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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001432-WC

GOODWILL COAL COMPANY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-83-22555

DOUGLAS BULLOCK; SURGICAL ASSOCIATES, P.S.C.; ST. JOSEPH HEALTHCARE; ROCKCASTLE HOSPITAL; HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE; and KENTUCKY WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND VANMETER, JUDGES.

VANMETER, JUDGE: In a workers' compensation case, an Administrative Law Judge (ALJ) who appoints a university evaluator must either give the opinions of that evaluator presumptive weight, or expressly set forth reasons for rejecting those opinions. The issue we must decide is whether the failure to file a petition for reconsideration, to bring to the ALJ's attention the fact that the university evaluator's report was

not addressed in the ALJ's opinion, is fatal to any subsequent appeal. We hold that it is, and we therefore reverse the decision of the Workers' Compensation Board (Board).

In 1981, Douglas Bullock was injured while working for Goodwill Coal Company when a small piece of steel struck him in the forearm. This fragment was not removed and, two years later, Bullock learned that it had migrated from his arm and was imbedded in the wall of his heart. Bullock filed and received benefits for an injury claim at that time, with future medical benefits remaining open. The case lay dormant until 2001, when Bullock filed motions to reopen to contest medical bills. Goodwill maintained that the bills were unrelated to the 1981 injury.

Ultimately, the ALJ directed Bullock to undergo a university evaluator examination pursuant to KRS 342.315. Dr. John C. Gurley at the University of Kentucky performed this examination. As summarized by the Board, Dr. Gurley noted that Bullock's chronic chest pain syndrome "could possibly be related to the intracardiac metal fragment" and recommended further testing. However, the ALJ did not refer to Dr. Gurley's report in his opinion and order, instead listing only the reports by Dr. Dennis Havens, Dr. Olash, Kelley West, R.N., and Dr. Karen Saylor. The conclusion of the ALJ was as follows:

> As a post-award medical fee dispute, the burden of proof rests with the defendant. *Square D Co. v. Tipton*, Ky., 862 S.W.2d 308 (1993). In this case, the records filed by the defendant indicate that, although plaintiff could not determine the cause of his chest complaints when he first presented for treatment, the testing performed each time seemed to relate such pains to bronchitis type problems which responded well to treatment based on that diagnosis. The only evidence filed on behalf of the plaintiff comes from Dr. Dennis Havens, who noted only that "*The relationship between the foreign body in the chest pain has remained an enigma for several years*." The remaining records filed from St. Joseph East hospital show only the treatment provided and do not detract from the aforementioned conclusions that plaintiff's chest pains were "bronchitic in nature." Based on the limited records available, the Administrative Law Judge is persuaded by the evidence filed on behalf of the defendant that the medical bills that are the subject of this dispute are not causally related to the original work injury and, therefore, are not compensable. Although it is conceivable that a metal fragment embedded around plaintiff's heart could lead to heart problems and/or chest pains, the available record shows that is not the situation presented here. For these reasons, this medical fee dispute is resolved in favor of the defendant.

Bullock filed an appeal with the Board, which held that since the ALJ had failed to address the report of Dr. Gurley, the ALJ's decision was erroneous as a matter of law. The matter was remanded for further findings of fact and rulings of law. Goodwill brings this petition for review.

As noted by the Board, the ALJ did not expressly address the conclusions of the university evaluator, Dr. Gurley. Under KRS 342.315(2), the "clinical findings and opinions" of the university evaluator "shall be afforded presumptive weight." In addition, if an ALJ "reject[s] the clinical findings and opinions of the designated evaluator, [the ALJ] shall specifically state in the order the reasons for rejecting that evidence."[1] The failure to address the findings of the university evaluator is a patent error appearing on the face of the order.[2] As such, in order to preserve such an error for review, the appeal must be preceded by the filing of a petition for reconsideration raising the error.[3]

We are aware that the Kentucky Supreme Court recently decided the case of *Brasch-Barry General Contractors v. Jones*.[4] In *Brasch*, the court addressed the ALJ's reliance on a doctor's opinion which departed from the AMA Guides in defining the

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[1] KRS 342.315(2).

[2] *See Eaton Axle Corp. v. Nally*, 688 S.W.2d 334, 337-38 (Ky. 1985) (court holding that the failure of the fact finder to make statutorily required findings of fact was a patent error that was required to be brought to attention of fact finder by petition for reconsideration in order to be preserved for appeal); *see also Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky.App. 2000).

[3] 688 S.W.2d at 337-38. KRS 342.285(1) requires that a petition for reconsideration be filed in accordance with KRS 342.281 whenever the complaining party wishes to preserve a question of fact for further review by the Board. Similarly, under KRS 342.281, an ALJ is limited in a petition for reconsideration "to the correction of errors patently appearing upon the face of the award, order or decision[.]"

[4] 175 S.W.3d 81 (Ky. 2005).

extent of the plaintiff's impairment. After the employer appealed to the Board without first filing a petition for reconsideration, the Board reversed and remanded to the ALJ for a determination consistent with the Board's opinion that substantial evidence did not support the doctor's impairment rating. The Court of Appeals reversed, relying on *Eaton Axle Corp. v. Nally*,[5] and finding that the underlying issue involved a factual determination which had not been preserved for review. The Supreme Court reversed, holding that the issue before the Board turned on the legal determination of whether the ALJ conformed with the requirements of KRS Chapter 342 when making findings of fact in reliance on the doctor's opinion.[6] Since the issue resolved a question of law rather than one of fact, it could "be appealed directly to the Board"[7] and a petition for reconsideration was not required. The court reaffirmed *Eaton Axle*, as it

> is completely consistent with the review procedures set forth in KRS 342.285 since it merely requires that a petition for reconsideration be filed in accordance with

[5] 688 S.W.2d 334.

[6] In *Brasch,* the ALJ erroneously based her conclusions on a doctor's opinion which departed from the AMA Guides. As found by the Board, a finding based on such an opinion was not supported by substantial evidence. 175 S.W.3d at 82. It hardly needs citation that whether the ALJ's conclusion is supported by substantial evidence is an appealable issue. *See, e.g., Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999) (court holding that "where the party with the burden of proof was successful before the ALJ, the issue on appeal is whether the substantial evidence supported the ALJ's conclusion").

[7] 175 S.W.3d 83.

> KRS 342.281 whenever the complaining party wishes to preserve a question of fact for appellate review. [688 S.W.2d] at 338. ("The purpose of this rule is to require that all justiciable issues are disposed of before the appellate process begins.")[8]

The matter now before us is distinguishable from *Brasch* as it involves the ALJ's failure to engage in mandatory fact finding rather than whether the ALJ conformed with KRS Chapter 342 in making findings of fact. The core holding of *Eaton Axle* is that the failure of the fact finder "to make findings of an essential fact" [9] is not reviewable unless a petition for reconsideration is filed pursuant to KRS 342.281.[10] Because the ALJ's error below in failing to address the findings of the university evaluator and to make statutorily required findings of fact constituted a patent error or omission of fact appearing on the face of the order, Bullock's failure to bring this error to the attention of the ALJ by means of a petition for reconsideration precludes appellate review of the issue.[11]

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[8] *Id*.

[9] 688 S.W.2d at 338.

[10] As noted by the court in *Eaton Axle*, the requirement of filing a petition for reconsideration of KRS 342.281 is akin to CR 52.04, which provides that a court's final judgment "shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue. . . ." 688 S.W.2d at 337-38.

[11] *See Osborne v. Pepsi-Cola*, 816 S.W.2d 643, 645 (Ky. 1991) (a timely petition for reconsideration must be filed before the ALJ in order to preserve a patent error or omission of fact for review by the Board).

The opinion of the Workers' Compensation Board is reversed and remanded with directions to reinstate the decision of the Administrative Law Judge.

ALL CONCUR.

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