# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: February 27, 2015**

CLAIM NO. 199410356

GARGOYLE MINING COMPANY PETITIONER

VS. **APPEAL FROM HON. GRANT ROARK, ADMINISTRATIVE LAW JUDGE**

TOMMY FOUTS
and HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**VACATING AND REMANDING**

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

**RECHTER, Member.** Gargoyle Mining Company ("Gargoyle") appeals from the August 12, 2014 Order rendered by Hon. Grant Roark, Administrative Law Judge ("ALJ") dismissing its motion to reopen. Gargoyle argues the ALJ erred in dismissing the motion to reopen prior to the expiration of

proof time. Because the order dismissing was premature, we vacate and remand.

In an August 10, 1995 Opinion and Award and a subsequent amended award issued March 20, 1996, Tommy Fouts was awarded permanent total disability benefits. Gargoyle filed a motion to reopen on April 21, 2014 to reduce the award, alleging Fouts had returned to employment with Dream House Furnishings and Pit Stop Express and he was therefore no longer permanently and totally disabled. Gargoyle supported the motion with a report from Lynn Shigley, case manager, and Dan Hubbard, investigator, of G4S Compliance & Investigations. Surveillance was conducted on November 1, 2013 from 7:59 a.m. until 1:00 p.m., but the investigator never located Fouts. The investigator inquired at Dream House Furnishings whether the claimant was working and was told he worked part time and was not there that day. The investigator then went to Pit Stop Express and inquired whether the claimant was working. The investigator was informed no one named Tommy Fouts worked there.

The matter came before Chief Administrative Law Judge, J. Landon Overfield ("CALJ") on the Frankfort Motion Docket. The CALJ rendered an order on May 20, 2014 determining Gargoyle set forth a *prima facie* case for reopening and sustaining the motion to the extent the claim

would be assigned to an ALJ for further adjudication. A scheduling order was issued on June 17, 2014 granting both parties 60 days to submit proof followed by 30 days for the respondent and 15 days thereafter for Gargoyle to file rebuttal proof.

Fouts filed a response to the motion to reopen and a motion to dismiss on July 10, 2014. Fouts denied working at Dream House Furnishings and Pit Stop Express. Fouts indicated he had a son who is also named Tommy Fouts, who was employed part time by Dream Home Furnishings. Fouts attached letters from Eric S. McPeek, Vice President of Dream Homes Furnishings and President of Pit Stop Express, indicating Fouts had not been employed at the two businesses.

Based upon Fouts' response, the ALJ granted the motion to dismiss by order dated August 12, 2014 without making any specific findings.

On appeal, Gargoyle argues the ALJ erred in dismissing the reopening prior to the expiration of proof time. Pursuant to the June 17, 2014 scheduling order, the parties had 60 days to submit proof followed by 30 days for Fouts to file evidence and 15 days for Gargoyle to file any rebuttal proof. The ALJ's order dismissing the claim was issued prior to the expiration of the initial 60 day proof

period. Gargoyle notes Fouts only filed unsworn statements and thus no competent evidence had been filed at the time the ALJ dismissed the claim. Gargoyle argues that, once the CALJ determined it had made a *prima facie* case to reopen, the ALJ was without authority to summarily dismiss the proceeding. Rather, Gargoyle contends it was entitled to have the matter adjudicated by the ALJ.

The procedure for reopening a prior workers' compensation claim pursuant to KRS 342.125 is a two-step process. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006). The first step is the *prima facie* motion, which requires the moving party to provide sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972). Only after the moving party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening will the adversary party be put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001). At this point, step two of the reopening process commences, with additional proof time being set so the merits of the reopening can be fully and finally adjudicated. Campbell v. Universal Mines, 963 S.W.2d 623 (Ky. 1998).

In Crawford & Co. v. Wright, 284 S.W.3d 186 (Ky. 2009), the Supreme Court instructed that once the motion to reopen is made with the required *prima facie* showing, the matter is to be assigned to an ALJ for further proof time and an adjudication of the merits. In the claim *sub judice,* the CALJ established Gargoyle made a *prima facie* showing in support of reopening, and the matter was properly assigned to an ALJ for further proof time and an adjudication on the merits. Therefore, the provisions of 803 KAR 25:010 Sections 8 - 18 became applicable and the parties were entitled to conduct discovery, introduce evidence, attend a Benefit Review Conference, and have a hearing. By granting the motion to dismiss, the ALJ abbreviated the proof schedule. The ALJ did not have the authority to "short-circuit" the adjudicative process and the order dismissing the claim was premature. The ALJ's Order, in effect, is a summary judgment. In Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991), the Supreme Court stated the record must demonstrate it is an impossibility for the losing party to prevail before a summary judgment may be granted. Here, Gargoyle has been denied an opportunity to produce evidence and the record does not demonstrate the impossibility of prevailing upon reopening.

Accordingly, the August 12, 2014 order rendered by Hon. Grant Roark, Administrative Law Judge, is **VACATED** and this matter is **REMANDED** for reopening of proof time and entry of a decision on the merits resolving the reopening.

ALL CONCUR.

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