Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 8, 2015

CLAIM NO. 201267487

PERRY COUNTY COAL CORPORATION PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

ANTHONY BOWLING
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Perry County Coal Corporation ("Perry County") appeals from the November 13, 2014, Order overruling its August 11, 2014, Motion to Reopen and setting aside the November 3, 2014, Order on Reopening rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). Perry County also appeals from the December 24,

2014, Order on Reconsideration overruling its petition for reconsideration.

On appeal, Perry County argues the ALJ erred in dismissing its Motion to Reopen.

The Form 101 alleges Anthony Bowling ("Bowling") sustained a torn right bicep while in the employ of Perry County on October 5, 2012, in the following manner: "Moving a 4x8 sheet of metal with another co-worker, the co-worker's feet got stuck in mud and he fell and jerked the piece of metal."

In an August 28, 2013, decision the ALJ awarded temporary total disability benefits, permanent partial disability benefits enhanced by the three multiplier, and medical benefits. The ALJ relied upon the 17% impairment rating assessed by Dr. Arthur L. Hughes. The ALJ expressly rejected Dr. Greg D'Angelo's 2% whole person impairment rating set forth in his May 13, 2013, report.

Perry County appealed to this Board and in a February 17, 2014, opinion we affirmed in part, vacated in part, and remanded the claim for a complete analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

In a May 28, 2014, Opinion, Award, and Order, the ALJ determined the three multiplier is more appropriate. No appeal was taken from this decision.

On August 11, 2014, Perry County Coal filed a Motion to Reopen to which Bowling filed a "Response and Objection to Motion to Reopen."

On September 10, 2014, Perry County filed a "Corrected Motion to Reopen." In its motion, Perry County asserted that on February 27, 2014, "after the close of proof taking in the claim," Bowling's treating surgeon, Dr. D'Angelo, released him to regular duty work and determined he was at maximum medical improvement ("MMI") with no permanent impairment rating. Perry County argued a Functional Capacity Examination ("FCE") dated January 22, 2014, found Bowling capable of returning to his past work as an electrician. Perry County further argued:

> Defendant-Employer moves to reopen this claim based on new medical evidence from plaintiff's treating surgeon that could not have been obtained during the pendency of the claim as plaintiff was not found to be capable of full duty work until more than 6 months after the final hearing, and also after the original Award was issued. The defendant-employer was without recourse to have this proof addressed until the ALJ issued his Opinion on Remand and ruled on plaintiff's Petition for Reconsideration by Order dated June 16, 2014. (See Exhibit "F") Defendant-employer is not contesting the judge's reliance on Dr. Hughes' 17% impairment, but only the award of the 3 multiplier.

Attached to its motion is a February 27, 2014, "Followup Evaluation" by Dr. D'Angelo. Dr. D'Angelo determined Bowling reached MMI and is able to return to the occupation he was performing at the time of the injury. Dr. D'Angelo also opined as follows: "There is no impairment rating for this." Also attached is a January 22, 2014, report concerning an FCE conducted by Heather Watts in which "none" is listed next to "potential barriers to return to work."

By Order dated November 3, 2014, the ALJ sustained the motion, ordered the case reopened, and set a proof schedule.

In an Order dated November 13, 2014, the ALJ *sua sponte* concluded and ordered as follows:

> This matter comes before the undersigned on his own Motion and following a recent review of this file. The following findings and Orders are made.
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> 1. The procedural and legal history of this matter consists, of among other things, an initial Opinion and Award issued by the undersigned on August 28, 2013. That Opinion was subsequently Remanded by the Workers' Compensation Board to provide further analysis to support the award. A Remand Opinion was issued on May 28, 2014, which following additional Petitions and Orders became final on July 16, 2014.

2. On or about August 7, 2014 the Movant-Defendant filed a Motion to Re-Open for newly discovered evidence and the Respondent-Plaintiff, on or about August 27, 2014 filed a Response and Objection. Neither that Motion nor the Response was ever ruled upon. Frankly, and taking all responsibility for that, I, as the Judge have no recollection of reviewing either of those pleadings. Nonetheless on or about September 5, 2014 the Movant-Defendant filed a Corrected Motion to Re-Open. The Corrected Motion to Re-Open did not address or correct any of the deficiencies or objections listed within the initial Response and Objection.

3. On or about November 3, 2014 the undersigned executed an Order Re-Opening this claim and setting forth a proof schedule. I have no idea why almost sixty days elapsed between the Corrected Motion to Re-Open and the Order and that certainly is not my standard practice. Nonetheless the Order to Re-Open was patent error which my further review of the file has disclosed to me.

The first error was that I did not take into account the Respondent-Plaintiff's Response and Objection. This is relevant because while I can, at this point, only speculate as to why the Order was erroneously entered it is possible that one reason was I thought it was unopposed. A second possible reason is that, due to the extremely high volume of medical fee disputes, including some that are filed while other disputes in the same claims are pending, is that a clerical error resulted in the wrong case caption and service being placed on the body of the Order. A third reason is some other,

> purely speculative clerical error or error regarding my understanding of this claim.
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> 3. The second, and more important error, is simply that the Motion to Re-Open should, based on the facts pled and the law, be overruled. As the Respondent notes this is not newly discovered evidence it is new evidence, which is a very important distinction. The Movant's own pleadings argue it is new evidence inasmuch as Dr. D'Angelo has now, post-closing of proof time, released the Respondent without restrictions. However, our rules do not allow a Motion to Re-Open to argue a change in condition and/or disability wherein the argument is solely one regarding application of the "3" multiplier under KRS 342.730(1)(c), under any circumstances but most certainly not in the absence of a change in impairment rating.
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> 4. Accordingly, as both a legal and factual matter, and with the above analysis taken into account, the November 3, 2014 Order Re-Opening this matter is SET ASIDE and the Motion to Re-Open is OVERRULED.

Perry County filed a petition for reconsideration on December 1, 2014, requesting the ALJ to reconsider his decision overruling its Motion to Reopen. Perry County argued as follows:

> We had originally argued this claim could be reopened under KRS 342.125 based on the newly discovered evidence of Dr. D'Angelo's release of plaintiff to return to work unrestricted, which was received after the close of proof

> time in the original claim. While we intended not to argue regarding change of impairment to simplify the focus of the reopening, if the ALJ will not reconsider his finding that Dr. D'Angelo's release is not 'newly discovered evidence', which would justify reopening pursuant to KRS 342.125, then we would additionally argue Dr. D'Angelo's 2/27/14 medical note also establishes that in his medical opinion plaintiff's permanent impairment had decreased to 0% from his previous assessment of 2% during the original claim. KRS 342.125 does not allow for reopening based on evidence of change of disability as shown by objective medical evidence or worsening or improvement of impairment due to a condition caused by the injury and Dr. D'Angelo's attached medical note to the Motion to Reopen along with the FCE from 1/22/14 satisfies these evidentiary requirements to the extent the reopening should be allowed.

In the December 24, 2014, Order, the ALJ concluded:

> This comes before the Administrative Law Judge on the Defendant's Petition for Reconsideration. The Administrative Law Judge having reviewed the pleadings and being otherwise sufficiently advised the following findings and Orders are made. I have attempted to set forth the errors which lead to the erroneous Order Re-Opening this matter. Regardless of what actual person or persons were at fault the Administrative Law Judge bears this responsibility. In fact as I have recited I believe that the undersigned did make errors. Nonetheless, the original entry of the Order to Re-Open

> was error. As such it was appropriate to Set It Aside. I do not like the rule regarding Re-Opening solely for a change in a Plaintiff's ability to do the type of work done on the date of injury. Far more often than not it harms rather than helps the injured workers'. [sic] Nonetheless it is the rule. Further the evidence is not "newly discovered evidence." Even the additional notation of a change in impairment rating does not change this fact as I did not rely on the rating assigned originally by Dr. D'Angelo. The Petition is OVERRULED.

The ALJ's November 13, 2014, Order and December 24, 2014, Order on Reconsideration are affirmed.

As clearly noted by the ALJ in the November 13, 2014, Order and the December 24, 2014, Order on Reconsideration, the evidence presented by Perry County in its motion to reopen is not "[n]ewly-discovered evidence which could not have been discovered with the exercise of due diligence." KRS 342.125(1)(b). Both the February 27, 2014, "Followup Evaluation" by Dr. D'Angelo and the January 22, 2014, FCE conducted by Heather Watts came into existence after close of proof time in the original litigation and after the ALJ’s initial decision of August 28, 2013. Perry County has acknowledged this evidence came into existence "after the close of proof taking in the claim." This makes the evidence new evidence, and new evidence is not an appropriate basis for reopening pursuant

to KRS 342.125(1). As held by the Supreme Court of Kentucky in Russellville Warehousing v. Bassham, 237 S.W.3d 197, 201 (Ky. 2007), the term "newly discovered evidence" as used in KRS 342.125(1)(b) "may not be construed to include evidence that came into being after a matter was decided."

In addition, in its September 10, 2014, "Corrected Motion to Reopen," Perry County states as follows: "Defendant-Employer is not contesting the judge's reliance on Dr. Hughes' 17% impairment, but only the award of the 3 multiplier." KRS 342.125(1) does not permit a motion to reopen which seeks only to vitiate the portion of the award enhancing income benefits by the three multiplier.

Finally, Perry County cannot be permitted to change, in its Petition for Reconsideration, the argument originally asserted in its Motion to Reopen. In the September 10, 2014, "Corrected Motion to Reopen," Perry County contested only the ALJ's award of the three multiplier. In its December 1, 2014, petition for reconsideration, Perry County adds a new argument that there has been a change in Bowling’s impairment rating. Perry County may not raise this argument for the first time in a petition for reconsideration. However, and as noted by the ALJ in the December 24, 2014, Order on Reconsideration,

assuming, *arguendo*, Perry County were to allege a change in impairment pursuant to KRS 342.125(1)(d), this argument would fail. On May 13, 2013, Dr. D'Angelo assessed a 2% whole person impairment rating. In the February 27, 2014, report, Dr. D'Angelo opined Bowling has no impairment rating. However, in the August 28, 2013, Opinion, Award, and Order the ALJ did not rely upon Dr. D'Angelo's 2% whole person impairment rating. Instead, he relied upon Dr. Hughes' 17% impairment rating. In the August 28, 2013, Opinion, Award, and Order, the ALJ specifically stated:

> I simply cannot, and will not find, that even with multipliers, that a 2% impairment rating adequately compensates the Plaintiff for the loss of a $1200.00 a week job.
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> ...
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> Forced to choose between the 2% and the 17% the undersigned finds the 17% more accurately reflects the Plaintiff's impairment rating. There is no dispute he cannot return to the type of work done on the date of injury.

As the ALJ did not initially rely upon Dr. D'Angelo's 2% impairment rating, any alleged change in Bowling's impairment rating is not relevant and does not fall within the range of factual scenarios enumerated in KRS 342.125(1)(d). It was appropriate for the ALJ to deny

Perry County's Motion to Reopen, and his decision will not be disturbed.

The November 13, 2014, Order and December 24, 2014, Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON SARAH K MCGUIRE
P O BOX 351
PIKEVILLE KY 41502

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON KY 40741

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
410 WEST CHESTNUT ST STE 700
LOUISVILLE KY 40202