Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 10, 2014

CLAIM NO. 200875177

JILLIAN MOORE PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

BAPTIST HOSPITAL EAST
HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE,
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Jillian Moore ("Moore") appeals from the January 9, 2014, order of Hon. Robert L. Swisher, Administrative Law Judge ("ALJ Swisher") and the February 4, 2014, order of Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") overruling her petition for reconsideration.

On appeal, Moore argues as follows:

> **DID THE MOTION TO REOPEN PRESENT A *PRIMA FACIE* CASE FOR REOPENING?**
>
> Yes, yes, yes, yes, yes! The issue as to pain management notwithstanding, which should have called for the Motion to Reopen being sustained for medical reasons, it is clear that the Motion also had to be sustained as it relates to the Claimant's income allegations. The Claimant stated that she was worse now than she was at the time of her injury. The Claimant stated that she had had a surgery. The attachment from Dr. Tien included the operative note which is objective evidence of a change of condition, a surgery. KRS 342.125 requires a change of disability as shown by objective medical evidence of worsening due to a condition caused by the injury since the date of the award or order. So what the Claimant showed was a change in disability, shown by objective medical evidence of worsening, (surgery), due to a condition caused by the injury since the date of the award or order. The surgery was caused by the injury and it occurred since the date of the award. The Administrative Law Judges erred in not reopening this claim.

Moore requests the ALJ's decision be reversed, the claim remanded, and assigned to an ALJ for adjudication of the issues on the merits.

In an August 8, 2011, opinion, order, and award, Hon. Chris Davis, Administrative Law Judge ("ALJ Davis"), determined that while in the employ of Baptist Hospital East ("Baptist Hospital"), Moore sustained a cervical spine

and left shoulder injury meriting a 6% impairment rating. ALJ Davis awarded temporary total disability benefits, permanent partial disability benefits, and medical benefits. It appears no appeal was taken of this decision.

On December 5, 2013, Moore filed a motion to reopen asserting there had been a change in condition and she is now more disabled than she was at the time of the August 8, 2011, decision. She stated her treating physician had performed surgery which was reasonable, necessary, and work-related and she was temporarily totally disabled during convalescence from the surgery, and remains permanently totally disabled. She also stated Baptist Hospital did not authorize the surgery nor did it completely authorize pain management as requested by her treating physician.

Moore attached her affidavit in which she stated she has continued to be treated by Dr. Huey Yuan Tien, who performed surgery on July 23, 2012. Later, he referred her to pain management. She asserts her condition has gradually worsened since ALJ Davis' decision and she was temporarily totally disabled for a period of time following surgery and is now permanently totally disabled. In the alternative, she asserts since surgery was performed she has an additional impairment pursuant to the 5th Edition of

the American Medical Association, Guides to the Evaluation of Permanent Impairment. She urges this merits reopening. Moore also attached her attorney's affidavit, the October 3, 2013, utilization review/approval letter authored by Karen Greenlee, the case manager, and the medical records of Dr. Tien spanning the period from July 27, 2010, to January 15, 2013.[1]

Baptist Hospital filed a response to the motion to reopen arguing Moore alleged permanent total disability, but offered no proof beyond a mere allegation. Baptist Hospital argued Moore's motion acknowledges there is no indication of increased permanent impairment to justify reopening. It asserted the motion "falls well short of establishing a *prima facie* case for reopening" and must be overruled.

On January 9, 2014, ALJ Swisher entered the following order:

> This matter comes before the Frankfort Motion Docket upon Plaintiff's motion to reopen the above-styled claim on the grounds of a worsening of his physical condition and/or an increase in occupational disability. Plaintiff has supported the motion with his own affidavit and medical records of Huey Tien, M.D.

[1] Moore tendered other records not germane to the issue on appeal.

> The ALJ notes that Plaintiff has failed to attach the required documents to his motion to reopen in compliance with KRS 342.125 and 803 KAR 25:010§4(6)(a). Namely, Plaintiff has not submitted a medical report demonstrating an increase in functional or occupational disability and has not submitted sufficient evidence to establish a *prima facie* case of permanent total occupational disability.
>
> Therefore, **IT IS HEREBY ORDERED** that Plaintiff's motion to reopen is **PASSED** and the Plaintiff is granted **ten (10) days** from the date of the rendering of this order to supplement the motion to reopen with the proper documents. Failure of the Plaintiff to file the required documents shall result in the denial of Plaintiff's motion to reopen.

On January 15, 2014, Moore filed a petition for reconsideration asserting her affidavit outlined that Dr. Tien had performed a left cubital tunnel release surgery on July 23, 2012. She contended this fact alone is objective evidence of a change of condition and is sufficient to establish a *prima facie* case when coupled with her testimony she is now permanently totally disabled. Moore asserted she is not required to have a change in impairment rating but only a change of condition demonstrating permanent total disability. She also noted there is another issue regarding entitlement to pain management which must be resolved. Therefore, she argued ALJ Swisher

should reconsider his January 9, 2014, order, reopen the claim, and assign it to an ALJ. In the alternative, because of the complicated nature of this claim, if her reconsideration request was not granted, Moore requested an additional thirty days to supplement the motion to reopen with additional documents.

Baptist Hospital filed a response to the petition for reconsideration.

The CALJ's February 4, 2014, order stated, in relevant part, as follows:

> On December 5, 2013, Plaintiff filed a motion to reopen for increased benefits and medical expenses relating to a cubital tunnel surgery. Plaintiff supported her motion with her own affidavit noting her condition has worsened as a result of the cubital tunnel syndrome and the cubital tunnel release surgery. Plaintiff also submitted medical records from the surgeon performing the cubital tunnel release surgery.
>
> ALJ Swisher's January 9, 2014 order made a finding that Plaintiff had not submitted sufficient medical evidence to establish a prima facie case for reopening. The order passed the consideration of the motion and granted Plaintiff ten (10) days within which to supplement the motion to reopen with proper documentation. The order noted that failure to file the required documents shall result in denial of Plaintiff's motion to reopen.

> Plaintiff did not file additional records but, instead, filed a petition for reconsideration of ALJ Swisher's January 9, 2014 order. Defendant Employer has responded. In the petition for reconsideration, Plaintiff argues there is adequate showing of Plaintiff's entitlement to reopening. However, the petition for reconsideration does not set forth any errors patently appearing on the face of ALJ Swisher's order.
>
> Review pursuant to a petition for reconsideration is limited by KRS 342.281 and 803 KAR 25:010§19 to the correction of errors patently appearing on the face of an award, order, or decision and does not allow reconsideration of the merits of a claim or defense. A review of the above order indicates no error patently appearing on the face thereof.
>
> Accordingly, the petition for reconsideration shall be and is hereby **DENIED**.

Because there has been no order entered ruling on Moore's motion to reopen, we dismiss the appeal and remand. In the case *sub judice*, the January 9, 2014, order of ALJ Swisher did not rule upon Moore's motion to reopen; rather, he passed the motion and granted Moore ten days from the date of the order to supplement the motion to reopen with the proper documents. ALJ Swisher noted that failure to file the required documents would result in denial of Moore's motion to reopen. Moore did not file the documents and instead filed a petition for reconsideration.

In his February 4, 2014, order, the CALJ did not rule upon Moore's motion to reopen. Instead, the CALJ denied her petition for reconsideration which sought relief from ALJ Swisher's January 9, 2014, order. Neither the CALJ nor ALJ Swisher has ruled upon Moore's motion to reopen. Thus, there is no final and appealable order ruling on Moore's motion to reopen.

For purposes of Chapter 342, a final award, order or decision is determined according to CR 54.02(1) and (2). 803 KAR 25:010. Pursuant to CR 54.02, an order is appealable only if it terminates the action itself, acts to decide all matters litigated by the parties, and operates to determine all the rights of the parties so as to divest the ALJ of authority. Tube Turns Division v. Logsdon, 677 S.W.2d 897 (Ky. App. 1984). Clearly, ALJ Swisher's January 2014 order passed Moore's motion to reopen and the CALJ's February 2014 order overruled Moore's petition for reconsideration. Neither order determined whether Moore has made a *prima facie* showing sufficient to justify entry of an order reopening the claim. Stated another way, there has been no determination as to whether Moore has made a *prima facie* showing sufficient to justify the granting of her motion. Therefore, this Board is without authority to

review either ALJ Swisher's January 9, 2014, order or the CALJ's February 4, 2014, order.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED the above-styled appeal is **DISMISSED** and this matter is **REMANDED** to the CALJ, or at the discretion of the CALJ, to ALJ Swisher for entry of an order ruling on Moore's December 5, 2013, motion to reopen.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, NOT SITTING.

_____
FRANKLIN A. STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON WAYNE DAUB
600 W MAIN ST STE 300
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON DOUGLAS A USELLIS
600 E MAIN ST STE 100
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON ROBERT L SWISHER
2780 RESEARCH PARK DR
LEXINGTON KY 40511

CHIEF ADMINISTRATIVE LAW JUDGE:

HON J LANDON OVERFIELD
657 CHAMBERLIN AVE
FRANKFORT KY 40601