

RENDERED: DECEMBER 29, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000024-WC

FULTON COUNTY FISCAL COURT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-93061

ROBERT E. HOPPER, JR.;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Fulton County Fiscal Court (Fulton County) has petitioned for review of an order of the Workers' Compensation Board (Board) entered on December 3, 2004, that summarily dismissed its appeal of an opinion and order of the Administrative Law Judge (ALJ) rendered September 7, 2004, and opinion on petition for reconsideration, rendered October 28,

2004, against Robert E. Hopper, Jr. (Hopper), as interlocutory. Before us, Fulton County argues alternatively that the Board erred in dismissing its appeal and that it was deprived of its due process right of review. We affirm.

As the material facts in the case are not at issue, the ALJ's statement of the case, contested issues, and conclusions of law in the September 7, 2004, opinion and order succinctly set forth the necessary background:

STATEMENT OF THE CASE

In this bifurcated claim, Robert Hopper, Jr. claims benefits arising from a motor vehicle accident on February 26, 2003. He claims that, on that date, he was acting in the course and scope of his duties as a volunteer deputy sheriff when the unmarked police car he was driving struck a deer while traveling at a high rate of speed, injuring him and his friend and passenger, Mike Woods. As a result of that collision, (Hopper) suffered major injuries which left him paralyzed for a period of time. . . .

CONTESTED ISSUES¹

The only issues to be decided at this point are:

1. Whether (Hopper's) injury occurred in the course and scope of his employment; and
2. Average weekly wage. . . .

CONCLUSIONS OF LAW

[Kentucky Revised Statutes] KRS 342.0011(1)
KRS 342.140(3)

ORDER

IT IS HEREBY **ORDERED** AND ADJUDGED as follows:

¹ These two issues resulted from bifurcation of the six contested issues at the March 9, 2004, benefit review conference. Contested issues remaining to be decided were extent and duration; temporary total disability (TTD); KRS 342.165 safety violation; and medicals.

1. (Hopper's) February 26, 2003 motor vehicle accident occurred in the course and scope of (Hopper's) employment as a volunteer deputy sheriff and he is therefore entitled to benefits under KRS 342 for a covered injury.

2. (Hopper's) average weekly wage at the time of his injury was \$0.

3. The parties have 45 days from the date of this Opinion and Order to agree on a further litigation plan, to settle the case, or to show cause why a final hearing should not be scheduled at the earliest available date.

On petition for reconsideration by both parties, the ALJ ordered that Hopper's name in the caption be corrected, but that "(a)ll other findings set forth in the Opinion issued September 7, 2004 remain unchanged."

Fulton County appealed the ALJ's opinion and order to the Board. On December 3, 2004, the Board, on motion by Hopper, dismissed the appeal as interlocutory. This petition for review followed.

Our standard of review of a decision of the Board "is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). Having reviewed the Board's application of the law, we conclude that the Board committed no error.

It is Fulton County's position that the ALJ's decision that Hopper was acting in the course and scope of his employment at the time of the accident should be reviewed at this point in time and not after the remainder of the contested issues have been decided. Fulton County contends that the relief it requests is in the interest of judicial economy, and submits that without review of this issue at this time, it is subject to a deprivation of due process.

At issue, ultimately, is whether the ALJ's opinion and order constituted a final order. For the following reasons, we believe it was not.

In Whittaker v. Wright, 969 S.W.2d 209, 211 (Ky. 1998), the Kentucky Supreme Court stated that there is no basis for treating a workers' compensation appeal any differently than a civil appeal, thus whether an order is final is determined in accordance with Kentucky Rules of Civil Procedure (CR) 54.02, a view also expressed in the workers' compensation regulations. 803 Kentucky Administrative Regulations (KAR) 25:010 § 21 provides:

Review of Administrative Law Judge
Decisions. . . .
(2) Time and format of notice of
appeal
(b) As used in this section, a final award,
order or decision shall be determined in
accordance with Civil Rule 54.02(1) and (2).

As such, we look at whether the ALJ's opinion and order are final pursuant to CR 54.02.

CR 54.02(1) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, 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.*

(Emphasis added.)

The ALJ's opinion and order did not recite that it was final; in fact, it gave the parties forty-five days to agree on a further litigation plan, to settle the case, or to show cause why a final hearing should not be scheduled. Pursuant to CR 54.02(1), therefore, it was interlocutory.²

² Additionally, pursuant to Kentucky Revised Statutes (KRS) 342.275(2), an ALJ's award, order, or decision subject to appeal to the Board, pursuant to KRS 342.285, is one rendered following the *final hearing*. There has not been a final hearing herein; at the benefit review conference, the parties agreed to bifurcate the proceedings.

As interlocutory, the Board's dismissal of the appeal was proper. In Reisinger v. Grayhawk Corporation, 860 S.W.2d 788, 790 (Ky. App. 1993), the court stated:

CR 54.02 has been held to require dismissal of an appeal where the record showed that the order did not adjudicate the rights of all the parties in the action and other matters remained to be adjudicated. Signer v. Arnold, Ky., 436 S.W.2d 493 (1969). In a recent case, this Court noted that an order allowing attorney fees, but not providing for a distribution of funds to the attorney, is not a "final order" from which an appeal will lie. As such, the order was interlocutory, and judicial economy necessitates this rule. Revenue Cabinet v. Barbour, Ky.App., 836 S.W.2d 418 (1992).

In the case at bar, the order of the ALJ³ was interlocutory. It did not adjudicate *finally* the rights of any of the parties and, as such, does not meet the test of CR 54.02 to be deemed "final" . . .

We also disagree that the Board's dismissal of the appeal of the ALJ's opinion and order deprives Fulton County of substantive and procedural due process. Upon disposition of all the claims in the case, Fulton County will have the opportunity to appeal the issue in the ALJ's September 7, 2004, opinion and order. CR 54.02(2) provides:

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

³ Denying motions for a protective order, to quash, and to prohibit the taking of a deposition.

which are not specifically disposed of in such final judgment.

Fulton County has cited no persuasive authority to the contrary.

Pursuant to Western Baptist Hospital, supra, therefore, we can find no error in the Board's decision.

For the foregoing reasons, the order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Denis S. Kline
Ferreri & Fogle
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jackson W. Watts
Versailles, Kentucky