right shoulder impingement syndrome.

The agreement indicated \$1,000.00 constituted consideration for a partial waiver of past medical expenses. With respect to future medical expenses, the agreement states as follows:

There is a partial waiver of future medical expenses in connection with the psychological/psychiatric claim. Plaintiff preserves and does not waive his right to future medical expenses for an open medical obligation of the Defendant/Employer which is defined as cervical and lumbar strain and right shoulder impingement syndrome. Medical expenses for any other medical conditions are waived, and \$1,000.00 of the settlement proceeds constitutes consideration for this partial waiver of future medical expenses.

For the sum of \$2,500.00, Howard waived his right to vocational rehabilitation, and for the sum of \$2,500.00, he waived his right to reopen. The agreement noted Howard

preserved and did not waive his right to future medical benefits for the physical injuries described by the open medical obligation. Under the heading "other information" the agreement contains, in part, the following:

Due to the risks and costs of further litigation, Plaintiff and the Defendant/Employer have agreed to compromise and settle this claim for a complete and total dismissal with prejudice of all claims including a waiver of medical expenses, a waiver of vocational rehabilitation and a waiver of the right to reopen; except that Plaintiff preserves and does not waive his right to future medical expenses that are reasonable and necessary and for the following defined open medical obligation; cervical and lumbar strain and right shoulder impingement syndrome. In consideration of the payment of \$85,000.00 in a lump sum all claims are waived except that Plaintiff preserves and does not waive his right to future medical expenses covered under the open medical obligation as described above.

The agreement also stated the \$85,000.00 lump sum payment included "interest, attorney fees, vocational rehabilitation, temporary total disability, permanent total disability, permanent partial disability, waiver of the right to reopen and waiver of medical expenses" except Howard did not waive his right to reasonable and necessary benefits for the defined physical injuries. However,

Howard waived his right to medical benefits for psychological/psychiatric conditions.

The agreement concludes with the following language:

The Plaintiff acknowledges the effects of the settlement. The Plaintiff has been advised that a dismissal with prejudice of all claims for indemnity means that he shall have no right to further payment of any income benefits whatsoever as a result of the work accident referenced herein. Plaintiff understands that he shall receive no further income benefits; vocational rehabilitation; or TTD benefits at anytime [sic] in the future. Plaintiff has been warned of the effects of this settlement agreement; Plaintiff desires to go forward with the settlement agreement due to the risk of loss and costs of further litigation.

The agreement was executed by Howard, his counsel, and counsel for Basin Energy.

On July 30, 2009, Hon. John Coleman, Administrative Law Judge ("ALJ Coleman") approved the agreement. On that same date, ALJ Coleman also approved an addendum to the agreement which set forth an allocation of the \$85,000.00 signed by Howard, his counsel, and counsel for Basin Energy. On July 30, 2009, ALJ Coleman also entered an order approving an attorney fee of \$9,000.00.

More importantly, on that same date, ALJ Coleman entered the following order:

This matter is before the Administrative Law Judge on motion of the Defendant-Employer to approve a Form 110-I settling the above-captioned claim. The Administrative Law Judge having reviewed the motion and being fully advised;

IT IS HEREBY ORDERED that the Plaintiff's claim will be and the same is hereby ordered DISMISSED, with prejudice, as SETTLED.

The above order clearly dismissed Howard's claim in its entirety, with prejudice, as settled. As the claim was dismissed with prejudice without any qualifying language, subject matter jurisdiction was lacking and the ALJ could not rule upon the medical fee dispute. Although neither of the parties have raised this issue, subject matter jurisdiction cannot be waived and may be raised at any time even on appeal even when not originally preserved as an issue at the time of the original proceedings. See Karahalios v. Karahalios, 848 S.W.2d 457 (Ky. App. 1993). Further, jurisdiction cannot be conferred by consent of the parties. Therefore, it is appropriate for this Board to make its own determination whether the CALJ properly granted Basin Energy's motion to reopen. See Hubbard v. Hubbard, 197 S.W.2d 923 (Ky. 1946). Therefore,

since Howard's claim was *dismissed with prejudice* neither Basin Energy nor Howard currently have the ability to seek reopening of the claim. Stated another way, Howard's claim could not be reopened as ALJ Coleman had dismissed his claim with prejudice on July 30, 2009.

We emphasize it is not within this Board's province to alter ALJ Coleman's July 30, 2009, order. As evidenced by Basin Energy's motion to reopen and Howard's response, it is apparent the July 30, 2009, order is contrary to the parties intended result. However, the fact remains the July 30, 2009, order has been in effect for over four years and neither party has sought relief from that order.

Accordingly, it is ordered the January 4, 2013, opinion and order, the February 6, 2013, order denying the petition for reconsideration, and the June 20, 2012 order sustaining Basin Energy's motion to reopen and joining Dr. Wright as a party are **VACATED**. It is further ordered this appeal is **DISMISSED** and this matter is **REMANDED** to the CALJ for entry of an order denying Basin Energy's motion to reopen.

ALL CONCUR.

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FRANKLIN A. STIVERS, MEMBER  
WORKERS' COMPENSATION BOARD

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