

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 24, 2015

CLAIM NO. 201473965

WISDOM FLOOR COVERINGS

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

GREGORY LYONS;
ERNIE'S CARPET;
UNINSURED EMPLOYERS FUND; and
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
DISMISSING

* * * * *

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

ALVEY, Chairman. Wisdom Floor Coverings ("Wisdom") seeks review of an Interlocutory Order rendered May 28, 2015 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits and medical benefits to Gregory Lyons ("Lyons"). The ALJ's

decision specifically notes it is interlocutory, and is not final and appealable. Wisdom also appeals from the July 22, 2015¹ order denying its petition for reconsideration, and from the June 18, 2015 order approving settlement agreement.

Lyons filed a Form 101, Application for Resolution of Injury Claim, on October 14, 2014 alleging he injured his right hand while cutting floor tile on July 23, 2013. A Benefit Review Conference ("BRC") was held on March 11, 2015. The BRC order and memorandum indicates the issues preserved for decision included jurisdiction; employment relationship; TTD benefits; medical benefits; average weekly wage; Lyons' physical capacity to return to the type of work performed on the date of injury; benefits per KRS 342.730; credit for unemployment benefits; whether Lyons was an employee or independent contractor; and entitlement to permanent total disability benefits.

In the "Interlocutory Opinion and Order" rendered May 28, 2015, the ALJ determined Lyon had not yet reached maximum medical improvement ("MMI") based upon Dr. Warren Bilkey's report, and was therefore entitled to TTD benefits and medical benefits. Wisdom filed a petition for

¹ Although the Notice of Appeal lists the order on reconsideration as July 22, 2015, it was actually dated June 22, 2015.

reconsideration on June 12, 2015 which was denied by the ALJ on June 22, 2015.

Because we conclude the ALJ's May 28, 2015 ruling is interlocutory and does not represent a final and appealable order, we dismiss this 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 readjudicate 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).

The ALJ, in arriving at his decision, stated he relied upon Dr. Bilkey's opinion expressed in his December 1, 2014 report. In that report, Dr. Bilkey stated, "Mr. Lyons is clearly not at MMI." Therefore, the ALJ could

reasonably determine from the record, especially based upon Dr. Bilkey's opinion additional treatment is required, Lyon has not reached MMI.

After reviewing the file, it is clear the opinion rendered May 28, 2015, and the June 22, 2015 order on reconsideration are interlocutory, and as such are not final and appealable as they do not operate to terminate the action or finally decide all outstanding issues. Likewise, they do not 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 merits of the claim.

That said, the appeal filed by Wisdom is hereby dismissed, and the claim is remanded to the ALJ to conduct all proceedings necessary for final adjudication of the claim, including a BRC and Hearing if required. Although the ALJ's orders are unclear, it is presumed his intent was for the claim to remain in abeyance until Lyon reaches MMI. We note the ALJ awarded TTD benefits and stated as follows:

Plaintiff is awarded temporary total disability benefits of \$266.67 per week, beginning January 26, 2015 and continuing until the plaintiff reaches maximum medical improvement and reaches a level of improvement that would permit him to return to his customary work or the work he was performing at the time of his injury on July 23, 2013.

The ALJ is reminded in determining the appropriate period of TTD benefits, he must apply the appropriate standard as set forth in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993); Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000); and Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004).

Also, while not required to do so, the ALJ should consider requiring status reports filed on a periodic basis to advise the status of Lyon's recovery. Nothing in this decision shall abridge the right of either party to appeal the final decision.

Accordingly, the appeal seeking review of the interlocutory decision rendered May 28, 2015; the order denying the petition for reconsideration issued June 22, 2015 by Hon. William J. Rudloff, Administrative Law Judge; and the settlement agreement approved on June 18, 2015, is hereby **DISMISSED**.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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