RENDERED: AUGUST 19, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000127-WC

JOSEPH K. HUTCHINS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-98565

SUMMA TECHNOLOGY/KEN-MAR;
HON. BONNIE C. KITTINGER,
ADMINISTRATIVE LAW JUDGE;
HON. JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

KNOPF, JUDGE: Joseph K. Hutchins appeals from an opinion and order by the Workers' Compensation Board (Board) which vacated an interlocutory order by the administrative law judge (ALJ) and remanded for entry of a final opinion and award. Hutchins argues that the Board did not have jurisdiction to review the ALJ's

interlocutory order. We agree with the Board that the ALJ exceeded her authority by entering an interlocutory order based upon the facts of this case. Hence, we affirm and remand for additional proceedings as directed by the Board.

On December 2, 2002, Hutchins suffered a back injury during the course of his employment with Summa Technology/Ken-Mar (Summa). He reported the injury the following day and was taken off work. He attempted to return to work several times, but the pain and the brace he was prescribed for his back interfered with the performance of his work duties. Hutchins's last day of paid employment was March 11, 2003.

The ALJ held a hearing on Hutchins's claim on March 24, 2003, and the claim was submitted for a decision based upon the medical evidence and other testimony of record. Neither party disputed that Hutchins had reached maximum medical improvement (MMI). But in an "Interlocutory Opinion, Award and Order" entered on June 8, 2004, the ALJ found that Hutchins had not reached MMI. In particular, the ALJ noted the medical testimony from Dr. Bilkey, Dr. Nazar, and Dr. Loeb, all of whom testified that Hutchins's back injury was treatable, but only if Hutchins lost a significant amount of weight.

Consequently, the ALJ ordered Summa to continue paying temporary total disability (TTD) benefits to Hutchins. The ALJ also ordered Summa to continue paying all of Hutchins's medical

expenses, including the costs of a referral for weight reduction treatment. Summa filed a petition for reconsideration, which the ALJ denied in an order entered on August 6, 2004. In that order, the ALJ clarified that Summa's obligation to pay for weight reduction treatment would "run for a reasonable period of time to establish whether the claimant is making progress toward weight loss and achieving maximum medical improvement."

On appeal, the Board vacated the ALJ's order and remanded for entry of a final disposition. The Board first found that the ALJ lacked any basis for designating the order as interlocutory. As a result, the Board determined that the ALJ's order was final and appealable. Second, the Board concluded that the ALJ had misconstrued the medical evidence in finding that Hutchins had not reached MMI. Finally, the Board found that the ALJ had erred by ordering Summa to pay the costs of Hutchins's weight reduction treatment.

Hutchins first argues that the ALJ specifically designated her order interlocutory and therefore not appealable. In reaching its conclusion that the ALJ was not authorized to enter an interlocutory order, the Board noted that the ALJ is required to issue an opinion, award or decision within sixty days after the final hearing.[1] Because the ALJ did not issue her

[1] KRS 342.275(2).

opinion for seventy-six days after the hearing, the Board concluded that Hutchins's claim became a final order by operation of law. However, we agree with the separate opinion by Board Member Stanley that the ALJ's delay in issuing the opinion is not relevant to a determination of the order's finality.

We first note that the ALJ's pre-hearing order provided that the matter would stand submitted as of April 21, 2004, when the parties' briefs were due. While the ALJ's June 8, 2004 order was entered seventy-six days after the hearing, it was entered within sixty-days from the submission date. KRS 342.275(2) allows entry of the order later than sixty days after the hearing "when extension is mutually agreed to by all parties." In this case, no party objected to the submission date set out in the pre-hearing order.

Moreover, the Board's jurisdiction cannot be invoked until entry of a final order by the ALJ.[2] While the ALJ must enter a decision within sixty days from the final hearing, KRS 342.275(2) does not deprive the ALJ of the authority to enter an order after that time.[3] "At best, where an ALJ fails to timely

[2] KRS 342.285.

[3] *See* Coleman v. Eastern Coal Corp., 913 S.W.2d 800 (Ky.,App. 1995). *See also* Evangelical Lutheran Good Samaritan Society, Inc. v. Albert Oil Co., Inc., 969 S.W.2d 691, 693 (Ky. 1998), holding that a quasi-judicial body is not deprived of jurisdiction to act after expiration of a mandatory time limit unless the statute expressly sets out such consequences.

render a decision in accordance with KRS 342.275(2), until such time as a decision is issued, the parties to the claim simply become empowered to seek a writ of mandamus from the Franklin Circuit Court compelling the performance by the ALJ of her statutory duties."[4] Consequently, the ALJ's delay in rendering the order does not affect its finality.

Nevertheless, we agree with the rest of the Board's reasoning holding that the ALJ was not authorized to enter an interlocutory order in this case. It is well-established that an award of interlocutory relief in the form of TTD benefits is not appealable to the Board.[5] However, an ALJ's authority to award interlocutory relief is not unlimited. The applicable administrative regulations set forth a procedure whereby a party may seek interlocutory relief.[6]

In the current case, Hutchins never sought interlocutory relief, and he never claimed that he would suffer irreparable injury, loss or damage pending final decision of his

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[4] Board Order Vacating and Remanding, December 17, 2004, p. 12 (Stanley, Member, Concurring in part and dissenting in part).

[5] KI USA Corp. v. Hall, 3 S.W.3d 355 (Ky. 1999); Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995); and Saling and Hall, 774 S.W.2d 468 (Ky.,App. 1989).

[6] 803 KAR 25:010, § 12.

claim, which is a prerequisite to granting interlocutory relief.[7] Indeed, Hutchins never argued to the ALJ that he had not reached MMI. Rather, in his brief to the ALJ following the hearing he asserted that he is 100% occupationally disabled and was entitled to an award of total disability benefits.

Furthermore, we agree with the Board that the evidence did not support the ALJ's finding that Hutchins had not reached MMI:

> The ALJ purported to premise her actions on evidence of record from Dr. Warren Bilkey regarding Hutchins' attainment of MMI. In his September 9, 2003 report, Dr. Bilkey stated the opinion that Hutchins had reached MMI '[f]rom the standpoint of the workers' compensation case.' Dr. Bilkey therefore assigned a permanent impairment rating pursuant to the Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. The fact that Dr. Bilkey also stated in his report a belief that Hutchins 'is not from the medical standpoint at maximum medical improvement,' as opposed to being at MMI '[f]rom the standpoint of the workers' compensation case,' appears, in the context of Dr. Bilkey's report, to relate to Hutchins' nonwork related medical problems – especially Hutchins' weight of approximately 400 pounds. It does not support the ALJ's acting, in the absence of a request from any party and in the absence of the requisite showing of irreparable harm to the claimant, to *place the claim in abeyance* and award ongoing TTD benefits . . .
>
> The ALJ also noted that Dr. Thomas Loeb made statements in his deposition 'that

[7] 803 KAR 25:010, § 12(4)(a).

> Plaintiff is unable to work and that his back condition is treatable, however, not while he weighs 425 pounds.' Dr. Loeb, however, also stated that Hutchins reached MMI from the work injury long ago; that Hutchins had no permanent impairment from the work injury; and that Hutchins' ongoing back condition was not work-related. Dr. Loeb's opinions do not support the ALJ's acting, in the absence of a request from any party and in the absence of the requisite showing of irreparable harm to the claimant, *to place the claim in abeyance* and award ongoing TTD benefits . . . [8]

Finally, Hutchins argues that the Board erred by setting aside the ALJ's order directing Summa to pay the costs of weight-reduction treatment. He notes the medical evidence that his back condition is treatable, but only if he loses a significant amount of weight. Consequently, Hutchins asserts that the costs of a weight-reduction treatment are reasonably related to the treatment of his work-injury.

There is no question that an employer is obligated to pay medical expenses for "the cure and relief from the effects of an injury or occupational disease."[9] However, Hutchins had the burden of proving that the medical expenses are related to the injury and are reasonable and necessary prior to an application of benefits being filed and before an award or order of

[8] Board Order, *supra*, pp. 8-9 (*emphasis in original*).

[9] KRS 342.020(1).

benefits.[10] In this case, Hutchins has a pre-existing, non-work-related condition (obesity) which complicates treatment of his work-related back injury. The ALJ ordered Summa to pay Hutchins's expenses for a non-specific weight-reduction treatment that Hutchins had never claimed was necessary to his treatment. In fact, Hutchins argued in his brief to the ALJ that his obesity did not contribute to his back injury. Furthermore, Hutchins never invoked the provisions of 803 KAR 25:012, which sets out the procedure for resolution of medical disputes. Given the absence of any proof that a specific weight-reduction treatment is reasonably related to the work injury, we agree with the Board that the ALJ erred by ordering Summa to pay such medical expenses.

Accordingly, the December 17, 2004, opinion and order of the Workers' Compensation Board is affirmed, and this matter is remanded to the ALJ for further proceedings as set forth in the Board's opinion.

ALL CONCUR.

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[10] KRS 342.735(3).