Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 20, 2019

CLAIM NO. 201701063

WADE MASSENGILL PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH, ADMINISTRATIVE LAW JUDGE**

D.W. WILBURN, INC.
DAVIS BROTHERS ROOFING
UNINSURED EMPLOYERS' FUND
and HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION & ORDER
DISMISSING

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

STIVERS, Member. On November 27, 2019, after reviewing the record, this Board entered a show cause order granting the parties fifteen (15) days to show cause why the above-styled appeal of the Petitioner, Wade Massengill ("Massengill"), should not be dismissed since his appeal is not from a final and appealable decision. The show cause order provided the following reasoning:

Massengill's Form 101 asserts a claim against Davis Brothers Roofing ("Davis Brothers") as his employer and against DW Wilburn, Inc. ("DW Wilburn") as an additional defendant. Massengill listed the reason for joining DW Wilburn as follows: "D.W. Wilburn was the general contractor who employed Davis Brothers Roofing." The Uninsured Employers' Fund ("UEF") was later joined as a party by Order dated June 15, 2017.

The first "Benefit Review or Status Conference Order and Memorandum" of October 11, 2017, lists the contested issues as jurisdiction under the Act; coverage under any insurance policy; and, up-the-ladder liability. A subsequent Benefit Review Conference dated November 13, 2018, reflects the parties stipulated an employment relationship existed between the plaintiff and the employer and that Massengill sustained a work-related injury on June 15, 2015. Temporary total disability ("TTD") benefits and medical expenses were paid. The parties stipulated to the average weekly wage. The contested issues were listed as follows: benefits per KRS 342.730; credit for TN benefits; and KRS 342.165 violation. Under the heading "Other," is "whether defense impairment in compliance with AMA Guides; whether safety violation can go up the ladder; and plaintiff alleging separate violations against DW Wilburn and Davis Brothers."

The defendants, Davis Brothers, DW Wilburn, and the UEF, were all represented by counsel during the proceedings.

On May 13, 2019, Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ") entered an Opinion, Award, and Order. In her decision, the ALJ stated Massengill sustained a June 15, 2015, work-related injury to his back, right shoulder, elbow, and wrist while working for Davis Brothers, a sub-contractor for DW Wilburn. On January 31, 2018, Riverport Insurance Company was dismissed by agreement of the parties. The ALJ noted the parties also agreed, "Davis Brothers did not have valid Kentucky workers' compensation insurance coverage." After summarizing all the evidence, the ALJ determined Massengill sustained a work injury resulting in an impairment rating. The ALJ also found there was no evidence that either Davis Brothers or DW

> Wilburn knowingly or willingly failed to comply with any safety regulations or procedures. The ALJ ordered Massengill recover from the defendants and/or its insurance carrier TTD benefits, permanent partial disability benefits, and medical benefits. The ALJ allowed a credit for the Tennessee workers' compensation benefits Massengill received.
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> Under this factual scenario, the defendants do not have joint and several liability. As such, the award should have assessed liability for Massengill's income and medical benefits against Davis Brothers. Since the parties agreed Davis Brothers did not have a valid Kentucky workers' compensation insurance carrier, the ALJ should have also determined whether DW Wilburn, as an up-the-ladder contractor, or the UEF bore the liability for the awarded benefits if not paid by Davis Brothers. The decision resolved none of these issues. It did not assess specific liability against any of the three defendants in this action. Thus, it appears the Opinion, Award, and Order is not a final and appealable order as the ALJ has failed to assess specific liability against any of the named defendants.

The parties were granted fifteen (15) days from the date of the order to show cause why the appeal should not be dismissed and the claim remanded to the ALJ for entry of an amended Opinion, Award, and Order setting forth Davis Brothers Roofing's ("Davis Brothers") liability for the income and medical benefits awarded. The ALJ would also determine whether D.W. Wilburn, Inc. ("D.W. Wilburn") was an up-the-ladder contractor and bears the responsibility for the income and medical benefits and, if not, whether the Uninsured Employers' Fund ("UEF") bears the responsibility.

None of the parties filed a response to the order. Because the ALJ's Opinion, Award, and Order and subsequent Order of June 12, 2019, ruling on Massengill's petition for reconsideration do not constitute a final and appealable

decision, we dismiss Massengill's appeal and remand the claim. As noted in our November 27, 2019, show cause order, the ALJ's May 13, 2019, Opinion, Award, and Order merely directs Massengill "shall recover from the defendants or its insurance carrier." Also, as noted in our order, the parties do not have joint and several liability. Since the parties agreed Davis Brothers did not have valid Kentucky workers' compensation insurance coverage, and the parties stipulated an employment relationship existed between Massengill and the defendant-employer, the ALJ should have determined Davis Brothers as the employer bore the initial liability for the award of income and medical benefits. In the findings of fact and conclusions of law, the ALJ adopted the stipulations by the parties. However, there is no finding Davis Brothers, as the employer, did not have valid workers' compensation insurance coverage. Further, the ALJ did not determine whether D.W. Wilburn is an up-the-ladder contractor and bears the responsibility for income and medical benefits, if not paid by Davis Brothers. If D.W. Wilburn did not bear the responsibility for income and medical benefits as an up-the-ladder contractor, then the ALJ should have addressed the UEF's potential liability for the income and medical benefits. The Opinion, Award, and Order is silent as to all of these issues.

The ALJ's decision does not address the liability of the respective defendants and Massengill's right of recovery against the respective defendants, if any. Therefore, we conclude, as a matter of law, the ALJ's May 13, 2019, Opinion, Award, and Order and the June 12, 2019, Order ruling on Massengill's petition for reconsideration are interlocutory and do not represent final and appealable orders. 803 KAR 25:010, § 22(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, § 22(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.
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> (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. *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).

Without question, the ALJ's May 13, 2019, Opinion, Award, and Order and subsequent order of June 12, 2019, meet none of these requirements. Consequently, 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 the rights of the respective parties so as to divest the ALJ once and for all of the authority to decide the overall merits of the case. Instead, the ALJ has yet to decide the issues concerning the respective defendant's liability, if any, for Massengill's income and medical benefits. Consequently, as a matter of law, the May 13, 2019, Opinion, Award, and Order and the June 12, 2019, Order ruling on the petition for reconsideration must be deemed interlocutory. Therefore, it is the ALJ as fact-finder, not this Board, who retains jurisdiction of this claim. *See* KRS 342.275. Accordingly;

IT IS HEREBY ORDERED AND ADJUDGED the appeal of Massengill is **DISMISSED**. This claim is **REMANDED** to the ALJ for entry of an amended Opinion, Award, and Order in conformity with the views expressed.

DATE ENTERED: DECEMBER 20, 2019

ALL CONCUR.

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FRANKLIN STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

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