RENDERED: November 13, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000306-WC

TAYLOR GROUP-CLASSIC COOKIES (Insured by ITT Hartford) — APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-95-008987 & WC-90-032336

TERESA RAYBURN; SPECIAL FUND; TAYLOR GROUP-CLASSIC COOKIES (Insured by Cincinnati Insurance Company); HON. J. LANDON OVERFIELD, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

AND: NO. 1998-CA-000558-WC

TERESA RAYBURN — CROSS-APPELLANT

v.

CROSS-PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-95-008987 & WC-90-032336

TAYLOR GROUP-CLASSIC COOKIES (Insured by ITT Hartford); SPECIAL FUND; TAYLOR GROUP-CLASSIC COOKIES (Insured by Cincinnati Insurance Company); HON. J. LANDON OVERFIELD, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION AND ORDER
1) AFFIRMING ON APPEAL
2) DISMISSING CROSS-APPEAL

* * * * *

BEFORE: COMBS, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE: The Taylor Group-Classic Cookies (The Taylor Group) as insured by ITT Hartford (ITT) petitions for review of an opinion of the Workers' Compensation Board (Board) entered January 12, 1998, affirming the opinion of the Administrative Law Judge (ALJ), and an order overruling a petition for reconsideration. The sole issue raised in the petition is the responsibility for medical payments as between the former insurer of The Taylor Group, ITT, and a subsequent insurer, Cincinnati Insurance Company (CIC). The claimant, Teresa Rayburn (Rayburn), cross-petitions for review of the ALJ's decision, affirmed by the Board, denying her claim for an award of permanent partial disability (PPD) payments. For the reasons set forth below, we affirm the Board on the petition and dismiss the cross-petition as untimely.

Rayburn was initially injured on the job at The Taylor Group in December 1988, and underwent low back surgery with Dr. James Russell in April 1989. She entered into a settlement agreement with ITT and the Special Fund for benefits based upon a 30% PPD, apportioned 50/50, which agreement was approved by the ALJ. Rayburn returned to work with only periodic flair-ups until February 5, 1995, when she experienced pain radiating down her right leg while lifting a box of Pepsi syrup. Rayburn returned to Dr. Russell for additional treatment, was treated conservatively, and was released to return to work with restrictions on July 31, 1995. Rayburn was paid TTD benefits of

$190.18 per week from February 5, 1995, through July 31, 1995, by CIC, The Taylor Group's insurer on February 5, 1995.

Rayburn moved to reopen her 1988 claim on September 5, 1995. This motion was supported by only Rayburn's affidavit indicating the restrictions placed upon her by Dr. Russell. No affidavit or report of Dr. Russell was submitted. The Chief ALJ determined that Rayburn failed to establish a prima facie showing of a worsening of her condition and denied the motion. On appeal, the Board affirmed in an opinion rendered March 8, 1996.

On July 16, 1996, Rayburn again moved to reopen her 1988 claim. Rayburn filed an affidavit claiming she was unable to return to work after the February 5, 1995 incident. Rayburn also submitted a vocational report from Eckman Freeman and Associates and a medical report from Dr. Russell. Dr. Russell's medical report authorized Rayburn to return to light duty work with restrictions of no lifting over 25 pounds; no stooping, bending or climbing; no moving of equipment or machinery; and sedentary work only. The Chief ALJ again denied the motion in an order entered September 4, 1996. The Chief ALJ determined that Rayburn had again failed to present a prima facie case. In his opinion, the Chief ALJ stated:

> While Plaintiff points to attempts to obtain vocational placement and a list of light duty restrictions from Dr. Russell, Dr. Russell's restrictions do not indicate that they were imposed as a result of the 1988 work injury and the vocational efforts were apparently undertaken by the insurance carrier for an alleged 1995 injury.

That order was initially appealed by Rayburn, then withdrawn.

On August 22, 1996, Rayburn filed a new claim for the February 5, 1995 incident. At this time ITT moved to reopen the 1988 injury claim to contest certain medical benefits arising out of the 1995 incident. Both motions were granted and thereafter a hearing held. The evidence presented at the administrative hearing consisted of medical reports and deposition of Dr. Russell and Rayburn's testimony. The ALJ found Rayburn's low back condition and need for restrictions and occupational disability that accompanied her condition were caused by the 1988 injury. The ALJ relied upon Dr. Russell's testimony that the February 5, 1995 incident was not a new injury but an exacerbation of Rayburn's condition caused by the 1988 injury. The ALJ further determined that Rayburn had failed to prove she had an occupational disability resulting from the February 5, 1995 incident. Dr. Russell testified that the restrictions recommended after the February 5, 1995 incident were essentially the same as those he made in 1989.[1] Accordingly, by opinion and order entered August 8, 1997, the ALJ dismissed Rayburn's injury claim, and resolved the medical fee dispute initiated by ITT in favor of Rayburn. The ALJ ordered ITT to pay all medical expenses incurred for the cure and relief of the effects of Rayburn's 1988 injury as exacerbated by the February 5, 1995 incident.

Both Rayburn's and ITT's petitions for reconsideration were denied by the ALJ. Thereafter, both Rayburn and ITT

[1]Dr. Russell testified that he had placed restrictions on Rayburn after the 1989 surgery, but did not put them in writing pursuant to Rayburn's request.

appealed to the Board. Rayburn appealed that portion of the opinion finding that she had not suffered a compensable injury in 1995, and ITT appealed that portion of the opinion finding it responsible for the contested medical expenses. The Board affirmed the decision of the ALJ by opinion rendered January 12, 1998. ITT filed a timely petition to this Court within thirty days as required by CR 76.25(2).

Thereafter on March 10, 1998, Rayburn submitted a cross-petition for review to this Court requesting that,

> If, as a result of deciding this appeal [ITT's], this court determines that Ms. Rayburn did suffer a compensable injury on February 5, 1995, Ms. Rayburn asks that this court remand this case to the Administrative Law Judge to determine an appropriate disability award based on the February 5, 1995 injury.

On April 1, 1997, CIC responded with a motion to dismiss Rayburn's petition as improper and untimely. By order entered May 26, 1998 by a motion panel of this Court, the motion to dismiss was denied. That denial was however, "without prejudice and subject to re-visit of the issue raised in the motion by the merits panel, at the panel's discretion." Citing Knott v. Crown colony Farm, Inc., Ky., 865 S.W.2d 326, 328-9 (1993).

The standard of review before this Court is whether the Board has overlooked or misconstrued controlling statutes or precedent or committed error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992).

In the medical fee dispute submitted to this Court by ITT, the only question of law raised is "which carrier is

responsible for the payment of medical benefits... ." CIC filed a timely response to ITT's petition. Both ITT and CIC rely on Calloway County Fiscal Court v. Winchester, Ky. App., 557 S.W.2d 216 (1977), in support of their positions. We agree that Calloway County Fiscal Court, is controlling and supports the conclusion reached by the ALJ.

In that case, the claimant, Winchester, was injured on July 30, 1974, while employed by Calloway County Fiscal Court. Winchester received TTD benefits and medical expenses from the County's insurance carrier until November 23, 1974, when he returned to light duty work. Winchester subsequently obtained employment under the Comprehensive Employment Training Act (CETA) which was insured by a different carrier. Winchester then sustained a further injury during that CETA employment. This Court affirmed the award of benefits for the second injury against Calloway County, noting that the second injury had been labeled by the fact finder as "an aggravation of the first injury." We stated that the finding that the second injury was an aggravation of the first was an implicit finding that the second injury did not result in liability upon the subsequent employer [CETA].

Here, although Dr. Russell did label the February 5, 1995 incident an injury, he also clearly testified that the February incident was a temporary aggravation and exacerbation of the underlying condition caused by the 1988 injury. Dr. Russell also testified he could not determine any additional increase in Rayburn's functional impairment as a result of the February 1995

incident. His restrictions on Rayburn's return to work were almost identical to those imposed after the 1989 surgery. The testimony of Dr. Russell is the only medical testimony in the record. His testimony is evidence of substance which cannot be said to compel a different result on the issue of responsibility for medical benefits. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Therefore, we affirm the opinion of the Workers' Compensation Board entered January 12, 1998, affirming the ALJ's determination that ITT is responsible for the medical fees in dispute.

CIC argues the cross-petition filed by Rayburn is an untimely and improper appeal and requests dismissal of the cross-petition. Although CR 76.25(9) permits a party to file a cross-petition within 20 days following the filing of a petition by another party, the relief requested by Rayburn is not dependent upon or responsive to the medical fee dispute issue presented by ITT's petition. In fact, no relief of any kind against ITT is sought in Rayburn's cross-petition. The purpose of the cross-petition is to obtain an award of income benefits from CIC.

CIC cites Department of Economic Security v. Sizemore, Ky., 741 S.W.2d 733 (1971), for the proposition that a direct appeal must be filed in a Workers' Compensation case to preserve a claim for review. There, the employer appealed a decision of the Board to the circuit court based on claimed errors relating to the sufficiency of the medical proof. Thereafter, the Special Fund, beyond the limitation period for appealing directly from

the Board's decision, filed a cross-claim to the employer's appeal, claiming error in the weekly rate awarded the employee against the Special fund. The circuit court dismissed the Special Fund's cross-appeal as untimely filed. The Court of Appeals affirmed the circuit court holding:

> [W]e are of the opinion [the Special Fund] has not properly preserved the error. The Special Fund did not take a direct appeal from the Board's order to the circuit court. Only the employer...appealed. The Special Fund tendered a 'Cross-Claim' in the employer's appeal seeking to have the award against it fixed at $6.41 per week instead of $12.82 per week... . We think the lower court properly dismissed the 'Cross-Claim' as being an attempted appeal from the order of the Board after the 20-day period prescribed [for direct appeal]... . If the Board erred in calculation, the Special Fund had recourse by direct appeal to the circuit court. It failed to do that. Its right to appeal in no way depended on whether the employer appealed.

Id. at 735.

We believe the cross-petition authorized by CR 76.25(9) is one filed in response to a petition that would, if granted, affect the rights of the Cross-Petitioner. We believe this interpretation is supported by the fact that the civil rules do not permit the filing of a response to a cross-petition. No response is authorized because the rule contemplates the petition and cross-petition will address the same issue(s). If a cross-petitioner (such as Rayburn) were allowed to assert claims for relief against a party (CIC) other than the petitioner (ITT), then the non-appealing party against whom claims for relief were asserted in the cross-petition (CIC) would have to be given the opportunity to respond. The income benefit issued raised by

Rayburn against CIC was not raised in ITT's petition, and therefore Rayburn had 30 days within which to appeal the decision on that issue under CR 76.25:

> ....
>
> (2) Time for Petition. Within 30 days of the date upon which the Board enters its final decision pursuant to KRS 342.285(3) any party aggrieved by that decision may file a petition for review by the Court of Appeals and pay the filing fee required by CR 76.42(2)(a)(xi). **Failure to file the**

petition within the time allowed shall require dismissal of the petition. (Emphasis Added).

The issue of CIC's liability to Rayburn for income benefits was subject to appeal for 30 days following entry of the Board's January 12, 1998, order. Thereafter, this Court lost jurisdiction to consider the issue of income benefits. CR 76.25; Rainwater v. Jasper & Jasper Mobile Homes, Ky. App., 810 S.W.2d 63 (1991); Staton v. Poly Weave Bag Co., Inc., Ky., 930 S.W.2d 397 (1996); Department of Economic Security, supra.

Accordingly, we order the cross-petition dismissed.

ALL CONCUR.

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: November 13, 1998

BRIEF FOR APPELLANT, THE TAYLOR GROUP-CLASSIC COOKIES (As Insured by ITT Hartford) IN NO. 98-0306:

Stephen D. Goodrum
Lexington, KY

BRIEF FOR APPELLANT, THE TAYLOR GROUP-CLASSIC COOKIES (As Insured by the Cincinnati Ins. Co.) IN NO. 98-0306:

Stephanie D. Ross, Esq.
Lexington, KY

BRIEF FOR APPELLEE, TERESA RAYBURN:

Leslie Rosenbaum
Lexington, KY

BRIEF FOR APPELLEE, SPECIAL FUND:

David W. Barr
Labor Cabinet
Louisville, KY