

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 26, 2021

CLAIM NO. 202000168

DOUG GABEHART, LLC D/B/A
ALL AMERICAN CONSTRUCTION

PETITIONER

VS.

APPEAL FROM HON. JOHN H. MCCRACKEN
ADMINISTRATIVE LAW JUDGE

PAUL DICKEN;
UNINSURED EMPLOYERS' FUND; AND
HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
DISMISSING & REMANDING

* * * * *

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

BORDERS, Member. Doug Gabehart, LLC d/b/a/All American Construction (“Gabehart”) appeals from the December 14, 2020 Interlocutory Opinion, Award, and Order and the January 15, 2021 Order on Petition for Reconsideration rendered by Hon. John McCracken, Administrative Law Judge (“ALJ”). The ALJ

determined Paul Dickens (“Dickens”) was an employee of Gabehart, and that he suffered a severe right foot and leg injury as a result of a work-related fall on November 21, 2019 and has not reached maximum medical improvement (“MMI”) from his injuries. The ALJ placed the claim in abeyance and ordered Gabehart to pay for medical treatment and to institute temporary total disability (“TTD”) benefits until he achieves MMI. The ALJ passed on ruling on the remaining issues regarding permanency of the injuries.

Gabehart filed a Petition for Reconsideration regarding the correct average weekly wage, and Dicken filed a Petition for Reconsideration to correct a typographical error concerning the start date of TTD benefits. The ALJ thereafter entered Orders correcting the errors regarding the rate and duration of TTD.

On appeal, Gabehart argues the ALJ erred in determining Dicken was an employee at the time of his accident. The Opinion, Award, and Order of December 14, 2020 and the Order on Reconsideration of January 15, 2021 are interlocutory in nature. They are not final and appealable. Therefore, this appeal must be dismissed.

Dicken filed a Form 101 alleging he suffered work-related injuries to his right foot and leg as a result of falling from a roof on November 21, 2019, while he was working as a roofer for Gabehart. Dicken and Gabehart both testified by deposition and at the hearing. The ALJ also considered medical proof. The ALJ bifurcated the claim to determine the threshold issues of whether Dicken was an employee versus independent contractor.

In the December 14, 2020 Interlocutory Opinion, Award, and Order, the ALJ stated as follows regarding the issue of employee versus independent contractor:

Employment relationship. A contractor that subcontracts any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor, unless the subcontractor is primarily liable for such compensation has secured the payment of compensation as provided for in this chapter...KRS 342.610(2).

The Kentucky Supreme Court set forth the factors to review to determine if a person is an independent contractor, or employee. These factors include: 1) the extent of control which, by the agreement, the master may exercise over the details of the work, 2) whether or not the employee is engaged in a distinct occupation or business, 3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, 4) the skill required, 5) whether the employer or the workman supplied the instrumentalities, tools, and the place of work for the person performing the work, 6) the length of time the person is employed, 7) method of payment, 8) whether or not the work is a part of the regular business of the employer, and 9) whether or not the parties believe they are creating the relationship of master and servant. Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965).

In the case at bar, Gabehart began All American Construction in the summer of 2018. He worked construction and remodeled houses. In September 2019, he hired Dicken. Gabehart provided a trailer with all the tools Dicken used for the jobs. Gabehart obtained the jobs and made all arrangements with the homeowners. Dicken did not interact with the homeowner about a job to perform. Gabehart paid Dicken \$12.50 per hour. Dicken testified that he worked five, sometimes six, days a week. Gabehart was Dicken's boss and told Dicken where and when to show up for work. Roofing was a part of Gabehart's regular business. There is no proof that Dicken exercised any control over any aspect of the

jobs he worked for Gabehart, other than perform the work instructed to perform. Gabehart testified that he did not believe he needed workers' compensation insurance when hiring contract labor. That is the only statement the ALJ could find that indicated he may have thought Dicken was a contract laborer. Dicken had not worked in almost 20 years when he began work for Gabehart. Finally, Gabehart stated that on November 21, 2019, Dicken worked for him.

The ALJ relies on Gabehart and Dicken to find that on November 21, 2019, Dicken was an employee of Gabehart and not an independent contractor. The ALJ finds it important that Gabehart admitted he employed Dicken on the date of the accident. This is in addition to the fact that Gabehart controlled almost every aspect of the work Dicken performed, including finding the jobs, supplying tools, setting the work day and location, and hourly pay.

The ALJ placed the case in abeyance pending Dicken attaining MMI and ordered payment of TTD benefits and medical benefits.

Because we conclude the ALJ's opinion and Order on Petition for Reconsideration are not final and appealable, 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 only determined Dicken was an employee of Gabehart. No determination was made regarding Dicken's entitlement to permanent income benefits, permanent medical benefits, or any other remaining contested issues. After reviewing the ALJ's December 14, 2020 Opinion and January 15, 2021

Order, it is readily apparent they do not operate to terminate the action or finally decide all outstanding issues, thereby divesting the ALJ once and for all of the authority to decide the merits of the claim.

That said, Dicken's appeal must be dismissed, and the claim is remanded to the ALJ to conduct all proceedings necessary for a final decision on all issues. Once the ALJ has issued a final determination regarding all issues, any aggrieved party may file an appeal.

Accordingly, the appeal seeking review of the decisions rendered December 14, 2020 and January 15, 2021 by Hon. John McCracken, Administrative Law Judge is hereby **DISMISSED**. This claim is **REMANDED** for an additional determination as set forth above.

ALL CONCUR.

R. SCOTT BORDERS, MEMBER
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