OPINION ENTERED: APRIL 24, 2012

CLAIM NO. 200900544

KROGER PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

LORI CATELLIER,
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION DISMISSING

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

SMITH, Member. Kroger appeals from the November 16, 2011 Order of Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") and from the December 12, 2011 Order denying its petition for reconsideration. The CALJ determined Lori Catellier ("Catellier") made a *prima facie* case for reopening pursuant to KRS 342.125 and sustained her motion to the extent the claim was assigned for further adjudication. On appeal, Kroger argues Catellier failed in

her burden of establishing a *prima facie* case for reopening based on newly discovered evidence and/or fraud. Kroger also argues it should be awarded costs in defending the motion to reopen since it was filed without a reasonable basis. Alternatively, Kroger argues the matter should be remanded for additional findings of fact and conclusions of law.

On May 11, 2009, Catellier filed an application for resolution of injury claim asserting she suffered injuries to her neck, right arm and right shoulder on November 9, 2008, while moving crates of milk. The claim was litigated, resulting in an Opinion and Award rendered by Hon. James L. Kerr, Administrative Law Judge ("ALJ") on January 10, 2011. Finding the opinion of Dr. Martin G. Schiller to be most credible, ALJ Kerr determined Catellier was at maximum medical improvement, had no permanent impairment related to the injury, and proposed cervical surgery by Dr. Arendall was unreasonable and unnecessary.

Catellier filed a motion to reopen on October 31, 2011, asserting Dr. Schiller testified in another claim he was not capable of reading imaging studies, which constituted newly discovered evidence, fraud, and/or falsified evidence pursuant to Civil Rule 60.02.

On November 7, 2011, Kroger filed a response to the motion to reopen and motion for assessment of costs for unreasonable proceedings. Kroger argued the portions of Dr. Schiller's April 2011 deposition could not constitute newly discovered evidence and could not be considered fraudulent. Thus, it contended Catellier’s reliance on the testimony as a basis for reopening constituted a misapplication of the law, was irrelevant to the claim, and was based on a misleading interpretation of Dr. Schiller's testimony.

The CALJ in an order rendered November 16, 2011, concluded Catellier had set forth a *prima facie* case for reopening pursuant to KRS 342.125. Citing, Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681 (Ky. 1972), the CALJ sustained the motion to reopen to the extent the claim was assigned to an ALJ for further adjudication. The CALJ passed Kroger's motion for costs for consideration to the assigned ALJ.

Kroger filed a petition for reconsideration requesting additional findings of fact. By order dated December 12, 2011, the CALJ denied the petition for reconsideration finding no patent error. The CALJ reviewed the unrebutted evidence submitted with Catellier’s motion and found it sufficient to establish a *prima facie* case for reopening.

We conclude the CALJ's ruling is interlocutory and does not represent a final and appealable order; therefore, we dismiss the appeal filed by Kroger. 803 KAR 25:010 Sec. 21 (2)(a) provides as follows:

> "[w]ithin thirty (30) days of the date 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 Sec. 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) states 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 of 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.
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> (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to re-adjudicate 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. Tube Turns Division vs. Logsdon, 677 S.W.2d 897 (Ky. App. 1984); *cf.* Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228 (1939); *and* Transit Authority of River City vs. Sailing, 774 S.W.2d 468 (Ky. App. 1980); *See also* Ramada Inn vs. Thomas, 892 S.W.2d 593 (Ky. 1995).

In this instance, the CALJ's orders of November 16, 2011 and December 12, 2011, clearly indicate the claim remains undecided, and requires additional evidence necessitating additional findings and a subsequent decision on the merits. As such, it does not meet the above requirements. Because there remain issues yet to be decided, the CALJ's orders do not operate to terminate the action. Additionally, the CALJ's ruling does not act to

finally decide all outstanding issues, nor does it operate to determine all the rights of the parties so as to divest the CALJ of the authority to decide the overall merits of the claim.

Accordingly, the appeal seeking review of the order rendered November 16, 2011, and the order ruling on the petition for reconsideration rendered December 12, 2011 by Hon. J. Landon Overfield, Chief Administrative Law Judge, is hereby **DISMISSED**.

ALL CONCUR.

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LAWRENCE F. SMITH, MEMBER
WORKERS' COMPENSATION BOARD

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