Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 27, 2015

CLAIM NO. 200767708

PEP BOYS 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

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

ALVEY, Chairman. Pep Boys Manny, Moe and Jack ("Pep Boys"), filed a Notice of Appeal on March 9, 2015 from the December 15, 2014 Interlocutory Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), and from the February 2, 2015 Interlocutory Opinion and Order on Reconsideration. The ALJ found

Christy Frazier ("Frazier") entitled to surgery to remove hardware from her lumbar spine which was implanted during fusion surgery performed on July 25, 2013. Because nothing contained in either order appealed from constitutes a final adjudication of the matters pending before the ALJ, we dismiss.

This claim has a very lengthy history, a brief recitation of which is necessary. On June 26, 2009, Frazier filed a claim against Pep Boys for alleged back, neck, head, face and left leg (with radiculopathy) injuries she sustained in a motor vehicle accident which occurred on November 2, 2007 as she was delivering parts. The claim was assigned to Hon. Howard E. Frasier, Jr., Administrative Law Judge ("ALJ Frasier"). On October 30, 2009, Frazier filed a motion to bifurcate the claim for a determination of her right to temporary total disability ("TTD") benefits and medical benefits. On December 4, 2009, ALJ Frasier entered an order bifurcating the claim for determination of the issues of maximum medical improvement ("MMI"), TTD benefits and medical expenses. On January 14, 2010, ALJ Frasier held a telephonic conference, after which he entered an order placing the claim in abeyance until Frazier reaches MMI.

On March 1, 2010, Pep Boys filed a motion to bifurcate the claim regarding the issue of reasonableness and necessity of either an MRI, or a myelogram and post-myelogram CT-scan. On June 1, 2010, ALJ Frasier ordered a university evaluation pursuant to KRS 342.315. A Benefit Review Conference ("BRC") was held on January 2, 2011. The BRC order and memorandum reflects Pep Boys' motion to remove the claim from abeyance was granted, and the claim was submitted for decision regarding the reasonableness and necessity of proposed lumbar surgery. A hearing on this issue was waived by the parties. On January 31, 2011, ALJ Frasier entered an Interlocutory Opinion and Award, finding the proposed decompression surgery compensable, but denying the recommendation for a lumbar fusion. ALJ Frasier also found Frazier was allowed to have a myelogram followed by a CT-scan if so desired.

On December 16, 2011, ALJ Frasier entered an order reassigning the claim to the ALJ. On February 13, 2012, Pep Boys filed a Form 112 Medical Dispute contesting "the MAST/TLIF hernia repair" (fusion surgery), recommended by Dr. Michael Casnellie. On February 23, 2012, the ALJ entered an order joining Dr. Casnellie as a party. On March 15, 2012, Pep Boys filed a motion to bifurcate the claim regarding the issue of the reasonableness and

necessity of the fusion surgery recommended by Dr. Casnellie. On March 22, 2012, the ALJ entered a "Second Interlocutory Opinion and Order", finding the proposed fusion surgery compensable because Frazier continued to suffer after the decompressive surgery. The ALJ denied the motion to bifurcate, because the claim was already bifurcated.

On April 9, 2012, Pep Boys filed a motion to vacate, or in the alternative, a petition for reconsideration. Pep Boys argued the ALJ erred in awarding the fusion surgery because the issue had previously been decided by ALJ Frasier. On April 18, 2012, the ALJ entered an "Interlocutory Opinion and Order on Reconsideration". He denied the motion/petition, and stated he found Frazier's condition had deteriorated since the previous interlocutory decision from ALJ Frasier.

On April 23, 2012, Pep Boys filed a supplemental Form 112 Medical Dispute, again challenging the fusion surgery recommended by Dr. Casnellie. On April 23, 2012, Pep Boys also filed a separate supplemental Form 112 Medical Dispute, challenging the request for a repeat MRI. On May 3, 2012, the ALJ entered an "Interlocutory Opinion and Order", again finding the fusion surgery proposed by Dr. Casnellie compensable. The ALJ additionally cautioned

Pep Boys that further contests of this issue may result in the imposition of sanctions pursuant to KRS 342.310.

On May 4, 2012, Pep Boys again filed a supplement to Form 112 Medical Dispute challenging the fusion surgery recommended by Dr. Casnellie. On May 8, 2012, Pep Boys filed a notice of "Interlocutory Appeal" to this Board. On May 9, 2012, the ALJ entered an "Interlocutory Opinion and Order", again finding compensable the fusion surgery recommended by Dr. Casnellie. The ALJ again cautioned Pep Boys of the possibility of the imposition of sanctions pursuant to KRS 342.310.

On May 21, 2012, this Board entered an order dismissing the "Interlocutory Appeal", finding the order appealed from was not final and appealable. On May 21, 2012, Pep Boys filed a notice of "Interlocutory Appeal" from the ALJ's interlocutory decision rendered May 9, 2012. On June 12, 2012, this Board entered an opinion dismissing the interlocutory appeal, reiterating the previous holding from May 21, 2012. Pep Boys appealed to the Kentucky Court of Appeals which issued an order on September 5, 2012 dismissing the appeal.

On February 3, 2014, Pep Boys filed a Form 112 Medical Dispute regarding Frazier's treatment at Norton Hospital for viral meningitis. On June 30, 2014, Pep Boys

filed a motion to terminate TTD benefits and remove the claim from abeyance. On July 9, 2014, the ALJ entered an order removing the claim from abeyance. On December 15, 2014, the ALJ entered an “Interlocutory Opinion and Order”. He noted Frazier had not reached MMI, and found compensable Dr. Casnellie’s request to perform surgery to remove hardware implanted from the fusion surgery performed on July 25, 2013. On January 5, 2015, Pep Boys filed a petition for reconsideration asking the ALJ to reconsider his decision approving the surgery recommended by Dr. Casnellie. On January 22, 2015, the ALJ entered an “Interlocutory Opinion and Order on Reconsideration”. Pep Boys’ petition for reconsideration was overruled and denied as merely an attempt to reargue the claim.

On February 18, 2015, Pep Boys filed a notice of appeal of the ALJ’s December 15, 2014 and January 22, 2015 opinions. On March 2, 2015, Frazier filed a motion to dismiss the appeal. On March 9, 2015, Pep Boys filed a response to the motion to dismiss.

No final determination has ever been entered in this claim which was filed in June 2009. Because we conclude this appeal is not from a final and appealable order, it is dismissed.

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.

> (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate 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).

After reviewing the file, it is clear the opinion rendered December 15, 2014, and the order on reconsideration issued January 22, 2015 are interlocutory, and as such are not final and appealable as they do not operate to terminate the action or finally decide **ALL** outstanding issues. Likewise, they do not operate to determine **ALL** the rights of the parties so as to divest the ALJ once and for all of the authority to decide the merits of the claim.

That said, the appeal filed by Pep Boys must be dismissed, and the claim remanded to the ALJ to conduct all proceedings necessary for final adjudication of the claim, including a BRC and Hearing if required. Since this Board has no authority to render any decision other than dismissal of the appeal, it is suggested the ALJ review the file to determine whether sanctions should be imposed pursuant to KRS 342.310, and/or whether this claim should be referred to the Commissioner of the Kentucky Department of Workers' Claims for a determination of whether Pep Boys committed unfair claims settlement practices in violation of KRS 342.267. Nothing in this decision shall abridge the right of either party to appeal the final decision.

Accordingly, **IT IS HEREBY ORDERD AND ADJUDGED** the appeal seeking review of the opinion rendered December 15, 2014 and the order on reconsideration issued January 22, 2015 by Hon. William J. Rudloff, Administrative Law Judge, is **DISMISSED**, and the claim is **REMANDED** for further proceedings as outlined above.

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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