

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 23, 2021

CLAIM NO. 201963440

RHONDA GARRETT and
WAYNE C. DAUB, ESQ.

PETITIONER

VS.

**APPEAL FROM HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE**

DOLLAR GENERAL CORPORATION and
HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

ALVEY, Chairman. Hon. Wayne C. Daub (“Daub”), the former attorney representing Rhonda Garrett (“Garrett”), appeals from the July 30, 2021 Order rendered by Hon. Tonya M. Clemons, Administrative Law Judge (“ALJ”). The ALJ dismissed Garrett’s claim without prejudice. On appeal, Daub argues the ALJ erred in dismissing the claim since it was based upon Garrett’s mistaken belief that

her workers' compensation claim should be adjudicated in a different court of law. Because we find no error in the July 30, 2021 Order, we affirm.

Garrett retained Daub as her attorney in January 2020 to represent her regarding her alleged work injury occurring on September 18, 2019. Subsequently, Garrett filed a Form 101 on February 12, 2020. The Form 101 alleges Garrett injured her head, neck, left shoulder, and left arm on September 18, 2019 when "a cart got caught and fell over." The Form 104 indicates Garrett began working for Dollar General Corporation ("Dollar General") sometime in 2019. In support of the claim, Garrett submitted medical records from the Norton Healthcare Emergency Department, University of Louisville Physicians, and Thompson and Chou Center for Physical Medicine and Rehabilitation. Also attached is a completed Form 113 designating Dr. Rodney Chou as her physician on October 8, 2019, various medical bills, and several Form 114s.

Dollar General filed medical records, the January 16, 2020 report and March 30, 2020 supplement report by Dr. Joseph Zerga, Dr. Rick Lyon's April 8, 2020 report, a job description, and wage records. Dr. Lyon also testified by deposition on August 14, 2020.

Garrett filed Dr. Jeffrey Fadel's June 11, 2020 report. He examined Garrett at Daub's request. Dr. Fadel diagnosed Garrett with cervical spondylosis with foraminal stenosis, aroused by the work injury; C5 nerve root radiculopathy left upper extremity due to the work injury; and adhesive capsulitis of the left shoulder, probably caused from C5 radiculopathy after the work injury. He assessed a combined 25% impairment rating attributable to the work injury. He recommended

additional treatment, but opined Garrett had reached medical maximum improvement if no further treatment was available. He assigned permanent restrictions and opined Garrett is unable to return to her prior job at Dollar General.

Garrett testified by deposition on March 30, 2020. Garrett began working for Dollar General in July or August 2019 as an assistant store manager. Garrett testified a roll cage is a six-foot-tall metal cage on wheels that is delivered to the store loaded with products. On September 18, 2019, Garrett opened the bay door to receive a delivery. The roll cage got hooked or caught on the automatic door. The automatic door lifted the roll cage off the ground, and it then fell over, striking Garrett in the forehead. Garrett was unable to clearly recall the events that took place thereafter. She reported the accident to the district manager and sought treatment the same day. Garrett testified as to the treatment she had received since the work accident. She also described her symptoms in relation to her head, neck, left arm, and left shoulder. Garrett also testified she began developing right arm symptoms in January or February 2020.

On December 22, 2020, Daub filed a motion to withdraw as counsel citing a breakdown in trust, and his belief Garrett is working against her own interest. Daub also filed a Motion for Attorney Lien for fee and costs. The ALJ sustained the motion to withdraw on January 11, 2021.

On January 29, 2021, Hon. Ian Godfrey (“Godfrey”) entered a notice of appearance on Garrett’s behalf. He filed additional treatment records and a motion to bifurcate. However, Godfrey filed a motion to withdraw as counsel on

April 5, 2021 stating Garrett had terminated his representation. The ALJ sustained the motion to withdraw on April 9, 2021. Subsequently, Garrett proceeded *pro se*.

A telephonic status conference was held on May 12, 2021 to address Garrett's pending motion to amend the Form 101, which included several attachments. The ALJ sustained Garrett's, *pro se*, motion to amend the Form 101, and noted her allegations of injuries shall now include her head, neck, shoulder, back, arms, elbows, and hands. The ALJ subsequently sustained Dollar General's motion to strike Garrett's motion to amend and attachments due to relevance and struck the documents from the record. The ALJ noted Daub's notice of a lien for attorney's fees and costs and set forth a proof schedule. Subsequently, Dollar General filed a Notice of Independent Medical Examination, giving notice to Garrett to appear for an examination with Dr. Lyon on July 7, 2021.

In an Order dated June 3, 2021, the ALJ sustained Garrett's motion for additional time to retain an attorney. The ALJ sustained Dollar General's motion to compel an updated Form 105 and an updated Form 106.

On June 7, 8, and 9, 2021, Garret filed approximately 190 documents. Two of the documents were titled "Response-Motion to Amend" and "Notice of Filing: Supplemental Notice of Disclosure." Two are titled, "Motion-Other." Approximately 180 documents were labeled "Notice of Disclosure." The remaining documents are duplicates of documents already contained in the record.

On, June 8, 2021, Dollar General filed a Motion for an emergency telephonic conference. Dollar General objected to and moved to strike all documents filed by Garrett labeled "Notice of Disclosure." In a separate document,

Dollar General filed a Motion to Compel Garrett's deposition testimony and for her to attend the examination with Dr. Lyon scheduled for July 7, 2021. Dollar General also stipulated it had not paid any temporary total disability benefits. Garrett also filed a document to request "financial benefits of representing herself" and included multiple attachments.

The ALJ entered an Order dated June 30, 2021 reflecting a telephonic status conference was conducted on June 22, 2021. The ALJ determined the multiple filings made by Garret in June 2021 were irrelevant and inadmissible, contained inflammatory allegations of conduct that Garrett attributed to both parties and non-parties, or were duplicative. The ALJ stated that the documents would remain in the record for appellate purposes. The ALJ sustained Dollar General's motion to compel Garrett to participate in a discovery deposition and attend the scheduled medical examination.

Ultimately, Garrett refused to participate in the deposition and failed to attend the July 7, 2021 medical examination with Dr. Lyon. Dollar General filed a Motion for Contempt, for Attorney's fees, and to dismiss Garrett's claim with prejudice based upon her failure to participate in a deposition and to attend the medical examination with Dr. Lyon, or to dismiss her amended claim.

On July 8, 2021, Garret, *pro se*, filed a document entitled, "Motion-Other: Motion to Close." Garrett stated that "this case should be closed" and that "all arguments or disagreements should be taken up with another court for review and ruling." Garrett requested "the court to close this case and take no actions to remove any evidence or to make any other ruling in favor or against either party."

Garrett stated this would coincide with the ALJ's statement that she could only adjudicate matters related to medical and worker's compensation benefits. Garrett desired a "new court where all aspects of this case can be reviewed, and a remedy will be sought is the best court for this particular case."

Daub filed a response on July 15, 2021 asserting Garrett did not understand the true consequences of dismissing her claim and the ALJ should not dismiss her claim. He also noted that the only remedy available to Dollar General is the suspension of benefits during the period of refusal to submit to an independent medical evaluation pursuant to KRS 342.205. Dollar General also filed a response on July 15, 2021. While it did not object to the dismissal of Garrett's claim, Dollar General requested the ALJ convert the scheduled telephonic conference to a hearing to obtain a written record. Garrett filed multiple documents on July 22, 2021 and July 28, 2021.

The ALJ entered an Order on July 30, 2021, which is subject to this appeal. It states, in relevant part, as follows *verbatim*:

This matter is before the Administrative Law Judge following a July 27, 2021 telephonic status conference. Present were Plaintiff Rhonda Garrett and counsel for Defendant, Mark Bush and Clarke Cotton. Also present was Wayne C. Daub, Plaintiff's prior attorney, whose pleadings describe his continued involvement as "a real party in interest."

At the conference, the parties were able to discuss several pending motions and responses including Defendant's motions for contempt, attorneys' fees, and to dismiss the claim; the response to Defendant's motions by Attorney Daub; Plaintiff's request to "close" the claim; and the response to Plaintiff's request to "close" submitted by Defendant.

At the time of the July 27, 2021 telephonic conference, the ALJ was able to question Plaintiff as to the intent of her request to “close” the claim as well as her understanding of its consequences. The ALJ explained to Plaintiff Garrett that her request to “close” her claim is equal to a request for a voluntary dismissal of her workers’ compensation claim without allowing an ALJ an opportunity to decide the merits of her entitlement to workers’ compensation income and medical benefits for her alleged September 18, 2019 work-related injuries.

As explained to Plaintiff in prior telephonic status conferences, the amendment of her claim to add allegations of injuries to additional body parts required additional proof time to allow all parties to support or defend against those claims. Pursuant to the May 12, 2021 Order sustaining Plaintiff’s request to amend her claim, a proof schedule providing time to present additional proof in this matter was entered. Consistent with that Order, Defendant attempted to schedule a new deposition and updated medical evaluation of Plaintiff. Plaintiff indicated in a June 22, 2021 telephone conference that she understood the process of allowing the parties to obtain additional proof. It was previously explained to Plaintiff that at the conclusion of proof a Formal Hearing would be held before this ALJ and a decision on her entitlement to workers’ compensation benefits would be issued within sixty days following that Hearing as provided by administrative regulations governing the procedure of workers’ compensation claims.

Plaintiff stated at that June 22, 2021 telephonic conference that she would participate in the discovery process of an additional deposition and medical evaluation to determine the extent of injury to any newly alleged body part. Plaintiff’s agreement to participate in additional discovery was documented in a June 30, 2021 Order. Subsequently, Plaintiff appears to have refused to participate in further discovery, prompting Defendant’s motion for contempt, attorneys’ fees, and dismissal.

Plaintiff Garrett indicated to the ALJ and all parties present at the July 27, 2021 telephonic status conference, as stated in her request to “close,” that her intent is to

seek remedy from a court and/or judge that she deems able to follow the law and rule on all aspects of her claim. Attorney Daub reiterated to the court the arguments in his response to Defendant's motions. Specifically, he stated that Plaintiff's request to "close" was not in her best interests as a closure of her claim at this time could prevent her from an award of workers' compensation benefits for her alleged injuries in the future. Despite statements from Attorney Daub, Plaintiff stated that her intent was to seek remedy from a court or judge, such as the Kentucky Workers' Compensation Board, that she deems able to decide all portions of her claim including, but not limited to, her allegations of fraud.

Plaintiff also stated that this ALJ had not reviewed all aspects of her claim and was unable or unwilling to undertake such a review. Despite Plaintiff's assertion, this ALJ explained that all aspects of her claim have been reviewed and the ALJ would be able to make a determination as to her entitlement to workers' compensation benefits as provided in the Workers' Compensation Act at the conclusion of proof. The ALJ also explained to Plaintiff that closure of her claim without a decision on the merits would mean that her workers' compensation claim would be closed without establishing her right to benefits associated with her alleged injuries. Plaintiff restated her intent to seek other remedies. Accordingly, this ALJ having reviewed this claim, said motions and responses, and being otherwise sufficiently advised, it is ordered:

Defendant's motion for contempt is overruled. The Kentucky Workers' Compensation Act and Title 803 of the Kentucky Administrative Regulations provide no mechanism for an ALJ to hold any party in contempt. The mechanism permitted for an ALJ when a party refuses to submit to a medical evaluation is suspension of benefits during any period for which the refusal occurs or continues to occur. See KRS 342.205. Defendant's motion for involuntary dismissal of Plaintiff's claim pursuant to Kentucky Civil Rule (CR) 37.02(2)(c) is overruled. Defendant's motion for attorneys' fees pursuant to CR 37.02(3) for Plaintiff's failure to comply with a discovery order is overruled as

circumstances exist in this matter making the award of such fees unjust.

Plaintiff's request to "close" her claim operates as a motion for voluntary dismissal of her workers' compensation claim. Plaintiff's request to "close" her claim is sustained. Plaintiff's claim is dismissed without prejudice.

No petition for reconsideration was filed by either party. Daub filed a Notice of Appeal listing himself and Garrett as Petitioners. Garrett, *pro se*, filed a "Brief to the Board" on August 24, 2021, which was ultimately accepted as filed.

On appeal, Daub notes he is a real party in interest to this claim due to his right to costs and an attorney fee, particularly considering Garrett had a valid and potentially compensable injury. Daub notes Garrett's previous attorneys all attempted to represent her zealously and in her best interest. Daub notes, "The ALJ did everything possible on every occasion to try to explain to [Garrett] what her rights were and what an ALJ can do in a workers' compensation claim and to protect her rights to the extent that she could and still be impartial." Daub argues the ALJ, as a matter of law, could not dismiss Garrett's claim "because it was based upon mistake, the fact that the Claimant believes that she is entitled to workers' compensation benefits . . . in a court and not before a Workers' Compensation Administrative Law Judge." Daub argues this fundamental mistake should prevent the ALJ from dismissing the claim.

In her "Brief to the Board," Garrett questions why Daub filed an appeal on her behalf. She alleges the "original claim 201912812¹ was fraudulently

¹ LMS does not contain a Claim # 201912812

closed.” Garrett explained she requested the ALJ to “close” her claim “so that a judge who is capable and has the powers to ‘judicate’ on the matters of a workers compensation case and unlawful activity in their court be sitting on the bench for this particular case.” Garrett argues she is entitled to indemnity and medical benefits, including reimbursement for out-of-pocket expenses and mileage reimbursement. Garrett alleges multiple parties have defrauded and retaliated against her. She requests the Board accept her statement regarding the occurrence of the accident, a copy of the file 201912812, and written answers from Dollar General regarding lost wages and mileage reimbursement. In a “Statement for Rhonda Garrett” filed October 26, 2021, Garrett stated she agreed with Daub in that she did not want her claim dismissed, but rather placed in front “of an ALJ that has judicial powers.” Garrett alleges the ALJ did not inform her the claim would be dismissed, or the consequences of a dismissal. She also requested her claim be amended to include seven allegations or documents. Garrett stated she has no legal background and only reads and interprets laws as they are written.

As noted above, Garrett filed a motion on July 8, 2021 requesting the ALJ close her case so that another court could review the claim. A telephonic conference was held on July 27, 2021. Subsequently, the ALJ issued the July 30, 2021 Order dismissing Garrett’s claim without prejudice. Although we are sympathetic to Garrett, we find Tony Smith and Smith Services, Inc. v. Bear, Inc., 419 S.W.3d 49 (Ky. App. 2013) instructive. There, the Court stated as follows regarding one who undertakes self-representation:

An individual may file and practice his own lawsuit in any court within the Commonwealth. If he elects to do

so, he is bound by the same rules and procedures as a licensed lawyer. *Taylor v. Barlow*, 378 S.W.3d 322, 326 (Ky.App.2012); SCR⁴ 3.020. Our Supreme Court has said:

[o]nly persons who meet the educational and character requirements of this Court and who, by virtue of admission to the Bar, are officers of the Court and subject to discipline thereby, may practice law. The sole exception is the person acting in his own behalf.

Fraze v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 782 (Ky.1965). Moreover, there is no constitutional right to counsel in civil cases other than: (1) those in which imprisonment is a potential punishment; or (2) in which an indigent inmate fails to defend a civil action brought against him. *May v. Coleman*, 945 S.W.2d 426, 427 (Ky.1997) (citing *Lewis v. Lewis*, 875 S.W.2d 862 (Ky.1993), and *Davidson v. Boggs*, 859 S.W.2d 662 (Ky.App.1993)). This civil case involves neither of those exceptions.

Though a degree of lenity is afforded *pro se* litigants and they are not strictly held to the same standard as legal counsel, *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky.1983), the judiciary's conciliatory attitude is not boundless. *Cardwell v. Commonwealth*, 354 S.W.3d 582, 585 (Ky.App.2011). The right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the litigant exercising the right, *King v. Commonwealth*, 374 S.W.3d 281, 290 (Ky.2012) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)), and one who undertakes self-representation assumes "the dangers and disadvantages" thereof. *Id.*, at 292 (citations omitted). Proceeding *pro se* does not provide one with "a license not to comply with relevant rules of procedural and substantive law." *Faretta v. California*, 422 U.S. 806, 835 n. 46, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). Thus, one who is ignorant and inexperienced regarding what is required by the substantive law and rules of procedure may unintentionally prove the veracity of the oft-quoted maxim, "a man who represents himself has a fool for a client and a fool for a lawyer." *Id.*, 422 U.S.

806, 852, 95 S.Ct. 2525, 2550, 45 L.Ed.2d 562 (1975)
(dissenting opinion).

Smith exercised his right to represent himself in this civil matter. He proceeded *pro se*, without benefit of qualified legal counsel. In appealing the unfavorable summary and monetary judgments ultimately entered against him by the trial court, Smith's election precludes him from reasonably arguing the matter should be reversed merely because—in hindsight—he now realizes he lacked the requisite legal knowledge, skill, and experience of an attorney in presenting his defense. In this respect, Smith may have erred, but the trial court did not.

Id. at 55-56.

Garrett exercised her right to represent herself in this workers' compensation claim. Garrett, *pro se*, moved to “close” the claim. It is clear both Daub and Dollar General explained the consequences of this motion in their responses. It is also clear, as noted in the July 30, 2021 Order, the ALJ explained to Garrett that the request to close the claim amounted to a request for a dismissal of her claim without allowing an ALJ an opportunity to decide the merits of her entitlement to income and medical benefits for her alleged September 18, 2019 work-related injuries. The ALJ noted that she explained to Garrett additional proof time had been granted since her Form 101 had been amended to include additional injuries. However, Garrett refused to participate in further discovery. The ALJ noted Garrett requested closure of her claim at the July 27, 2021 conference, and Daub argued her request to “close” the case was not in her best interest. Despite Daub's arguments, Garrett stated she wished to seek remedies from another court or judge able to address and decide all portions of her claim, including but not limited to her allegations of fraud. The ALJ emphasized she had reviewed all aspects of Garrett's

claim, and would be able to make a determination as to her entitlement to workers' compensation benefits at the conclusion of proof.

The ALJ also explained to Garrett "that closure of her claim without a decision on the merits would mean that her workers' compensation claim would be closed without establishing her right to benefits associated with her alleged injuries. Plaintiff restated her intent to seek other remedies." Daub cites to no case law, statute, or regulation supporting his argument the ALJ was precluded as a matter of law from dismissing the claim, as requested by Garrett, based upon mistake. In appealing the unfavorable July 30, 2021 Order, Garrett's election to proceed *pro se* precludes her from arguing she was mistaken since she has no legal background and only reads and interprets laws as they are written. The Board is satisfied the consequences of Garrett's motion to close was explained to her by the ALJ, and that Garrett pursued this course of action nevertheless.

Accordingly, the July 30, 2021 Order rendered by Hon. Tonya M. Clemons, Administrative Law Judge, is hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

DISTRIBUTION:

PETITIONER:

RHONDA GARRETT
15046 BOBWHITE DR
BROOKVILLE, IN 47012

USPS

PETITIONER:

HON WAYNE C DAUB
600 W MAIN ST, STE 300
LOUISVILLE, KY 40202

LMS

COUNSEL FOR RESPONDENT:

HON MARK BUSH
250 GRANDVIEW DR, STE 550
FT MITCHELL, KY 41017

LMS

ADMINISTRATIVE LAW JUDGE:

HON TONYA M CLEMONS
657 CHAMBERLIN AVE
FRANKFORT, KY 40601

LMS