

RENDERED: JUNE 24, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001677-WC

GARY SKINNER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-01-82485

HALE CONTRACTING, INC.; HON. MARCEL  
SMITH, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

JOHNSON, JUDGE: Gary Skinner has petitioned this Court for review of an opinion of the Workers' Compensation Board entered on July 23, 2004, which affirmed an opinion and award of an Administrative Law Judge. Having concluded that the opinion of the Board fairly and adequately sets out the facts of this case and applies the correct law to those facts, we affirm.

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<sup>1</sup> Senior Judge Joseph R. Huddleston 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.

Our standard of review as set forth by our Supreme Court in Western Baptist Hospital v. Kelley, provides that the function of this Court in reviewing 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."<sup>2</sup> Since the Board's opinion meets the requirements of Western Baptist Hospital and concisely addresses the issue raised by Skinner in his petition, we adopt it in full as our own:

Gary Skinner ("Skinner") appeals from an opinion rendered on February 12, 2004[, ] by Hon. Marcel Smith, Administrative Law Judge ("ALJ"). Skinner contends the ALJ erred in considering a medical report, which was submitted by Hale Contracting, Inc. ("Hale") pursuant to an order entered without formal written objection from Skinner, without granting [or] permitting Skinner time to subject the medical report to cross examination or submit rebuttal evidence.

Skinner's Form 101 (Application for Resolution of Injury Claim) was filed on January 14, 2002. It did not allege any eye injury.

A notice of scheduling order [was] issued on January 30, 2002. It provided for a 60 day period for the taking of proof by both parties, followed by a 30 day period for [Hale], and a 15 day rebuttal period thereafter for [Skinner].

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<sup>2</sup> Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

On April 19, 2002, Skinner filed a motion to amend his Form 101 "to include all injuries and treatment." Skinner indicated the motion was being made "so that it is clear he is seeking compensation for injuries to his right lower leg, his back, and to his right shoulder." The motion did not allege any eye injury.

On May 14, 2002, Skinner filed a motion to place the claim in abeyance. The motion was granted in an order dated May 15, 2002.

On December 2, 2002, Skinner filed a motion to remove the claim from abeyance and set it for a final hearing. Hale filed a response on December 10, 2002, asking that the parties be given additional proof time before scheduling of a final hearing.

On January 21, 2003, an order was entered granting Skinner's motion to amend his claim "to include injury to his right lower leg, back and right shoulder"; granting Skinner's motion to remove the claim from abeyance; and granting the parties additional time in which to complete the taking of proof. The order provided for a 30 day period for the taking of proof by both parties, followed by a 30 day period for [Hale], and a 15 day period thereafter for [Skinner].

On February 10, 2003, an agreed order was rendered. Skinner was granted until March 10, 2003[, ] to complete proof.

On June 11, 2003, Hale filed a motion to schedule a benefit review conference. Hale indicated in its motion that "[i]t appears that all proof has been taken in the claim and the parties are now ready to proceed." Skinner filed no objection to the motion. In an order rendered on June 24, 2003, Hale's motion was granted and a benefit review conference was scheduled for September 11, 2003.

On July 23, 2003, Hale filed a medical fee dispute contesting the compensability of treatment Skinner received in April and May of 2003 for problems with his right eye. Skinner then filed, on July 30, 2003, his second motion to amend his Form 101, alleging a right eye injury.

On August 8, 2003, Hale filed a written objection to Skinner's second motion to amend the Form 101. Hale also filed a written special answer. Hale asserted a limitations bar.

A benefit review conference order and memorandum, dated September 11, 2003, gave the parties up to the time of the final hearing to take proof on issues relating to Skinner's assertion of a right eye injury. A formal hearing was set for December 17, 2003[,] pursuant to an order rendered on October 8, 2003.

An order was rendered on December 17, 2003, in conjunction with the final hearing held on that date. The order prospectively deemed the Form 107 from Dr. Adam Kaufman to have been filed as evidence for Skinner, and noted the Form 107 would be filed. The Form 107 was not physically filed in the written record until December 22, 2003.

The December 17, 2003[,] order also gave [Hale] until January 23, 2004[,] to file medical proof in response to the Form 107 of Dr. Kaufman.

An order was entered on January 20, 2003, administratively reassigning the claim to Hon. Marcel Smith, Administrative Law Judge. The claim had previously been handled by another ALJ.

On January 26, 2003, Hale filed a motion to extend its proof time. A medical

report from Dr. Richard Eiferman, dated January 19, 2004, was also filed.

Skinner filed a written response to Hale's motion for an extension of proof time, and also requested the ALJ to whom the claim had been reassigned to hear Skinner's testimony live to assist in making a general determination regarding credibility. Skinner's written response did not contain an objection to Hale's request for an extension of proof time.

In an order rendered on February 6, 2004, Hale was granted until February 12, 2004[,] to complete its proof. The order directed [Hale's] counsel to send any additional evidence by facsimile transmission to the ALJ, in addition to filing.<sup>3</sup>

On February 12, 2004, Hale filed an additional report, dated February 11, 2004, from Dr. Richard Eiferman. Counsel for Hale certified, in filing the additional report, that copies were sent by facsimile transmission to [Skinner's] counsel and to the ALJ on February 11, 2004.

Skinner argues on appeal that, pursuant to 803 KAR 25:010, Sections 8 and 15, the ALJ's February 6, 2004[,] order granting Hale's motion for an extension of time to complete its proof automatically entitled him to an extension of time for rebuttal.

The customary timeframe for taking proof is set forth in 803 KAR 25:010, Section 8. That timeframe begins "from the date of issuance by the commissioner of the scheduling order." 803 KAR 25:010, Section 8(1). In Skinner's claim, that timeframe,

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<sup>3</sup> "Hale has moved to strike Skinner's reply brief because it refers to statements allegedly made by Hale's counsel in a telephonic conference. Since we are confining our review to the written record and are not considering any statement allegedly made in that telephonic conference, we decline to strike the reply brief."

as extended, had already expired before Skinner filed his second motion to amend his Form 101 and allege a right eye injury. No motion to extend that customary proof schedule was filed within 5 days prior to its expiration, as required by 803 KAR 25:010, Section 15(2).

Consequently, the additional taking of proof for which provision was made in the September 11, 2003[,] benefit review conference order and memorandum was grounded not in the provisions of 803 KAR 25:010, Section 8, but in a different regulatory provision, 803 KAR 25:010, Section 13(15), which authorizes an ALJ to "order that additional discovery or proof be taken between the benefit review conference and the date of the hearing." 803 KAR 25:010 Section 13(15), unlike 803 KAR 25:010, Section 8, does not specify by whom, in what order or in what timeframe additional proof shall be taken. Hence, those matters are governed by the terms of the order allowing additional discover or proof between the date of the benefit review conference and the date of the hearing.<sup>4</sup> Moreover, since 803 KAR 25:010, Section 13(15) does not specify by whom, in what order or in what timeframe additional proof shall be taken, there is no response or rebuttal time of an adverse party subject to automatic extension under 803 KAR 25:010, Section 15(5)(b) [emphasis original].

In Skinner's case, the September 11, 2003[,] benefit review conference order and memorandum made no provision for additional rebuttal discovery or proof time. No objection to this order or request for rebuttal time appears of record.

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<sup>4</sup> "We note no order was entered granting Skinner's motion to amend his Form 101 to include his allegation of injury to his right eye. The September 11, 2003[,] benefit review conference order and memorandum merely noted that 'limitations on eye claim' was a contested issue. We do not decide here if a different result might have been warranted had the ALJ entered a written order formally permitting amendment of the claim."

The subsequent December 17, 2003[,] hearing order gave [Hale] until January 23, 2004[,] to file medical proof in response to the Form 107 of Dr. Kaufman. It made no provision for additional rebuttal discovery or proof time. No objection to this order or request for rebuttal time appears of record.

When Hale filed a motion on January 26, 2003[,] to extend its proof time, Skinner filed a response which neither objected nor requested additional proof time to rebut any additional filing by Hale.

Failure to assert a right to rebuttal may result in loss of that right. Maxey v. R.R. Donnelley and Sons Company, Ky. App., 859 S.W.2d 130, 132 (1993). In Skinner's case, he failed to assert the right when the benefit review conference memorandum and order was rendered; failed to assert the right when the December 17, 2003[,] hearing order was rendered; and failed to assert the right when Hale filed its motion for extension of time on January 26, 2003. Under the unique facts of this case, therefore, we find no reversible error.

Finally, we note Hale has argued in the alternative, in response to Skinner's appeal, that the ALJ correctly ruled adversely to Skinner on limitations and notice issues pertaining to Skinner's claim of a right eye injury. In view of our resolution of the issue raised in [Skinner's] brief, we find it unnecessary to address these alternative arguments advanced in support of affirmance.

Based on the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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