OPINION ENTERED: September 28, 2012

CLAIM NO. 200673643

MARYHURST, INC. PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

JUDY GILLESPIE
JOHN E. HARPRING, M.D.
MITCHELL CAMPBELL, M.D.
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Judy Gillespie ("Gillespie") filed an "Objection to and Motion to Dismiss" the appeal of Maryhurst, Inc. ("Maryhurst") from the July 31, 2012, order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ Rudloff") denying Maryhurst's motion to reopen to assert a medical fee dispute, ordering it to authorize the surgery

recommended by Dr. Mitchell Campbell, and to pay temporary total disability ("TTD") benefits. Maryhurst also appealed from the August 24, 2012, order overruling its petition for reconsideration/motion for clarification. Gillespie asserts Maryhurst's notice of appeal is premature since the ALJ's July 31, 2012, order is not a final order but rather interlocutory in nature, and the ALJ specifically stated his order was interlocutory.

Maryhurst filed a lengthy response asserting Gillespie did not initially seek interlocutory relief pursuant to 803 KAR 25:010 Section 12 but merely asserted her motion to reopen was for payment of TTD benefits. Maryhurst asserts the ALJ impermissively exceeded his authority by ordering it to pay for the recommended surgery and TTD benefits. It also asserts the ALJ's order is capricious and an abuse of discretion or is a clearly unwarranted exercise of discretion.

Maryhurst also argues the ALJ's order is not interlocutory and is appealable. Maryhurst posits even if the ALJ's orders of July 31, 2012, and August 24, 2012, are interlocutory the Board still has the authority to consider whether the orders are valid and enforceable under the authority granted it in KRS 342.285. Maryhurst argues the

ALJ's May 31, 2012, order effectively terminated the litigation.

Maryhurst also maintains Gillespie never satisfied her burden of proving the recommended surgery is related to the injury as required by the statute and case law. Maryhurst asserts the order summarily overruling its motion to assert a medical fee dispute and ordering it to pay for the proposed surgery provided it no opportunity to litigate the work-relatedness of the recommended fusion procedure, and if the surgery was work-related, whether it was reasonable and necessary treatment of the injury. Maryhurst asserts its due process rights have been violated since it is without adequate opportunity to be heard. Maryhurst requests this Board vacate the ALJ's orders and remand the claim to the ALJ with instructions to reopen the claim and resolve all issues raised by Maryhurst and Gillespie.

A brief recitation of the procedural history of this claim is necessary. On May 31, 2012, Gillespie filed a "Motion to Reopen for Payment of Temporary Total Disability Benefits." Gillespie pointed out her claim was settled in 2009. She stated that recently she underwent an MRI and Dr. John Harpring recommended surgery. She represented that currently the authorization for the

surgery is pending. Gillespie asserted KRS 342.125(4) and the case law direct she must file a "prospective motion to reopen" to preserve her right to TTD benefits should Maryhurst fail to voluntarily pay benefits while she is restricted from work. Gillespie attached the Form 110 settlement agreement and an updated Form 106. Gillespie represented medical records had been requested from Drs. Harpring and Campbell and would be submitted upon receipt.

Maryhurst filed an objection stating the motion with the attached off-work slip from Dr. Campbell was its first notice Gillespie intended to undergo additional surgery, and no request for pre-certification had been received. Maryhurst asserted it had not had the opportunity to submit the matter to utilization review.

Maryhurst also asserted the single off-work slip is insufficient to establish a *prima facie* basis to reopen. It contended the off-work slip does not state the nature of the surgery, the physical condition for which surgery has been proposed, and that the proposed surgery is for treatment of a work-related condition. Maryhurst requested the motion be denied.

On June 28, 2012, Hon. Chris Davis, Administrative Law Judge ("ALJ Davis") entered an order finding Gillespie had set forth a *prima facie* case for

reopening and sustained the motion to reopen to the extent the claim shall be assigned to an Administrative Law Judge for further adjudication.

On July 9, 2012, Maryhurst filed a motion to reopen to assert a medical fee dispute and attached the pre-certification request for surgery received by its workers' compensation carrier on June 11, 2012, Dr. Harpring's May 30, 2012, office note, a past medical history sheet, and report from an MRI performed January 31, 2012. It represented that upon receiving the pre-certification request, the carrier requested Dr. Bart Goldman perform a medical consultation review. Maryhurst attached Dr. Goldman's report which it represented reflects he believed the need for the proposed surgery by Drs. Harpring and Campbell was due to the natural effects of aging on Gillespie's pre-existing degenerative disc disease and/or other non-work-related conditions, and not due to the work injury. Accordingly, Maryhurst requested the claim be reopened to assert a medical fee dispute contesting liability for the lumbar surgery. Maryhurst stated it was filing a medical fee dispute contemporaneously with the motion.

On July 10, 2012, a letter was sent from the Department of Workers' Claims notifying the parties the

matter was assigned to ALJ Rudloff, directing a Form 111 be filed, setting a proof schedule, and setting a benefit review conference ("BRC") for October 31, 2012.

On July 13, 2012, Maryhurst again filed its motion to reopen to assert medical fee dispute and a Form 112- medical fee dispute. On July 19, 2012, ALJ Rudloff ordered the parties to file and serve a position statement at the final hearing. On July 23, 2012, Maryhurst filed a motion to join the medical providers and its Form 111 denying Gillespie's claim. On July 25, 2012, Gillespie filed a response to Maryhurst's motion to reopen to assert a medical fee dispute.

In a July 31, 2012, interlocutory order, without explanation, ALJ Rudloff summarily denied Maryhurst's motion to reopen to assert a medical fee dispute and ordered Maryhurst to authorize the surgery recommended by Dr. Campbell and to pay TTD benefits to Gillespie beginning July 15, 2012, and continuing until she reaches maximum medical improvement ("MMI") post-operatively.

Oddly enough, on August 3, 2012, ALJ Rudloff entered an order sustaining Maryhurst's motion to join the medical providers and joined Drs. Harpring and Campbell as parties to the reopening and medical fee dispute.

On August 13, 2012, Maryhurst filed a petition for reconsideration/motion for clarification making much of the same argument it made in response to Gillespie's motion to dismiss the appeal. In addition, it requested the ALJ provide the medical basis for his finding the recommended surgery is "reasonable, necessary, and related to the work injury." Since the ALJ ordered the payment of TTD benefits it also requested the ALJ make findings of fact reflecting how Gillespie will suffer irreparable harm. Maryhurst also asked the ALJ to explain why the doctors were joined as parties.

On August 20, 2012, Gillespie filed a notice of filing the medical records of Dr. Harpring and a response to Maryhurst's petition for reconsideration/motion for clarification. On August 24, 2012, ALJ Rudloff perfunctorily denied Maryhurst's petition for reconsideration. On September 7, 2012, Maryhurst filed a notice of appeal.

While we are troubled by ALJ Rudloff's order overruling Maryhurst's motion to assert a medical fee dispute and directing it authorize the proposed surgery and pay TTD benefits, we conclude the July 31, 2012, order and the August 24, 2012, order overruling the petition for reconsideration are interlocutory and do not represent

final and appealable orders. Therefore, we dismiss Maryhurst's appeal. 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) read 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.

> (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, although ALJ Rudloff's July 31, 2012, order does come close to completely terminating the litigation there is still the issue of the extent to which Gillespie is entitled to TTD benefits which must still be resolved. Further, ALJ Rudloff clearly stated his order was interlocutory in nature and therefore his order is not appealable. As such, neither order from which Maryhurst appeals meet the above requirements. Further, since the

ALJ joined the doctors as parties he may at some point choose to alter or amend his July 31, 2012, order. Because there is at least one issue which remains unresolved, ALJ Rudloff's July 31, 2012, and August 24, 2012, orders do not operate to terminate the action or finally decide all outstanding issues. Further, the orders do not determine all the rights of the parties so as to divest ALJ Rudloff once and for all of the authority to decide the overall merits of the claim. While we sympathize with Maryhurst, at this juncture in the litigation we are powerless to entertain its appeal. Certainly, once ALJ Rudloff has determined the extent to which Gillespie is entitled to TTD benefits and resolves any other issues which may arise, Maryhurst and/or Gillespie are free to file a notice of appeal.

Accordingly, for the reasons set forth above, the appeal filed by Maryhurst on September 7, 2012, appealing from the July 31, 2012, interlocutory order and the August 24, 2012 order overruling Maryhurst's petition for reconsideration is hereby **DISMISSED**. This claim is **REMANDED** to the ALJ for further proceedings.

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FRANKLIN A. STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

ALL CONCUR.

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