

RENDERED: JULY 12, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000504-WC

KEN LASHLEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-18-96086

KENTUCKY VOLUNTEER FIRE DEPARTMENT;
HON. JEFF V. LAYSON, III, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * **

BEFORE: GOODWINE, SPALDING AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Ken Lashley appeals from an opinion and order of the Workers' Compensation Board which dismissed his appeal of an opinion and order by Hon. Jeff Layson, III, Administrative Law Judge (ALJ), as interlocutory. We find no error and order the appeal dismissed.

Appellant is a volunteer firefighter and was injured while on the job on January 19, 2018. Appellant is covered for workplace injuries pursuant to Kentucky Revised Statute (KRS) 342.640(3). In order to determine what benefits Appellant is owed, a determination was needed regarding his average weekly wage. As a volunteer firefighter, his average weekly wage is based on his other “regular employment.” KRS 342.140(3). In this case, Appellant is self-employed.

The parties litigated the matter and the ALJ bifurcated the proceedings. The ALJ first wanted to determine Appellant’s average weekly wage. All other issues were reserved for further proceedings. Evidence was taken and arguments were made. The ALJ entered an “Interlocutory Opinion and Order” which found that Appellant’s average weekly wage was \$0. The ALJ held that because Appellant owned his own business, he did not have wages from regular employment. In other words, Appellant could not claim money earned as the owner of the business as wages for the purpose of calculating his average weekly wage. The ALJ then placed the claim in abeyance until Appellant reaches maximum medical improvement (MMI).

Appellant then appealed to the Workers’ Compensation Board. The Board ordered that the appeal be dismissed because it was from an interlocutory order and, therefore, not final and appealable. This appeal followed.

Appellant argues that the finding that he does not have an average weekly wage determines most of the issues in this case and should be reviewable. We agree with the Board that this appeal is premature and from an interlocutory order. 803 KAR¹ 25:010 Sec. 22(2)(a) states that “[w]ithin thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers’ Compensation Board.” 803 KAR 25:010 Sec. 22(2)(b) states that “[a]s used in this section, a final award, order, or decision shall be determined in accordance with Civil Rule 54.02(1) and (2).”

Kentucky Rule of Civil Procedure (CR) 54.02 states:

(1) 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.

¹ Kentucky Administrative Regulation.

(2) 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 which are not specifically disposed of in such final judgment.

Here, the ALJ's order determining that Appellant had an average weekly wage of \$0 is not a final order. It still leaves issues to determine such as how much temporary total disability payments Appellant should receive, what medical related payments are owed, when did Appellant reach MMI, and what disability rating to assign Appellant. Furthermore, the ALJ will need to determine if Appellant is permanently partially disabled or permanently totally disabled. Although, as things stand, Appellant will not be entitled to monetary benefits for a finding of permanent partial disability or permanent total disability, these findings would be necessary for future appeals.

In addition, the ALJ did not say that the order is final and appealable and that there is no just reason for delay.

For the purpose of making an otherwise interlocutory order final and appealable, the trial court is required to determine 'that there is no just reason for delay,' and the judgment must recite this determination and also recite that the judgment is final. The omission of one of these requirements is fatal.

Hale v. Deaton, 528 S.W.2d 719, 722 (Ky. 1975) (citations omitted). Because the interlocutory order held the remaining issues in abeyance and did not use the

“judgment is final” and “no just reason for delay” language, there can be no appeal at this time.

Based on the foregoing, we ORDER that this appeal be, and is hereby,
DISMISSED.

ALL CONCUR.

ENTERED: July 12, 2019



JUDGE, COURT OF APPEALS

ALL CONCUR.

BRIEF FOR APPELLANT:

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