RENDERED: AUGUST 1, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002117-WC

CRAWFORD & COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-87-39549

JOSEPH WRIGHT; DR. SCOTT WATKINS; DR. DAVID WATKINS; HON. MARCEL SMITH, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRIMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Crawford & Company (Crawford) seeks review of an opinion of the Workers' Compensation Board reversing and

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

remanding this matter to an administrative law judge for a proofing schedule and disposition of a medical fee dispute on the merits. We find no error and thus affirm.

Wright was an underground coal miner who was employed by the Webster County Coal Corporation in Henderson, Kentucky. On December 3, 1987, he suffered a work-related injury to both knees. A settlement agreement was approved by the Board in June 1988, acknowledging a 12.5% impairment with a lump sum to be paid by the employer or its insurance carrier. The agreement was silent as to payment of future medical bills. Crawford has been paying those bills as the third-party adjusting company for Webster County Coal.

Crawford filed a medical fee dispute and motion to reopen and a motion to join the medical providers on January 4, 2007. *See* 803 Kentucky Administrative Regulations (KAR) 25:012. These motions claimed the doctors were providing treatment to Wright that was unreasonable, unnecessary, and unrelated to the original work injury. That opinion was supported by Dr. Ronald J. Fadel after his review of Wright's medical records but without his actually having seen Wright as a patient. Crawford tendered proposed orders along with the motions. *See* 803 KAR 25:010 Sec. 4(1).

The motions were reviewed by Administrative Law Judge (ALJ) Chris Davis during the regular Frankfort motion docket. *See* 803 KAR 25:012 Sec. 1(6)(c). On February 1, 2007, ALJ Davis entered the order tendered by Crawford, granting the motion to reopen and providing 20 days for the doctors to respond.

The order made no mention of Wright having to file any response. The order stated that "[s]hould a timely response not be filed within the requisite 20 day period, the movant shall then be relieved from responsibility for payment of the respondent's future medical treatment." ALJ Davis did not sign the order tendered with Crawford's motion to join the medical providers, and the February order granting the motion to reopen did not join them as parties.

There was no response from either Wright or the doctors within the 20-day time period. Crawford states it sent copies of the motions and tendered orders to Wright at his last known address. Wright's attorney states that there was no proof of record that Wright was ever served with copies of the motions and tendered orders and that he personally was never served even though he had originally represented Wright in 1988 and remained attorney of record.

The motions again came up on the March 9, 2007, regularly scheduled Frankfort motion docket before Chief ALJ (CALJ) Shelia C. Lowther. The order entered by CALJ Lowther granted the motion to reopen and assigned the controversy to an ALJ with a proofing schedule to be issued. Although this order was contrary to the February order signed by ALJ Davis, there is nothing in it overruling or vacating that order.

Crawford filed a petition to reconsider and a motion to vacate on March 20, 2007. Additionally, on the same date, a scheduling order was issued assigning the case to ALJ Marcel Smith.

On April 5, 2007, Crawford, through counsel, submitted the records of Dr. Jacob O'Neill as required by the proofing schedule. Wright also submitted evidence in compliance with the schedule, and his attorney entered his appearance representing Wright on April 9, 2007.

On that same date, ALJ Smith entered an order granting Crawford's petition for reconsideration. That order vacated the March order of CALJ Lowther and had the effect of reinstating the February order that provided 20 days for Wright or the doctors to respond. As neither Wright nor the doctors had responded within the 20-day time period, the reinstatement of the February order had the further effect of relieving Crawford of payment of Wright's future medical treatment. Wright thereafter filed a motion to reconsider and an amended motion to reconsider. ALJ Smith denied those motions in an order on May 7, 2007. Wright then appealed to the Board.

The Board reversed the order of ALJ Smith granting Crawford's petition for reconsideration, and it remanded the case for ALJ Smith to set a proofing schedule and decide the case on its merits. The Board determined that ALJ Smith improperly vacated the CALJ's March order which had established a proofing schedule so the case could be determined on its merits. Crawford then filed this petition for review.

Crawford argues in its petition to this court that the Board erred in reversing ALJ Smith's order that vacated CALJ Lowther's March order. Crawford maintains that ALJ Smith properly and summarily decided the medical fee dispute

in its favor when neither Wright nor the medical providers responded within 20 days of the February order.

We agree with the Board's decision and its analysis in addressing Crawford's arguments. Thus, we adopt the following portion of the Board's opinion:

> We agree that Wright is entitled to a decision on the merits and we therefore reverse and remand. It is important to remember this dispute is a post award medical dispute. The administrative regulation providing the procedure for post award medical disputes is contained in 803 KAR 25:012 1(6). Section 1(6)(c) provides a dispute "shall be assigned to the Frankfort motion docket, where it shall be either summarily decided upon the pleadings or assigned to an Administrative Law Judge for further proof time and final resolution." Prior to assignment to an ALJ, the Chief Administrative Law Judge has jurisdiction over medical disputes. Other Administrative Law Judges presiding over the motion docket do not retain continuing jurisdiction over the medical disputes. The applicable regulation as noted above provides for only two possible orders by an ALJ on the motion docket. Either the matter is summarily decided or the matter is assigned to an ALJ for proof taking and a decision on the merits.
>
> Here, the initial order by ALJ Davis was improper based upon the above regulation. His order was neither a summary decision nor did it assign the matter to an ALJ for proof taking. Rather, ALJ Davis' order imposed a twenty day response requirement on the treating physicians, a procedure not contemplated by the applicable regulation. The order did not require that Wright do anything. Further, we note that ALJ Davis' order did not join the medical providers as parties to the action. Thus, the doctors were not compelled to respond to the ALJ's order. The initial order improperly shifted the post award burden to Wright's doctors regarding all

future medical care even though Wright's doctors are not the real party in interest as to the future medical care.

Although Crawford contends in its brief that the Chief Administrative Law Judge's order was most likely the result of the CALJ being unaware of ALJ Davis' order, we believe the CALJ's order was rendered for a far different reason. Since ALJ Davis' order neither summarily decided the claim nor did it assign the claim for proof taking in [sic] a decision on the merits, in all likelihood the matter was again before the ALJ because ALJ Davis' order was not dispositive. The CALJ, who had continuing jurisdiction at this time, most likely entered the order to cure the defects in the initial order. The CALJ's order assigned the claim for proof taking and, for the first time, ordered the medical providers joined as parties. The CALJ's order superseded ALJ Davis' order rendering it null and void. Once the CALJ rendered her order and the Executive Director issued the scheduling order on March 20, 2007, Wright was entitled to proof taking, a hearing, and a decision on the merits.

In its brief to the Board, Crawford cites to 803 KAR 25:012 Section 1 (4) (b) and (c) in arguing that Wright and the physicians were required to file a response to the motion to reopen. However, Section 1(4) sets forth the procedure for medical disputes in which an Application for Adjustment of Claim concerning the injury or disease has not been filed. That regulation has no application in a post award dispute which is governed by Section 1(6).

We believe ALJ Smith improperly vacated the CALJ's order and cut short proof taking in the claim. Further, prior to ALJ Smith ruling on the petition for reconsideration, Wright had submitted evidence within proof taking time pursuant to the scheduling order. Wright had submitted medical evidence which could support a ruling in his favor in the medical dispute. The sole reason given for dismissal in ALJ Smith's orders is the failure of Wright's physicians to tender a response. Again, we note the physicians were not parties at the time ALJ Davis rendered his order and were not made parties until the CALJ's order was entered. Further, we note that

> in vacating the CALJ's order, ALJ Smith would have removed the physicians as parties and thus, even at this time, the doctors would not be parties to the action.
>
> Since the orders in this case cut short the proof time set forth in the scheduling order, on remand the ALJ shall set forth a new proofing schedule, hold a hearing and reach a decision on the merits.

While the Board addressed the 803 KAR 25:012 Sec. 1(4) argument raised by Crawford, Crawford also relied in its brief on 803 KAR 25:010 Sec. 4(6). That regulation states that "any response" to a motion to reopen "shall be filed within twenty (20) days of filing the motion to reopen." The regulation does not require the filing of a response.

In *AAA Mine Service v. Wooten*, 959 S.W.2d 440 (Ky. 1998), the Kentucky Supreme Court described a two-step process for a reopening of a workers' compensation claim. The court stated as follows:

> The first step of the process involves the filing of a motion to reopen the award, with the movant being required to make a *prima facie* showing of the possibility of prevailing on the merits. Only if that requirement is satisfied will the adversary be put to the expense of relitigation or will the taking of further proof be authorized.

Id. at 441-42. *AAA Mine Services* involved a reopening under Kentucky Revised Statutes (KRS) 342.125 in that an award had previously been made. Here, however, there was no award or order granting future medical benefits. Nonetheless, we believe the same principles for reopening apply.

In other words, the failure to file a response to a motion to reopen does not entitle the movant to a ruling in its favor on the merits. It means only that the party failing to respond runs the risk that the movant's motion to reopen will be granted, a proofing schedule will be entered, and the matter will proceed on the merits rather than be summarily dismissed.

We will "only reverse the Board's decision when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice." *Abbott Laboratories v. Smith,* 205 S.W.3d 249, 253 (Ky.App. 2006). We conclude that the Board did not err when it reversed and remanded the matter to the ALJ for proof and a decision on the merits.

Finally, Wright contends that Crawford's petition for review herein is frivolous and in bad faith. He asks this court to impose sanctions against Crawford. The same issue was before the Board when it rendered its opinion in favor of Wright. The Board noted that Wright had filed a motion for assessment of costs before the ALJ. The Board stated that it was premature for it to address the motion and remanded the matter to the ALJ for consideration. We agree that disposition in that manner is appropriate.

The Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joel W. Aubrey
Louisville, Kentucky

BRIEF FOR APPELLEE:

William B. Norment, Jr.
Henderson, Kentucky