Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 11, 2015

CLAIM NO. 201270864

SARAH BROWN f/k/a PATRICK BROWN PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

UNITED PARCEL SERVICE and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING AND REMANDING

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

ALVEY, Chairman. Sarah Brown f/k/a Patrick Brown ("Brown") appeals from the March 30, 2015 order rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") dismissing her claim without prejudice. Brown also appeals from the May 22, 2015 order denying her petition for reconsideration.

On appeal, Brown argues the ALJ erred in dismissing her claim against United Parcel Service ("UPS") for failure to attend multiple medical evaluations it had scheduled. She argues the only remedy available to the ALJ is set forth in KRS 342.205. We agree, and hereby reverse the dismissal of this claim, and remand to the ALJ for further proceedings.

Brown filed a Form 101 on August 9, 2013 alleging injuries to her low back on August 18, 2011, and to her neck on September 12, 2012 while working for UPS in Louisville. She alleged the August 18, 2011 injury occurred as she was lifting a box. She alleged the second injury occurred as she was driving a forklift backward and struck a hole in the floor. In support of the Form 101, Brown filed records from Baptistworx, Dr. Gary Davis, Dr. Ellen Ballard, Dr. Steven Young, and Dr. Rodney Chou. She later filed additional records from Dr. Young, the evaluation report of Dr. Warren Bilkey, records from the VA hospital in Louisville, and records from the University of Louisville Hospital.

UPS filed records from Dr. Timir Banerjee who conducted an evaluation on April 13, 2012, Jewish Hospital, Dr. Chou, Norton Suburban Hospital, and Norton Audubon Hospital. On March 10, 2014, UPS filed a motion to dismiss the claim with prejudice due to Brown's failure to attend

evaluations scheduled with Dr. Robert Jacob on two occasions. On April 19, 2014, the ALJ entered an order denying the motion to dismiss, but placed the claim in abeyance. On September 10, 2014, UPS again filed a motion to dismiss due to Brown's failure to attend an evaluation for a third time. On November 13, 2014, the ALJ denied the motion to dismiss, but cautioned Brown her failure to cooperate may result in dismissal of the claim. On March 2, 2015, UPS again filed a motion to dismiss due to Brown's failure to attend a fourth examination. On March 30, 2015, the ALJ entered an order dismissing the claim without prejudice. On April 13, 2015, Brown filed a petition for reconsideration of the order dismissing, arguing as she does on appeal, the only remedy available was to place the claim in abeyance with no benefits accruing so long as she refused to cooperate. The petition for reconsideration was denied by order entered May 22, 2015. Brown filed this appeal on June 22, 2015.

KRS 342.205(3) states as follows:

> If an employee refuses to submit himself or herself to or in any way obstructs the examination, his or her right to take or prosecute any proceedings under this chapter shall be suspended until the refusal or obstruction ceases. No compensation shall be payable for the period during which the refusal or obstruction ceases.

This is the only sanction applicable in this instance. The ALJ could have placed the claim in abeyance with no benefits accruing for so long as Brown persists in refusing to attend an evaluation at UPS' request, but dismissing the claim was not an option available.

KRS 342.205(3) is unambiguous on its face, and a rule of statutory construction long accepted by the Kentucky courts is unambiguous statutes must be applied as written. "[A]bsent an ambiguity, 'there is no need to resort to the rules of statutory instruction in interpreting it.'" Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008) citing Stewart v. Estate of Cooper, 102 S.W.3d 913, 915 (Ky. 2003). The legislature's intent must be inferred, "from words used in enacting statutes rather than surmising what may have been intended but was not expressed." Id. Neither the ALJ nor this Board are at liberty to interpret a statute at variance with its stated language. McDowell v. Jackson Energy RECC, 84 S.W.3d 71, 77 (Ky. 2002).

Additionally, an established rule of statutory construction is where both a specific statute and a general statute are potentially applicable to the same subject matter, the specific statute controls. Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005). The Kentucky Courts

have held, "one of the established rules of statutory construction is that when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails." Land v. Newsome, 614 S.W.2d 948, 949 (Ky. 1981). Here KRS 342.205(3) is clear on its face, and specifically sets forth the remedies available in this instance.

KRS 342.205(3) does not permit an ALJ to dismiss a claim due to the claimant's failure to attend a medical examination at the request of the employer, or as in this case, multiple failures to attend such examination. The only sanctions available for Brown's repeated failure to submit to a medical examination are set forth and clearly articulated in KRS 342.205(3). *See also* B.L. Radden & Sons Inc. v. Copley, 891 S.W.2d 84, 84-85 (Ky. App. 1995) where the Kentucky Court of Appeals stated, "We have no hesitation to hold that the Board correctly concluded that the penalty for failing to appear for a scheduled medical exam is not dismissal of one's claims." While this Board believes Brown's continued obstruction is unfortunate and may demonstrate a reluctance to move forward, the ALJ does not have the discretion to dismiss the claim for this reason.

Based upon the foregoing and facts of the claim, the ALJ's dismissal of the claim is reversed, and the claim

is remanded for further determination, including whether to assess sanctions pursuant to KRS 342.205(3).

Accordingly, the March 30, 2015 Order dismissing this claim without prejudice and the May 22, 2015 Order denying the petition for reconsideration by Hon. Grant S. Roark, Administrative Law Judge are **REVERSED.** This claim is **REMANDED** to the ALJ for further proceedings as set forth above.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON TAMARA TODD COTTON
429 W MUHAMMAD ALI BLVD, STE 1102
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON SARAH C ROGERS
10503 TIMBERWOOD CIRCLE, STE 112
LOUISVILLE, KY 40223

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601