

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lewis Brothers and Sons, Inc.	:	
and State Workers' Insurance Fund,	:	
Petitioners	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (Smiley),	:	No. 255 C.D. 2011
Respondent	:	Submitted: June 10, 2011

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: July 18, 2011

Lewis Brothers and Sons, Inc. (Employer) petitions this Court for review of the January 18, 2011 order of the Workers' Compensation Appeal Board (Board) remanding the matter to a Workers' Compensation Judge (WCJ) for a hearing on a termination petition filed by Employer. Employer essentially presents two issues for this Court's review: (1) whether a remand decision is appealable as of right, and (2) whether the Board reweighed the evidence when it reconsidered Claimant's complaints to an independent medical examiner. For the reasons that follow, we quash Employer's appeal.

Claimant was receiving workers' compensation benefits pursuant to a Notice of Compensation Payable. On June 2, 2009, Employer filed a Petition for Termination alleging that Claimant returned to work at no loss of wages. A Notice of Hearing was sent to Claimant's last known address on June 9, 2009. On July 21,

2009, Claimant failed to appear at the hearing. The WCJ scheduled a second hearing. A Notice of Hearing was sent to Claimant's last known address on July 21, 2009, and on August 25, 2009, Claimant failed to appear again. The WCJ took evidence and on August 26, 2009 entered an order granting Employer's termination petition effective May 11, 2009. Claimant appealed to the Board, and on January 18, 2010, the Board remanded the matter to the WCJ for a hearing on the merits of the termination petition. Employer appealed to this Court.¹

Pursuant to Section 763(a)(1) of the Judicial Code, 42 Pa.C.S. § 763(a)(1), this court has jurisdiction over appeals from *final orders* of government agencies. A final order is one that disposes of all claims or parties, or is defined as such by order or statute. A court order remanding a case to the local agency for further hearings is generally interlocutory and not a final order. Thus, because the Board's order does not dispose of all claims or parties and is not one defined as final by order or statute, it is not a final order.

City of Phila. v. Workers' Comp. Appeal Bd. (Mellon), 885 A.2d 640, 642 (Pa. Cmwlth. 2005) (citations omitted) (emphasis added). "Although appeals are generally only permitted from final orders, in limited circumstances, a party can take an interlocutory appeal." *Id.* Interlocutory appeals are governed by Pa.R.A.P. 311.

Employer first argues that the Board's order is appealable. Specifically, Employer contends this matter is appealable as of right pursuant to Pa.R.A.P. 311(f). We disagree.

Pa.R.A.P. 311(f) specifically provides:

¹ This Court's review is limited to determining whether an error of law was committed, whether the findings of fact are supported by substantial evidence and whether there was a violation of constitutional rights. *Sysco Food Servs. of Phila. v. Workers' Comp. Appeal Bd. (Sebastiano)*, 940 A.2d 1270 (Pa. Cmwlth. 2008).

An appeal may be taken as of right from: (1) an order of a common pleas court or government unit remanding a matter to an administrative agency or hearing officer for execution of the adjudication of the reviewing tribunal in a manner that does not require the exercise of administrative discretion; or (2) an order of a common pleas court or government unit remanding a matter to an administrative agency or hearing officer that decides an issue which would ultimately evade appellate review if an immediate appeal is not allowed.

Here, the case was remanded for a hearing on the merits. As such, the WCJ will be required to take evidence. “It is well settled that the WCJ exercises administrative discretion ‘[i]n taking evidence and in assessing its credibility and weight. . . .’ Therefore, when a WCJ is required to take evidence on remand, the Board’s remand order is not appealable under [Pa.R.A.P.] 311(f)(1).” *Peterson v. Workers’ Comp. Appeal Bd. (Wal Mart)*, 938 A.2d 512, 515 (Pa. Cmwlth. 2007) (citation omitted). Thus, the Board’s order is not appealable pursuant to Pa.R.A.P. 311(f)(1).

In addition, the Board’s order is not appealable pursuant to Pa.R.A.P. 311(f)(2) because after the hearing on the merits, if the Claimant prevails, the Employer can once again appeal to the Board and, if necessary, from the Board to this Court. At that time, Employer may raise its argument as to why the matter should not have been remanded initially. *See Macaluso v. Workers’ Comp. Appeal Bd. (Philadelphia College of Osteopathic Medicine)*, 597 A.2d 730 (Pa. Cmwlth. 1991) (determining that the Board erred in holding that a claimant’s failure to appeal its initial order remanding the matter for further proceedings resulted in preclusion of his claim, as the interlocutory remand order could be challenged on appeal from the Board’s final order once the matter was appealed to this Court). Thus, the issue will only evade appellate review if Employer does not raise the issue in subsequent appeals. Accordingly, the Board’s order is not appealable pursuant to Pa.R.A.P. 311(f)(2).

As we have determined that the Board's order is not appealable as of right, there is no need to address the remaining issue at this juncture. For all of the above reasons, the Employer's appeal is quashed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 18th day of July, 2011, the appeal filed by Lewis Brothers and Sons, Inc. is quashed.

Jurisdiction relinquished.

JOHNNY J. BUTLER, Judge