

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 26, 2018

CLAIM NO. 201501253

CALDWELL TANKS

PETITIONER

VS. APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

BRANDON BESS
TANK COATING AND CONTAINMENT SPECIALISTS
and HON. STEPHANIE KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
DISMISSING THE APPEAL AND REMANDING

* * * * *

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

STIVERS, Member. This matter came before the Board because the Hon. Stephanie Kinney, Administrative Law Judge ("ALJ"), had failed to address an outstanding petition for reconsideration. However, upon further review of the file, we conclude as a matter of law that the ALJ's April 10, 2017, Opinion and Order and the September 13, 2017, Order

ruling on Caldwell Tank's ("Caldwell") petition for reconsideration are interlocutory and do not represent final and appealable orders.

The Introduction of the ALJ's April 10, 2017, Opinion and Order reads as follows:

Plaintiff, Brandon Bess, has filed a claim alleging an injury as the result of a work accident on May 27, 2015, in the course of his employment with the Defendant, Tank Coating & Containment Specialists ("Tank Coatings"). Caldwell Tanks ("Caldwell") subcontracted Tank Coatings to paint the water tower Plaintiff fell from.

On December 28, 2015, the Uninsured Employers' Fund ("UEF") moved to join Caldwell as party to this claim. After reviewing the file, it appears that the prior Administrative Law Judge whom this claim was previously assigned never expressly granted the UEF's motion to join. However, a Benefit Review Conference Order, dated January 13, 2016, indicated the Benefit Review Conference was cancelled due to a "new defendant." Thus, the record implies Caldwell was effectively joined as a party on January 13, 2016. In any event, the claim proceeded and Caldwell was afforded an opportunity to take proof and participate in the claim. Therefore, none of the parties were prejudiced by this oversight.

This claim was transferred to the undersigned on July 25, 2016. Subsequently, the parties agreed to bifurcate this claim to address threshold issues including jurisdiction and coverage. Additionally, the parties agreed to waive a final hearing. The

Administrative Law Judge has reviewed all of the evidence of record and the matter is now ripe for decision.

After setting forth a summary of the evidence, the ALJ found the Commonwealth of Kentucky is vested with jurisdiction to adjudicate Brandon Bess's ("Bess") workers' compensation claim for an injury occurring in the Commonwealth. The ALJ concluded the workers' compensation policy issued by the Hartford/Travelers ("Travelers") to Tank Coating and Containment Specialists ("Tank Coating") did not provide coverage for injuries occurring within the Commonwealth of Kentucky. The ALJ also concluded Tank Coating subcontracted with Caldwell to complete a job in Kentucky but failed to obtain Kentucky workers' compensation insurance coverage. Therefore, pursuant to KRS 342.610(2), since "Caldwell subcontracted with Tanks [sic] Coatings [sic] to paint a water tower. As such, Caldwell is liable for payment of compensation to Plaintiff pursuant to KRS 342.610(2)." Based on the findings of fact and conclusions of law, the ALJ ordered as follows:

1. This ALJ finds Plaintiff was an uninsured employee of Tank Coating & Containment at the time of the May 27, 2015 work injury.
2. This ALJ finds Caldwell Tanks is liable pursuant to KRS 342.610 (2) for payment of compensation relating to the May 27, 2015 work injury.

3. The UEF is dismissed from this claim.

4. All motions for the approval of attorney's fees shall be filed within thirty (30) days after final disposition of this order. Any such motions must include an itemization of services together with either the actual times or a reasonably accurate estimate of the time expended of the itemized services listed.

On April 21, 2017, Caldwell filed a petition for reconsideration. On May 1, 2017, Bess filed a response to the petition for reconsideration and Travelers filed a response to the petition for reconsideration and a cross-petition for reconsideration. On May 12, 2017, Caldwell filed a response and objection to Travelers' petition for reconsideration asserting it was not timely filed. In the September 13, 2017, Order, the ALJ addressed Caldwell's petition for reconsideration providing additional findings of fact but left her April 10, 2017, Opinion and Order unaltered. The ALJ did not address Travelers' cross-petition for reconsideration and Caldwell's objection to the cross-petition for reconsideration. On October 11, 2017, Caldwell filed its notice of appeal.

803 KAR 25:010, § 21(2)(a), provides as follows:
"[w]ithin thirty (30) days of the date of 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, § 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) state 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 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; 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 all authority. *Cf.* KI USA Corp. v. Hall, 3 S.W.3d 355 (Ky. 1999); Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995); Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1980).

The ALJ's April 10, 2017, Opinion and Order and September 13, 2017, Order ruling on the petition for reconsideration meet none of these requirements. The ALJ's opinion does not operate to terminate the action. Moreover, the ALJ's ruling does not act to finally decide all outstanding issues, nor does it operate to determine all rights of the parties so as to divest the ALJ once and for all of authority to decide the overall merits of the case. The ALJ has yet to decide the extent of Bess's injuries and the appropriate award of income and medical benefits, if any, to which he is entitled. Thus, the ALJ has not entered a final decision on the merits of Bess's claim. Without question, the language in the ALJ's April 10, 2017, Opinion and Order establishes Caldwell cannot

appeal the ALJ's April 10, 2017, interlocutory Opinion and Order and the September 13, 2017, Order ruling on the petition for reconsideration filed by Caldwell. Consequently, the appeal must be dismissed.

In this instance, the ALJ's decision plainly does not address with finality "all" of the outstanding contested issues. We also note the language required by CR 54.02 is not contained in the ALJ's decision. The ALJ specifically stated in the opinion that the claim was bifurcated for an initial determination as to jurisdiction and coverage. Consequently, the appeal of Caldwell is ordered **DISMISSED** and this claim is **REMANDED** to the ALJ for entry of a final decision on all remaining issues.

We point out our dismissal of this appeal does not in any manner affect the enforceability of the ALJ's April 10, 2017, interlocutory Opinion and Order. The parties are required to comply with all terms and conditions of that order until amended or set aside by the ALJ.

ALL CONCUR.

FRANKLIN STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

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