OPINION ENTERED: June 12, 2012

CLAIM NO. 200767708

PEP BOYS MANNY, MOE AND JACK PETITIONER

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

CHRISTY FRAZIER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING
* * * * * *

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

STIVERS, Member. On May 21, 2012, this Board *sua sponte* entered an opinion and order dismissing the interlocutory appeal filed by Pep Boys Manny, Moe and Jack ("Pep Boys") appealing from the April 18, 2012, interlocutory opinion and order on reconsideration by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In our opinion and order, we determined the appeal filed by Pep Boys was not

from a final and appealable order and ordered the appeal dismissed and remanded the matter to the ALJ.

In the May 21, 2012, opinion and order we set out the procedural history which led up to the entry of our opinion and order. We noted that on April 23, 2012, Pep Boys filed a medical fee dispute and supplemental medical fee dispute. However, we did not reference the "Notice of Filing Physician Advisor Reports of David Karp, M.D." also filed on April 23, 2012. We also alluded to the fact that on May 4, 2012, Pep Boys filed a second supplemental medical fee dispute. Attached to that Second Supplemental Medical Fee Dispute is Dr. Robert Simpson's "Physician Advisor Report." Additionally, on May 4, 2012, Pep Boys filed a notice of filing that same report of Dr. Simpson with a copy of the report attached to the notice of filing. Pep Boys also filed on May 4, 2012, a "Notice of Filing of Utilization Review Decision of April 17, 2012."

On May 3, 2012, the ALJ rendered a four page order styled "Interlocutory Opinion and Order." In that order, the ALJ noted Pep Boys had filed the report of Dr. Karp and that Christy Frazier ("Frazier") had filed a response to the medical dispute and supplemental medical

dispute.[1] After setting forth the procedural background, the ALJ stated as follows:

> As indicated in my prior Opinions and Orders, I have made a factual determinations [sic] that the plaintiff's physical condition has deteriorated since her initial back surgery, that the fusion surgery recommended by Dr. Casnellie is reasonable and necessary for the treatment of plaintiff's work injuries and that the defendant is responsible for the bills and expenses for said surgery. My rulings have been based upon the totality of the medical evidence in the record, specifically including the credible and convincing new evidence from Dr. Casnellie.
>
> KRS 342.310(1) provides that if the Administrative Law Judge before whom proceedings are brought determines that such proceedings have been brought, prosecuted or defended without reasonable grounds, the Administrative Law Judge may assess the whole costs of proceedings, including attorney's fees and litigation expenses, upon the party who has so brought, prosecuted and defended said proceedings. Although the courts and the Workers' Compensation Board have been reluctant in years past to award sanctions, the present case does seem to warrant consideration of sanctions.
>
> The defendant's repeated re-litigation of the surgical issue bespeaks a sanctionable lack of reasonable ground. The parties are hereby given notice that any further attempts to re-litigate the surgery

[1] We are unable to determine when the order was filed.

> issue will probably bring about sanctions under KRS 342.310(1).

Accordingly, the ALJ denied, overruled, and dismissed Pep Boys' medical fee dispute "raised by the 'notice of Filing Physician Advisor Reports of David Karp, M.D.'"

Additionally, on May 9, 2012, the ALJ rendered another Interlocutory Opinion and Order which reads, in part, as follows:

> In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Jackson v. General Refractories Co.*, 581 S.W.2d 10 (Ky. 1979); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974). The board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging

discretion. *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213 (Ky. 2006); *Seventh Street Road Tobacco Warehouse v. Stillwell*, 550 S.W.2d 469 (Ky. 1976).

As indicated in my prior Opinions and Orders, I have made a factual determinations [sic] that the plaintiff's physical condition has deteriorated since her initial back surgery, that the fusion surgery recommended by Dr. Casnellie is reasonable and necessary for the treatment of plaintiff's work injuries and that the defendant is responsible for the bills and expenses for said surgery. My rulings have been based upon the totality of the medical evidence in the record, specifically including the credible and convincing new evidence from Dr. Casnellie.

KRS 342.310(1) provides that if the Administrative Law Judge before whom proceedings are brought determines that such proceedings have been brought, prosecuted or defended without reasonable grounds, the Administrative Law Judge may assess the whole costs of the proceedings, including attorney's fees and litigation expenses, upon the party who has so brought, prosecuted and defended said proceedings. Although the courts and the Workers' Compensation Board have been reluctant in years past to award sanctions, the present case does seem to warrant consideration of sanctions.

The Administrative Law Judge is well aware that the defendant's attorney, Mark Bush, is a very fine lawyer. Although the defendant-employer and its workers' compensation insurer have found some grounds for repeated re-litigation of the surgical

> issue, they do not appear to have reasonable ground and the Administrative Law Judge concludes that the plaintiff could be entitled to attorney's fees and costs for the defense of the repeated re-litigation of the surgical issue.

Accordingly, the ALJ overruled and dismissed Pep Boys' medical fee dispute "raised by its 'Second Supplemental Medical Fee Dispute of 4/19/12' and its 'Notice of Filing of Dr. Robert Simpson's Report.'"

On May 21, 2012, Pep Boys filed a "Notice of Interlocutory Appeal for Interlocytory [sic] Opinion and Order of May 3, 2012" and a "Notice of Interlocytory [sic] Appeal for Interlocutory Opinion and Order of May 9, 2012." On June 4, 2012, Frazier filed a motion to dismiss the appeals filed by Pep Boys.

In our May 21, 2012, opinion and order dismissing we set out our reasons for *sua sponte* dismissing Pep Boys' initial notice of interlocutory appeal filed May 8, 2012. We will not set forth in depth the reasons provided in the May 21, 2012, opinion and order for dismissing the initial interlocutory appeal. Rather, we incorporate by reference the text of that opinion as if it were fully set out in this opinion and order because we believe the reasons stated in our May 21, 2012, opinion and order apply to the notice of interlocutory appeal of the opinion and order of

May 3, 2012, and the notice of interlocutory appeal of the opinion and order of May 9, 2012. We sustain Frazier's motion to dismiss and remand the matter to the ALJ for further proceedings. The notices of appeal filed by Pep Boys on May 3, 2012, and May 9, 2012, are clearly appeals from interlocutory orders and not appeals from final and appealable orders.

Accordingly, for the reasons previously stated in the May 21, 2012, opinion and order dismissing Pep Boys' initial interlocutory appeal, Pep Boys' appeals dated May 3, 2012, and May 9, 2012, are **DISMISSED** and this matter is **REMANDED** to the ALJ for further proceedings.

ALL CONCUR.

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FRANKLIN A. STIVERS, MEMBER,
WORKERS' COMPENSATION BOARD

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