RENDERED: SEPTEMBER 27, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000397-WC

ALICE JOLLY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-17-01582 & WC-16-73241

LION APPAREL, INC.;
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Alice Jolly petitions for review of the opinion of the Workers' Compensation Board (the Board) vacating and remanding for additional factual findings the Administrative Law Judge's (ALJ) opinion and award permitting Jolly to recover temporary total disability (TTD) benefits from her former employer,

Lion Apparel, Inc. (Lion). Jolly argues the Board should have dismissed Lion's appeal as untimely. After careful review, we hold that Lion's appeal was timely. Hence, we affirm.

In September 2017, Jolly filed a workers' compensation claim alleging she sustained cumulative trauma to her cervical spine. The claim listed January 1, 2016, as the injury date, but Jolly was granted leave to amend so she could change the date of her injury to January 15, 2015. At the formal hearing on Jolly's claim, Lion introduced evidence that Jolly had preexisting neck conditions and that her cervical spine injury was not work related. Jolly introduced the records of Dr. Craig Roberts, who diagnosed Jolly with cervical disc herniations caused by cumulative trauma. Dr. Roberts opined that Jolly reached maximum medical improvement (MMI) on July 1, 2016.

On July 12, 2018, the ALJ issued an opinion, order, and award finding that Jolly suffered cumulative trauma injury to the cervical spine that became manifest on January 1, 2016 and that she reached MMI on July 1, 2016. Jolly was awarded TTD benefits from January 15, 2015 through July 1, 2016. Lion then filed a timely petition for reconsideration alleging the ALJ's opinion, order, and award contained several patent errors. Lion argued there was no credible evidence Jolly suffered a work-related neck injury that became manifest on January 1, 2016. Lion also argued it was erroneous to award TTD benefits because there was

insufficient evidence Jolly was incapable of performing her customary work prior to her MMI date. Finally, Lion contended that the ALJ erred by awarding benefits beginning January 15, 2015, when he found Jolly's injury did not become manifest until January 1, 2016.

On August 16, 2018, the ALJ entered an order making additional findings but otherwise denying Lion's petition for reconsideration. The ALJ stated that he relied on Dr. Roberts's diagnosis to conclude Jolly sustained a work-related injury to the cervical spine caused by cumulative trauma, which was also supported by diagnostic imaging of Jolly's spine showing a large cervical disc herniation. On August 22, 2018, Lion filed a second petition for reconsideration, arguing that multiple patent errors remained in both the ALJ's original opinion, order, and award, and his order denying it petition for reconsideration. However, the second petition merely rehashed the same arguments in Lion's first petition for reconsideration. The ALJ summarily denied the second petition for reconsideration.

On October 8, 2018, Lion filed a notice of appeal to the Board. Jolly moved to dismiss, arguing the appeal was untimely because Lion's second petition for reconsideration did not suspend the finality of the ALJ's order denying Lion's original petition for reconsideration; thus, Lion's notice of appeal was not filed within thirty days and was untimely. The Board denied the motion to dismiss on

the merits and subsequently entered an opinion vacating and remanding the ALJ's opinion and award. The Board held that additional factual findings were needed to review the ALJ's finding that Jolly's injury became manifest on January 1, 2016 and his award of TTD benefits. The only error Jolly argues on appeal is that the Board should have dismissed Lion's appeal as untimely.

As a threshold matter, we must address Lion's argument that Jolly failed to preserve her timeliness argument for our review by failing to raise it in her brief to the Board. Lion is correct that a party must preserve an assertion of error by raising it first to the Board. *Breeding v. Colonial Coal Co.*, 975 S.W.2d 914, 916 (Ky. 1998). However, there is no requirement that a party rehash a procedural argument in its brief to the Board when the Board has already rejected the argument in a written order denying a motion to dismiss. Thus, we will review Jolly's arguments on the merits.

Appellate review of an opinion by the Board is limited to determining whether "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). Because Jolly's appeal is not premised on any factual dispute but the timeliness of Lion's appeal to the Board, this case concerns only a question of law and our review is *de novo*. *Justice v. Kimper Volunteer Fire Dept.*, 379 S.W.3d

804, 807 (Ky. App. 2012).

An ALJ's order shall be conclusive and binding as to all questions of fact unless a party petitions for reconsideration within fourteen days. KRS[1] 342.285(1); KRS 342.281. A timely petition for reconsideration is necessary to preserve a party's right to contest an ALJ's factual findings on appeal. *Uninsured Employers' Fund v. Stanford*, 399 S.W.3d 26, 31 (Ky. 2013). Doing so stays finality of the ALJ's order and tolls the time for filing an appeal. *Id.* However, this court held in *Tube Turns Division of Chemetron v. Quiggins*, 574 S.W.2d 901, 903 (Ky. App. 1978), that a second petition for reconsideration is permissible only when it seeks to correct an error that was not present in the original order and, therefore, could not have been raised in the first petition. We reasoned that "that if parties adversely affected could continue to ask for reconsideration, a final determination could be unduly delayed, and there would never be an end to workmen's compensation litigation. To hold otherwise would be to provide a series of procedural traps and delays." *Id.* Accordingly, we reversed an order by the Board sustaining an injured employee's second petition for reconsideration and ordered the ALJ's previous order be reinstated. *Id.*

Lion's second petition merely rehashed arguments it believed the ALJ did not adequately address in his order denying its first petition to reconsider.

[1] Kentucky Revised Statutes.

Doing so was clearly improper under *Quiggins*. Jolly argues that this impropriety requires that Lion's second petition for reconsideration be considered a nullity that did not toll the time for filing an appeal. The Board rejected this argument by relying on *Stanford*. In *Stanford*, the claimant filed a second petition for reconsideration, which the ALJ denied for requesting the same relief as the first petition for reconsideration. 399 S.W.3d at 29. The Board, citing *Quiggins* as support, dismissed the employer's subsequent appeal as untimely. *Id.* at 30. This Court affirmed, but the Kentucky Supreme Court reversed:

> The plain language of KRS 342.285(1) allows a party to file an appeal from the order of an ALJ once that order is final and no petition for reconsideration is pending. . . . As soon as Stanford filed the second petition for reconsideration, it stayed the finality of the ALJ's order and award and tolled the time for a party to file an appeal. It is unimportant that Stanford's second petition for reconsideration failed to raise a new allegation of error. The validity of Stanford's second petition for reconsideration could only be determined by the ALJ and it is only after he has either dismissed or ruled on the petition that a party can say with any certainty that the petition was meritless or as the Board put it, a "nullity." It is unfair to place the burden of guessing the success or validity of a subsequent petition for reconsideration upon the opposing party.

Id. at 31. Jolly argues *Stanford* applies only when the party appealing to the Board is not the same party filing the second petition for reconsideration. She relies on the following dicta in *Stanford*:

> In response, Bluegrass argues that the Board's ruling in this matter "perpetuates an orderly appellate process." They argue that holding that USACC's appeal was timely will create a slippery slope because it allows a party to destroy the finality of opinions and orders by the filing of successive petitions for reconsideration requesting identical relief. A party would presumably do this to improperly extend their time to file an appeal. We agree with Bluegrass, but only to the extent that the party filing the successive petitions for reconsideration is the party filing an appeal. In this matter it was Stanford who filed the improper petition for reconsideration and USACC should not be punished for Stanford's action.

Id. We do not interpret this passage as holding the outcome necessarily would have been different had the party filing the appeal been the same party filing the second petition for reconsideration. Rather, it is mere dicta explaining that the alleged benefits in embracing the "orderly appellate process" argument were not applicable under the facts in *Stanford*. We conclude that dismissing Lion's appeal as untimely would have been inconsistent with *Stanford* in particular and Kentucky law in general.

First, *Stanford* explicitly states that its holding was compelled by the plain language of KRS 342.285(1), which makes no distinction regarding which party petitioned for reconsideration. Second, the Kentucky Supreme Court has already rejected the argument that inappropriate post-judgment motions should be considered nullities that do not timely toll the time for filing an appeal. In *Kentucky Farm Bureau Mutual Insurance Company v. Conley*, 456 S.W.3d 814

(Ky. 2015), an insurer moved under CR[2] 59.05 to alter, amend, or vacate an order granting declaratory judgment. The insurer's CR 59.05 motion did not state with particularity grounds supporting the motion, which violated CR 7.02. *Id.* at 816. This Court held this defect rendered the CR 59.05 motion invalid; thus, it did not toll the time for filing an appeal and the insurer's appeal was dismissed as untimely. *Id.* at 817. The Kentucky Supreme Court reversed, holding that the tolling provision of CR 59.05 did not turn on the particular characteristics of a CR 59.05 motion. *Id.* at 819. Likewise, we decline to hold that the tolling provision of KRS 342.285 turns on the characteristics of the petition to reconsider.

Our holding in this case is consistent with *Quiggins*. First, we note that the Court in *Quiggins* merely vacated an order granting the second petition for reconsideration. It did not dismiss the appeal as untimely. Doing so was not necessary to prevent workers' compensation litigation from being unduly delayed. A successive petition for reconsideration cannot provide the basis to reverse an ALJ's finding of fact unless it corrects an error appearing for the first time in the order granting or denying the original petition for reconsideration. An inappropriate petition for reconsideration can also form the basis for imposing sanctions. Thus, a party already has a strong incentive to lay out all the alleged errors in an ALJ's order in a single, timely petition for reconsideration.

[2] Kentucky Rules of Civil Procedure.

Because the relief Lion requested from the Board was preserved by its first petition for reconsideration, there are no procedural grounds to disturb the Board's opinion. Accordingly, the Board's opinion vacating and remanding the ALJ's July 12, 2018 opinion, order, and award is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James D. Howes
Louisville, Kentucky

BRIEF FOR APPELLEE, LION APPAREL, INC.:

Lyn Douglas Powers
Louisville, Kentucky