OPINION ENTERED: AUGUST 7, 2012

CLAIM NO. 200200482

SPEEDWAY/SUPERAMERICA
AS ADMINISTERED BY AVIZENT PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD,**
CHIEF ADMINISTRATIVE LAW JUDGE &
HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

DONNA JONES
and HON. J LANDON OVERFIELD, CALJ
HON. DOUGLAS W. GOTT, ALJ RESPONDENTS

OPINION DISMISSING AND REMANDING

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

SMITH, Member. Speedway/SuperAmerica as administered by Avizent ("Speedway"), appeals from the January 11, 2012 Order of Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") and from his February 22, 2012 Order denying its petition for reconsideration. The CALJ determined Donna Jones ("Jones") made a *prima facie* case for reopening

pursuant to KRS 342.125 and sustained her motion to the extent the claim would be assigned for further adjudication. On appeal, Speedway argues the CALJ's January 11, 2012 Order was improper, exceeded his scope of authority and should be overturned. Alternatively, Speedway argues the motion is flawed on its face and should be denied.

Jones filed a Form 101 Application for Resolution of Injury Claim on April 4, 2002 alleging an injury to her low back occurring on October 24, 2001. The claim was litigated resulting in an Opinion and Award rendered by Hon. James L. Kerr, Administrative Law Judge ("ALJ Kerr") on August 20, 2004, granting permanent partial disability benefits for a low back condition based upon a 5% permanent impairment rating enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1.

On October 27, 2004, Speedway filed a motion to reopen to resolve a medical fee dispute relating to injections and medications prescribed by Dr. Greg Reasor. In an Opinion and Order dated June 17, 2005, Hon. R. Scott Borders, Administrative Law Judge ("ALJ Borders") found that Speedway had not sustained its burden of proving OxyContin, Neurontin, Osi–1R, and Paxil were unrelated to, or not reasonable and necessary for, treatment of the work injury.

On December 28, 2010, Speedway filed another motion to reopen and a medical fee dispute challenging continued low back treatment provided to Jones by Dr. Ballard Wright, including prescriptions for OxyContin and Lyrica. By Opinion and Order rendered July 18, 2011, ALJ Douglas W. Gott ("ALJ Gott") ruled in favor of Speedway, finding the treatment by Dr. Wright was not related to the 2001 work injury.

Jones, now proceeding *pro se*, timely filed a notice of appeal to the Board on August 15, 2011. She then filed a motion entitled "Motion to Consider Notice of Appeal As Petitioner's Brief" In addition, during the pendency of the appeal, on September 10, 2011, Jones filed a motion entitled "Response to Objection of Respondent to Notice of Appeal and Motion to Reverse Opinion and Judgment and to Remand to Appropriate Administrative Law Judge". In this motion Jones raises the issue of newly discovered evidence and fraud stating in part:

> This claim arises from a work related injury of October 24, 2001, involving the Plaintiff/Petitioner's inoperable lumbar spine. An opinion and Award was rendered by Administrative Law Judge, James L. Kerr on August 20, 2004, wherein the Plaintiff was found to have a 5% whole person impairment due to an inoperable work-related low back injury. The Plaintiff/Petitioner was to further recover of the defendant-employer and/or

its insurance carrier, for the cure and relief from effects of injury such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as reasonably required at the time of injury and thereafter during disability as may be related to the Plaintiff/ Petitioner's low back. The Employer/ Respondent has failed to pay ongoing medical treatment, instead continuing to bill Medicare. Indiana Medicaid, and the Plaintiff/Petitioner, all but prescription medications since returning to Kentucky in December 2007, and even then denied some prescriptions (too much to get into here) nor reimburse Medicare, Medicaid to recover prior expenses as ordered and adjudged, thus committed and is committing an act of fraud against the United States and Indiana Taxpayers as well as the Plaintiff/ Petitioner as per KRS 342.020.

On December 28, 2010, the Respondent/Employer filed a Medical Fee Dispute in which the Plaintiff/ Respondent continued treatment with Dr. Ballard Wright for the 2001 low back injury, including prescription medications, were challenged. The Medical Fee Dispute was litigated with the submission of obtainable extensive medical evidence by all parties. Following completion and a final Hearing conducted on June 21, 2011, during which the Plaintiff/Petitioner testified, and submission of Arguments and Briefs by all parties, Hon Douglas Gott. ALJ, issued an Opinion and Order in favor of the Employer/Respondent and suspended medical treatment related to the Plaintiff/Petitioner's 2001 injury. It was noted that records were not obtained from Pain Management of Southern Indiana by the

> Plaintiff/Petitioner's then Lawyer. Hon. Mark Webster. Only later was it found out that the records were under seal by the Federal Courts in Indiana. They are now out of seal and the Plaintiff/Petitioner, as well as, the Federal Investigator on the case, are working together in order to obtain the records. Some have been found, but not all as of yet, due to the owner of Pain Management, Dr. Kamal Twiari, had not paid his storage bill. The Federal investigator in charge is currently working on obtaining the remainder. It is also a great probability with the Doctor involved being in the immediate area of Avizent, local involvement in possible other cases, being in position to get firsthand knowledge, and in the local news media, that Avizent, and the Employer/Respondent knew about this incident and thus knew the records would be unattainable. Thus willing and knowingly giving noncurrent and inaccurate information to the court. (Errors in Original.)

By order dated September 21, 2011, the Board denied the motion but accepted her tendered brief filed September 14, 2011. Jones then filed an additional motion to reopen on October 3, 2011 based upon newly discovered evidence.

On November 2, 2011, the Board affirmed ALJ Gott’s July 18, 2011 Opinion. The Board’s opinion did not address the reopening and did not remand the claim. No appeal was taken from the Board’s Order which became final 30 days following the date it was rendered.

On January 11, 2012, the CALJ rendered the following order:

> This matter comes before the undersigned Chief Administrative Law Judge (CALJ) upon the Frankfort Motion Docket for consideration of a motion by the Plaintiff to reopen the above styled claim alleging entitlement to a reconsideration of the opinion of July 18, 2011. In the opinion of July 18, 2011, the ALJ to whom was assigned a medical fee dispute concerning Plaintiff's pain management treatment ruled on the medical fee dispute in favor of Defendant Employer. Plaintiff now submits "newly discovered evidence" which does in fact provide evidence which may support Plaintiff's physicians in the medical fee dispute. This evidence, according to Plaintiff's affidavit, was "previously unattainable due to Federal Seal of New Albany Pain Management of Southern Indiana…" Plaintiff supports this motion with an affidavit, the medical records of the referenced pain management clinic, and all attachments required pursuant to 803 KAR 25:010 §(6)(a).
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> Upon being fully and sufficiently advised, the CALJ concludes that the Plaintiff has set forth a *prima facie* case for reopening pursuant to KRS 342.125. *Stambaugh v. Cedar Creek Mining Co.*, *Ky.*, *488 SW2d 681 (1972)*.
>
> Therefore, **IT IS HEREBY ORDERED** that Plaintiff's motion to reopen is **SUSTAINED** to the extent that this claim shall be assigned to an Administrative Law Judge for further adjudication. A notice of assignment shall contain a proof schedule for the parties.

Speedway filed a petition for reconsideration reciting the claim's procedural history. Speedway contended the motion to reopen was an invalid pleading that did not meet the requirements of KRS 342.125(1) since it was based upon "newly discovered evidence," which, is defined as evidence that "could not have been discovered with the exercise of due diligence." Speedway argued Jones, during the pendency of the medical fee dispute, was aware she had treated at a medical facility in Indiana and the records were reasonably known and discoverable within a modicum of due diligence. Speedway also argued Jones' motion to reopen was filed before the Workers' Compensation Board and not directed to the Frankfort motion docket. Thus, Speedway argued the order issued by the CALJ was improper and exceeded his scope of authority. Speedway contended the Board considered all the pleadings, evidence and documentation and issued its opinion concerning the totality of the claim. Speedway noted the Board did not remand any portion of the appeal to the Frankfort motion docket. Finally, Speedway asserted the CALJ's order reopening the claim was issued untimely. Speedway noted the motion was filed in October 2011 and asserted the appeal was fully adjudicated when the Board issued its final order on November 2, 2011.

On February 22, 2012, the CALJ issued an Order overruling the petition for reconsideration on February 22, 2012, stating in part:

> Defendant Employer seeks reconsideration on multiple grounds. Defendant Employer argues that Plaintiff's motion to reopen was improperly filed before the Kentucky Workers[’] Compensation Board and not before the CALJ on the Frankfort motion docket. Defendant employer further argues that the CALJ had no jurisdiction over Plaintiff’s motion to reopen as the claim was then on appeal to the Kentucky Workers[’] Compensation Board. Defendant Employer's argument puts form over substance. The record before the CALJ and before the Kentucky Workers[’] Compensation Board is contained in one continuous file. Plaintiff's motion to reopen was filed in that record. In addition, the CALJ's order on the most recent motion to reopen was not rendered until the appeal was final and the matter had been remanded to the Frankfort motion docket. The issues presented in plaintiff's most recent motion to reopen were not considered in the appeal to the Kentucky Workers[’] Compensation Board.
>
> Concerning the CALJ's finding that a *prima facie* showing of entitlement to reopen had been presented by the Plaintiff, the CALJ believes a full explanation of the basis for this finding was presented in the order sought to be reconsidered. There is no showing of any error patently appearing on the face of that order.
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> Review pursuant to a petition for reconsideration is limited by KRS 342.281 and 803 KAR 25:010 §19 to the

> correction of errors patently appearing on the face of the award, order, or decision and does not allow reconsideration of the merits of a claim or defense. A review of the above order indicates no error patently appearing on the face thereof.
>
> **IT IS THEREFORE ORDERED AND ADJUDGED** that Defendant Employer's petition for reconsideration shall be and is hereby **DENIED**.

On appeal, Speedway argues ALJ Gott's Opinion was affirmed by the Board and is conclusive and binding regarding matters of fact and law. Speedway again notes the Board's previous decision was not appealed and became final. Speedway further notes the Board's decision did not remand the matter to the CALJ. Speedway continues to argue Jones' motion to reopen was part of her appeal to the Board and is thereby subject to the findings and order issued by the Board. Speedway argues the CALJ's January 11, 2012 Order was improper, exceeded his scope of authority, and should be overturned. Again, Speedway notes the motion to reopen was not directed to the Frankfort motion docket, but was filed before the Board as the decision making body. Speedway notes the CALJ stated in the February 22, 2012 Order the matter was before him on remand. However, Speedway notes the Board's Opinion did not remand any portion of the

appeal. Thus, Speedway contends no matter was properly before the CALJ.

Finally, Speedway argues, if the Board feels the motion to reopen should be addressed, then it is flawed on its face and should be denied. Speedway argues Jones' motion relies on evidence which does not constitute "newly discovered evidence" since it was in existence during the litigation of the claim, its existence was known to Jones, and it could have been discovered through due diligence. Speedway concludes the evidence from the Pain Management Clinic is simply not "newly discovered evidence" and does not qualify as a statutorily permitted reason for reopening pursuant to KRS 342.125(1).

Contrary to Speedway's argument, the motion to reopen was not part of the appeal to the Board and the Board's decision did not rule on the motion. Certainly, once a notice of appeal has been filed, the Board has jurisdiction over the claim. At that point, an ALJ no longer has authority to issue a ruling in the claim absent a remand from the Board. The Board decides appeals of ALJ's decisions. The Board has no authority to rule on a motion to reopen and has no fact-finding authority. Speedway correctly notes the Board did not remand the matter during the pendency of the appeal. However, once the Board's

decision became final, jurisdiction over the claim returned to the CALJ and he could, and did, properly rule on the outstanding motion. *See* KRS 342.275

We believe Jones' motion to reopen was in substantial compliance with the statute and regulations concerning reopening. The Workers' Compensation Board has previously explained that, in considering whether there has been substantial compliance with a procedural rule, considerations include the essential purpose of the rule and whether the opposing party's needs are adequately protected. Asplundh Tree Expert Company v. Neace, Claim No. 05-00381 (October 17, 2005). Jones used a form to file her motion to reopen and noted in the caption the matter was before the "Work Comp Board." The motion was filed during the pendency of the appeal, so, literally, the matter was before the Board even though the Board had no authority to rule on the motion. Further, we note Jones had requested a remand of the matter to an ALJ. We further believe Speedway's interests are adequately protected since it will have adequate time and opportunity to defend the claim.

Finally, we conclude the CALJ's Orders were interlocutory and do not represent final and appealable

orders; therefore, we dismiss the appeal filed by Speedway.

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) state 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, the CALJ's Orders of January 11, 2012 and February 22, 2012 clearly indicate the claim remains undecided, and requires additional evidence necessitating additional findings and a subsequent decision on the merits. As such, the Orders do not meet the above requirements. Because there remain issues yet to be decided, the CALJ's Orders do not operate to terminate the action. The CALJ's ruling does not act to finally decide all outstanding issues, nor does it operate to determine

all the rights of the parties so as to divest the CALJ of the authority to decide the overall merits of the claim.

Accordingly, the appeal of the Order rendered January 11, 2012, and the Order ruling on the petition for reconsideration rendered February 22, 2012 by Hon. J. Landon Overfield, Chief Administrative Law Judge, is hereby **DISMISSED**. It is further **ORDERED** this matter is **REMANDED** for proof taking and further proceedings on the motion to reopen.

ALL CONCUR.

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LAWRENCE F. SMITH, MEMBER
WORKERS' COMPENSATION BOARD

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