Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 11, 2013

CLAIM NO. 201100465

A & C COMMUNICATIONS PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, ADMINISTRATIVE LAW JUDGE**

HENRY J. DECKER
OWEN CARROLL LANEY
d/b/a/ LANEY UTILITIES
EMPLOYEE STAFF, LLC
SUNZ INSURANCE COMPANY
UNINSURED EMPLOYERS' FUND
and HON. OTTO D. WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. A & C Communications ("A & C") appeals from the September 12, 2012, "Opinion and Interlocutory Order" of Hon. Otto D. Wolff, Administrative Law Judge ("ALJ") determining Henry J. Decker ("Decker") was an

employee of Owen Carroll Laney d/b/a Laney Utilities ("Laney") on the date of injury, A & C was the up-the-ladder employer pursuant to KRS 342.610(2), and dismissing Employee Staff, LLC ("Employee Staff") and Sunz Insurance Company ("Sunz Insurance") as parties to the claim. The ALJ also set aside his previous order dated September 15, 2011. Because A & C has appealed from an interlocutory order which is not subject to appeal, we dismiss the appeal and remand the claim to the ALJ. We will only discuss the facts of this case necessary to explain the grounds for dismissal and remand.

On March 28, 2011, Decker filed a Form 101 against Laney, the Uninsured Employers' Fund ("UEF"), and A & C. Kentucky Employer's Mutual Insurance ("KEMI"), as the workers' compensation carrier for A & C, was also listed as a party. Decker alleged on January 4, 2011, he was injured in a motor vehicle accident ("MVA") in the course of his employment with Laney.

On March 28, 2011, the Commissioner of the Department of Workers' Claims certified Laney had workers' compensation insurance on the alleged date of injury and was "insured under Employee Staff, LLC." The certification stated the insurance carrier for Employee Staff was Sunz Insurance. The Commissioner also certified A & C had

workers' compensation insurance on the alleged date of injury through KEMI. The UEF and A & C filed Forms 111 denying liability and the claim. A & C also asserted it was not Decker's employer and denied it was liable pursuant to KRS 342.610. On June 2, 2011, A & C filed a motion to join Employee Staff and Sunz Insurance based on the Commissioner's certification. By order dated June 27, 2011, the ALJ sustained A & C's motion and directed Employee Staff and Sunz Insurance to enter an appearance and file a Form 111 within forty-five days of the date of the order. The order also provided Employee Staff and Sunz Insurance shall take notice that pursuant to statute and regulations they must file a denial or acceptance of the claim and failure to file the Form 111 may result in sanctions as provided in 803 KAR 25:010 § 5.

On August 15, 2011, Decker filed a motion to amend his Form 101 to assert in the alternative Employee Staff was his employer. On that same date, Decker filed a motion to have the allegations contained in his Form 101 admitted. Decker cited KRS 342.270(2), 803 KAR 25:010 § 5, and the June 27, 2011, order in which the ALJ joined Employee Staff and Sunz Insurance as parties and directed them to enter their appearance and file a Form 111 within forty-five days of the June 27, 2011, order. He also noted

the order provided the sanctions for their failure to timely file a Form 111. Decker asserted Employee Staff and Sunz Insurance failed to timely file a Form 111 and requested all allegations be deemed admitted as to Employee Staff and Sunz Insurance and a hearing be held to determine the damages to be awarded to him due to the work-related injury. Further, pursuant to the Commissioner's certification, Decker requested Laney and Employee Staff be deemed his employers and insured by Sunz Insurance.

On August 19, 2011, Employee Staff filed a motion to continue the hearing set for August 24, 2011. Counsel for Employee Staff stated he was newly hired and had been contacted by Employee Staff on August 17, 2011, and had no opportunity to review the file but had made telephone contact with counsel for the UEF, Decker, and A & C in order to receive the pleadings. He stated it was his understanding Employee Staff had moved its office and therefore did not receive the majority of the pleadings. On that same date, counsel entered his appearance for Employee Staff and Employee Staff filed a Form 111 asserting Decker was not its employee on the date of the alleged injury.

On August 24, 2011, the ALJ entered an order containing the following:

> Matter continued based upon parties agreement over A & C obj. to commence TTD and Med Ben, claim in abeyance as to TTD and med. ben; bifurcate claim on all other issues. [Defendant] Sunz's to prep agreed formal order setting forth above.

The order was signed by counsel for all the parties.

On August 29, 2011, Sunz Insurance filed a special answer stating Decker did not have an employment relationship with Employee Staff. Sunz Insurance also filed a Form 111 asserting as one of its defenses that Decker was not employed by Employee Staff on the date of the alleged injury.

On August 29, 2011, A & C filed an objection and motion to strike the pleadings of Employee Staff and Sunz Insurance asserting the pleadings were untimely. It pointed out KRS 342.270(2) and 803 KAR 25:010 § 5(2) permit an employer to file a Form 111 within forty-five days. It asserted the failure of Employee Staff and Sunz Insurance to timely respond requires their admission of all allegations in Decker's Form 101 and issues of insurance coverage, notice, and employment relationship are deemed to be admitted by Laney, Employee Staff, and Sunz Insurance. A & C also requested it be dismissed as a party.

On September 1, 2011, the ALJ entered an order sustaining Decker's motion to include Employee Staff "as a

Defendant Employer in the alternative." Thereafter, both Employee Staff and Sunz Insurance filed objections to A & C's motion.

On September 15, 2011, the ALJ entered an order noting Employee Staff and Sunz Insurance failed to comply with KRS 342.270(2) and 803 KAR 25:010 § 5 by not filing a Form 111 or notice of claim denial or acceptance within forty-five days of the scheduling order or the order entered by the ALJ on June 27, 2011. The ALJ noted the defendants were provided notice their failure to enter an appearance and file a Form 111 within forty-five days may result in sanctions pursuant to 803 KAR 25:010 Section 5. Citing to the Commissioner's certification, the ALJ ordered the allegations contained in the Form 101 be deemed admitted as to Employee Staff and Sunz Insurance. The ALJ further ordered Laney "was insured under Employee Staff" and its insurance carrier is Sunz Insurance. The order stated a hearing would be held to determine the extent of the damages to be awarded to Decker. A & C and the UEF were to remain parties to the action until further orders.

On September 26, 2011, Sunz Insurance filed a petition for reconsideration and motion to vacate the September 15, 2011, order.

On September 28, 2011, Employee Staff filed a petition for reconsideration of the order.

Significantly, in the record is a document styled "Agreed Order," not signed by the ALJ but signed by all parties except for A & C, setting out that a discussion occurred between the ALJ and all the parties on August 24, 2011, and that to which there was an agreement. The document stated the hearing scheduled for August 24, 2011, was cancelled and Decker's motion to have the allegations of the Form 101 admitted as to Employee Staff and Sunz Insurance was rendered moot and withdrawn. The proposed agreed order also stated the claim was placed in abeyance as to extent and duration and medical benefits. However, the remaining issues including coverage, employer/employee relationship, determination of proper indemnity and medical payment obligor were bifurcated. Sunz Insurance will pay Decker's past temporary total disability ("TTD") benefits beginning January 5, 2011, and future TTD benefits at the weekly rate of $668.00 until such time as he reaches maximum medical improvement or further order of the ALJ which would include a determination of the proper payment obligor. Sunz Insurance will pay these benefits subject to reimbursement upon determination of the proper payment obligor. Sunz Insurance will also pay Decker's medical

expenses commensurate with the medical fee schedule, as may reasonably be required for the cure and relief of his injuries, effective August 24, 2011, and thereafter until further orders of the ALJ. Further, Sunz Insurance will pay these medical benefits subject to reimbursement upon determination of the proper payment obligor. A determination of further responsibility for the payment of the medical expenses incurred would be decided by the ALJ. The proposed agreed order stated A & C objects to the commencement of TTD benefit payments and moved to have the ALJ deem all matters admitted pertaining to the allegations made against Employee Staff and Sunz Insurance. A & C was directed "to file a written objection and motion for same." A decision on the issue would be made upon receipt of A & C's written submissions and any responses.

Thereafter, Employee Staff and Sunz Insurance sought discovery and A & C filed a motion to quash depositions set by Sunz Insurance of Lisa Plank and Owen Carroll Laney. It argued the September 15, 2011, order precluded Sunz Insurance from continuing to take depositions on the issues other than extent and duration of disability.

On November 15, 2011, Owen Carroll Laney and Lisa Plank were deposed.

By order dated November 27, 2011, the ALJ set a time each party had to respond to various motions.

On November 30, 2011, A & C filed a supplemental response and objection to the petitions for reconsideration.

On December 14, 2011, Employee Staff filed a response to A & C's supplemental response and objection to its petition for reconsideration.

On December 27, 2011, Sunz Insurance filed a reply and response to A & C's objection.

The parties filed status reports. Pursuant to Sunz Insurance's motion to set a status conference, on May 18, 2012, the ALJ entered an order granting the motion and directing a telephonic status conference would be held on June 6, 2012.

As previously mentioned, on September 12, 2012, the ALJ entered a twenty-four page "Opinion and Interlocutory Order." Concerning the September 15, 2011, order, the ALJ determined as follows:

> Petitioner's ES and Sunz correctly identified an error patently appearing on the face of the September 15, 2011 Order. In fact, the entire Order is a patent error. The Order of September 15, 2011 is set aside in its entirety.
>
> The patent error starts with the introductory sentence of the Order, the

> first sentence read, "This matter is before the ALJ upon Motion of the Plaintiff, Henry Decker, to have the allegations of the Form 101 admitted as to Defendants, Employee Staff, LLC and Sunz Insurance Company." This is a patent error on the face of the Order; Plaintiff did not have any motion pending before the undersigned on September 15, 2011.
>
> Plaintiff's Motion To Have Allegations of Form 101 Admitted was withdrawn by Plaintiff at the August 24, 2011 conference in London, Kentucky. Plaintiff withdrew his Motion at that time because Sunz agreed to promptly pay Plaintiff all of his past due indemnity and medical benefits. Sunz even agreed to continue paying such weekly benefits until the correct payment obligor was identified in this litigation or until Plaintiff attained MMI status. This quid pro quo agreement allowed Plaintiff to receive benefits and eliminated ES and Sunz' exposure of having the allegations of Plaintiff's Form 101 admitted against them.
>
> There being a patent error on the face of the Order, Petitioners ES and Sunz's Petitions are Sustained. The Order of September 15, 2011 is set aside in its entirety.

The ALJ found that on the date of injury, Decker was an employee of Laney and was not an assigned employee of Employee Staff. Therefore, Employee Staff and Sunz Insurance, its workers' compensation carrier, were not obligated to pay workers' compensation benefits. Accordingly, they were no longer necessary parties to the

litigation and would be dismissed. The ALJ made the following determination:

> It having been determined that on 1/4/11 Plaintiff was an employee of LU, that LU was an insured and that Plaintiff and LU were working under the SUBCONTRACT between LU and AC, and/or AC working under the SUBCONTRACT LU had with AC Kentucky workers compensation insurer, KEMI, is liable to Plaintiff for the payment of all workers' compensation benefits due him.

The ALJ determined that since Employee Staff and Sunz Insurance were dismissed from the litigation, A & C's objection and motion to strike their pleadings was moot. The ALJ also noted other issues remain to be resolved, stating as follows:

> There remain issues to be addressed and decided in this matter. Undoubtedly there will be another wave of motions and petitions for reconsideration filed as a result of this Order, and such filings and/or Petitions shall be promptly addressed.
>
> The determinations herein set forth, render any other issues, presently pending, but unaddressed, moot.
>
> This is an interlocutory order and not subject to appeal.

The ALJ's findings of fact, conclusions of law, and order are as follows:

> 1. Facts as stipulated and above discussed.

2. On January 4, 2011 Plaintiff was an employee of LU. This finding is based upon Plaintiff's testimony, Carroll Laney's testimony in two depositions and the proof indicating LU exercised complete control over Plaintiff's work on January 4, 2011.

3. On January 4, 2011 Plaintiff sustained a work-related injury in the course of his employment.

4. On January 4, 2011 LU, as pertains to Plaintiff, did not have workers' compensation insurance in place. This finding is based upon Owen Laney's testimony, indicating that the only workers' compensation insurance coverage LU had was through ES.

5. On 1/4/11 Plaintiff was not an "Assigned Employee" of ES. This finding is based upon the wording of the Service Agreement and the testimony of Owen Laney that he took no steps to have Plaintiff designated an "Assigned Employee" of ES.

6. On January 4, 2011 there was in effect a SUBCONTRACT between LU and AC. This finding is based upon a review of the SUNCONTRACT [sic] and Owen Laney's acknowledgement the SUBCONTRACT was in effect on 1/4/11.

7. On 1/4/11 Defendant LU was working under the SUBCONTRACT between LU and AC. This finding is based upon the testimony of Owen Laney, Plaintiff and Scott Terpening.

8. On January 4, 2011 AC had in place a policy of Kentucky workers' compensation insurance through Kentucky Employer Mutual Insurance (KEMI). This finding is based upon AC's repeated representations throughout this litigation that its workers compensation

insurance carrier on January 4, 2011 was KEMI. These representations include [sic], but are not limited to, the content of Defendant AC's Form 111 and its Notice of Claim Denial or Acceptance.

9. On 1/4/11 Plaintiff was an employee of LU, an uninsured subcontractor of AC, thus, pursuant to KRS 342.610(2), Plaintiff is entitled to receive workers' compensation benefits from AC and/or its insurer KEMI. This finding is based upon the testimony of Plaintiff, Owen Carroll and Scott Terpening.

ORDER

1. Defendants' Employee Staff LLS [sic] and Sunz Insurance Company Petitions for Reconsiderations are SUSTAINED.

2. The Order of September 5, 2011 is SET ASIDE in its entirety.

3. Defendant A&C Communication Company's Objection and Motion to Strike Pleadings of Employee Staff and Sunz Insurance Company is OVERRULED.

4. Defendants A&C Communication Company and its Kentucky Workers' Compensation insurance carrier (KEMI) shall, within thirty (30) days of this Order, provide Plaintiff, with all past, present and future indemnity benefits due him since January 5, 2011. Defendant's obligation to provide Plaintiff with such benefits shall continue until Plaintiff attains MMI from the effects of his work-related injury.

5. Defendant A&C Communications and/or KEMI shall provide Plaintiff with all future medical benefits as may reasonably be required for the care and

> relief from the effects of his work-related injury.
>
> 6. Defendants A&C Communications Company and/or KEMI shall, within thirty (30) days from the date of this Order, pay Employee Staff LLC and/or its insurer Sunz Insurance Company any and all benefits paid to or on behalf of Plaintiff to date. Within ten (10) days of this Order, Defendants Employee Staff, LLC and/or its insurer Sunz, shall provide to Defendant's A&C Communications Company or its insurer KEMI an account of all benefits paid to and/or on behalf of Plaintiff.
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> 7. Defendant A&C Communications Company and/or its insurer KEMI are entitled to a credit against the amounts owed Plaintiff, equal to the amounts they are required to refund to Employee Staff, LLC and/or Sunz.
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> 8. Defendants Employee Staff, LLC, Sunz and the UEF are DISMISSED from further litigation of this claim.
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> 9. Any other pending Petitions for Reconsideration and/or Motions, not addressed herein, are moot.
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> 10. This is an Interlocutory Order, and, at this time, not subject to appeal.
>
> 11. As to the remaining parties, a Benefit Review Conference is scheduled for Wednesday, November 28, 2012 at 1:30 p.m. eastern time at the Lexington hearing site.

On September 28, 2012, A & C filed a petition for reconsideration which the ALJ overruled on April 9, 2013, concluding there was no patent error in the opinion and

interlocutory order. The ALJ stated the September 12, 2012, order was set aside because it addressed and ruled upon an issue which was not before the ALJ as Decker had withdrawn his motion in return for Sunz Insurance agreeing to immediately pay past and future indemnity benefits as well as medical benefits.

On appeal, A & C argues the ALJ erred in overruling its motion to strike the untimely filed Forms 111 of Employee Staff and Sunz Insurance and in dismissing them as parties and assigning liability to A & C's carrier with an order of reimbursement. In an abbreviated argument, A & C also contends the ALJ's opinion and interlocutory order is appealable. In their briefs, Decker, Employee Staff, and Sunz Insurance all maintain this Board does not have jurisdiction as A & C has appealed from an interlocutory order.

The arguments on appeal by A & C notwithstanding, we conclude, as a matter of law, the ALJ's ruling of September 12, 2012, was interlocutory and does not represent a final and appealable order. 803 KAR 25:010, § 21(2)(a), provides as follows: "[w]ithin thirty (30) days of the date of 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, § 21(2)(b) defines a final award, order or decision as follows: "[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)."

Civil Rule 54.02(1) and (2) state as follows:

> (1) When more than one claim for relief is presented in an action, . . . the court may grant a final judgment upon one or more but less than all 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.
>
> (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.

Hence, an order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and, 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. *Cf.* KI USA Corp. v. Hall, 3 S.W.3d 355 (Ky. 1999); Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995); Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1980).

The September 12, 2012, decision and subsequent order ruling on the petition for reconsideration meet none of these requirements. The ALJ's opinion and interlocutory order does not operate to terminate the action. Moreover, the ALJ's ruling does not act to finally decide all outstanding issues, nor does it operate to determine all the rights of Decker, Laney, and A & C so as to divest the ALJ once and for all of the authority to decide the overall merits of the case. Further, we note the order dismissing Employee Staff and Sunz Insurance is not final and appealable as it is an interlocutory order. Similarly, the ALJ has not entered a final order determining Sunz Insurance has a right to reimbursement from A & C or KEMI. The ALJ has yet to decide several issues including Decker's entitlement to an award of income and medical benefits and, if appropriate, A & C's and KEMI's right of recovery from

Laney for any income and medical benefits for which it may be determined to be liable.

In summary, the ALJ's September 12, 2012, opinion and interlocutory order plainly does not address with finality "all" of the outstanding contested issues in Decker's case. The language required by CR 54.02 is not contained in the ALJ's decision. Further, the ALJ specifically stated the opinion was interlocutory and not appealable and there were remaining issues to be addressed and decided in this claim. The ALJ set a benefit review conference on November 28, 2012, in Lexington. Clearly, this was not a final and appealable order or award and was interlocutory in nature, and A & C cannot appeal from the order.

As a matter of law, therefore, the September 12, 2012, decision and subsequent order ruling on the petition for reconsideration must be deemed interlocutory, and it is the ALJ as fact-finder, not this Board, who retains jurisdiction. *See* KRS 342.275.

ACCORDINGLY, IT IS ORDERED the appeal of A & C is **DISMISSED** and this claim is **REMANDED** to the ALJ for further proceedings and a final decision on all remaining issues.

ALL CONCUR.

_____
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