OPINION ENTERED: April 10, 2012

CLAIM NO. 200683580

STEVEN TURNER PETITIONER

VS. **APPEAL FROM HON. CAROLINE PITT CLARK, ADMINISTRATIVE LAW JUDGE**

RICHARDSON CONTRACTING
DR. MAURA GIORDANI
DR. CHARLES STEWART
DR. R. CARTER CASSIDY
and HON. CAROLINE PITT CLARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING AND REMANDING

* * * * * *

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

STIVERS, Member. Richardson Contracting ("Richardson"), filed a motion to dismiss the appeal of Steven Turner ("Turner"), asserting Turner has appealed from an interlocutory opinion and order which is not final and

appealable. It argues Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ") did not adjudicate all of the rights of the parties in her February 19, 2012, Opinion and Order. Richardson maintains the ALJ is awaiting the resolution of Turner's rehabilitation before making a decision regarding his need to continue pain management. Richardson also maintains the finality requirements of CR 54.01 have not been satisfied. Alternatively, Richardson argues in the event this Board determines the ALJ's February 18, 2012, Opinion and Order is final and appealable, it requests Turner's attachments to his "Statement for Appeal," the references to additional evidence, and Turner's additional testimony contained in the body of his "Statement for Appeal" be stricken.

In the February 19, 2012, Opinion and Order the ALJ sustained Richardson's motion to reopen for the purpose of resolving a medical fee dispute ordering, in part, as follows:

> A. The total left hip replacement recommended by Dr. Giordani is found to be unreasonable and unnecessary for the cure and/or relief of the effects of the work injury Plaintiff sustained on June 18, 2006, and Defendant Employer is relieved of liability for payment of Plaintiff's total left-hip replacement.
>
> B. Plaintiff's osteoporosis is found to be unrelated to the work injuries he

sustained on June 18, 2006, and his need for a DEXA bone density scan is not reasonable and necessary for the cure and/or relief of the effects of the work injuries Plaintiff sustained on June 18, 2006. Defendant Employer is relieved of liability for payment of the recommended DEXA bone density scan.

C. Dr. Stewart failed to timely bill Defendant Employer for his treatment of Plaintiff pursuant to KRS 342.020, and the contested medical bills for the following dates of service are found to be non-compensable: 9/18/2010, 9/23/2010, 10/4/2010, and 11/17/2010. Neither Plaintiff nor Defendant Employer are liable for payment of these contested medical bills.

The ALJ then ordered as follows:

Plaintiff's current prescription medication regimen is found to be unreasonable, and Plaintiff needs to be weaned from his current narcotic medications. The weaning process should be accomplished through a rehabilitation/weaning program, likely in-patient, at the expense of Defendant Employer. Plaintiff's claim is placed in **ABEYANCE** during the pendency of Plaintiff's rehabilitation, and the ultimate determination of his need for continuing pain management will be made following that process, based upon the recommendations of the doctors supervising his rehabilitation, as well as his treating doctors. Should Plaintiff refuse to undergo a rehabilitation/weaning program, Defendant Employer will no longer be liable for his narcotic medications. A status report is due from the parties within thirty (30) days of the date of this order to update the ALJ on the plans for Plaintiff's

> rehabilitation/weaning. Status reports will be due every sixty (60) days thereafter while this claim remains in abeyance.

Since we conclude this is an interlocutory order and is not a final and appealable order, we are dismissing Turner's appeal and remanding this matter to the ALJ.

The Court of Appeals, in an opinion styled Fulton County Fiscal Court v. Robert E. Hopper, Jr., 2005-CA-000024-WC, rendered December 29, 2005, Designated Not to be Published, affirmed this Board's order dismissing an appeal as interlocutory where the ALJ had only decided Hopper's injury occurred in the course and scope of his employment and the average weekly wage. In that particular case, the ALJ had also stated the parties had 45 days from the date of the opinion and order to agree on further litigation plans to settle the case or show cause why a final hearing should not be scheduled at the earliest available date. This Board, finding the appeal from that decision was interlocutory, dismissed the appeal. The Court of Appeals affirmed, stating as follows:

> In Whittaker v. Wright, 969 S.W. 2d 209, 211 (Ky. 1998), the Kentucky Supreme Court stated there is no basis for treating a workers' compensation appeal any differently than a civil appeal, thus whether an order is final is determined in accordance with

Kentucky Rules of Civil Procedure (CR) 54.02, a view also expressed in the workers' compensation regulations. 803 Kentucky Administrative Regulations (KAR) 25:010 § 21 provides:

> Review of Administrative Law Judge Decisions. . . .
>
> (2) Time and format of notice of appeal. . . .
>
> (b) As used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2).

As such, we look at whether the ALJ's opinion and order are final pursuant to CR 54.02.

CR 54.02 (1) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims of 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.*

(Emphasis added.)

> The ALJ's opinion and order did not recite that it was final; in fact, it gave the parties forty-five days to agree on a further litigation plan, to settle the case, or to show cause why a final hearing should not be scheduled. Pursuant to CR 54.02(1), therefore, it was interlocutory.

The Court of Appeals added the following footnote:

> 2 Additionally, pursuant to Kentucky Revised Statutes (KRS) 342.275(2), an ALJ's award, order, or decision subject to appeal to the Board, pursuant to KRS 342.285, is one rendered following the final hearing. There has not been a final hearing herein; at the benefit review conference, the parties agreed to bifurcate the proceedings.

> As interlocutory, the Board's dismissal of the appeal was proper. In Reisinger v. Grayhawk Corporation, 860 S.W. 2d 788, 790 (Ky. App. 1993), the court stated:

> CR 54.02 has been held to require dismissal of an appeal where the record

> showed that the order did not adjudicate the rights of all the parties in the action and other matters remained to be adjudicated. Signer v. Arnold, Ky., 436 S.W. 2d 493 (1969). In a recent case, this Court noted that an order allowing attorney fees, but not providing for a distribution of funds to the attorney, is not a "final order" from which an appeal will lie. As such, the order was interlocutory, and judicial economy necessitates this rule. Revenue Cabinet v. Barbour, Ky. App., 836 S.W. 2d 418 (1992).
>
> In the case at bar, the order of the ALJ was interlocutory. It did not adjudicate finally the rights of any of the parties and, as such, does not meet the test of CR 54.02 to be deemed "final". . .

We also disagree that the Board's dismissal of the appeal of the ALJ's opinion and order deprives Fulton County of substantive and procedural due process. Upon disposition of all the claims in the case, Fulton County will have the opportunity to appeal the issue in the ALJ's September 7, 2004, opinion and order. CR 54.02(2) provides:

> 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 the date and in the same terms all prior

> interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Fulton County has cited no persuasive authority to the contrary.

Further, we find nothing in the record before us that would except this case from the rule expressed by the Kentucky Court of Appeals in Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App., 1989),[1] and later by the Supreme Court of Kentucky in Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995). Both Courts dismissed appeals from awards of TTD benefits as interlocutory. In Transit Authority of River City v. Saling, supra, the Court of Appeals panel reasoned as follows:

> T.A.R.C. now appeals, asserting that under the logic expressed in Tube Turns Division v. Logsdon, Ky.App., 677 S.W.2d 897 (1984), the temporary total disability order *is* appealable. We disagree and dismiss the appeal.
>
> The General Assembly enacted a comprehensive revision of the Workers' Compensation Act in 1988; pursuant to those changes, the regulations (803 KAR 25:011) governing "procedure in applications for adjustments of claims" were also drastically revised. Temporary total disability benefits are provided for by 803 KAR 25:011(9),

[1] Following the 1988 amendments to the Act, the Court of Appeals revisited its holding in Tube Turns Division v. Logsdon, Ky. App., 677 S.W. 2d 897 (1984) overruling that decision in Transit Authority of River City v. Saling, supra.

"Interlocutory Relief"; each of the nine subsections of that section also refers to "interlocutory relief." Under that section, the Administrative Law Judge (the fact finder) may grant such relief if the record shows that the claimant is "eligible" for the relief sought, and that "he will suffer immediate and irreparable injury, loss, or damage pending a *final decision* on the application.". . .

> KRS 342.285 allows for the appeal of "[a]n award or order of the Administrative Law Judge. . . ." These awards or orders are entered by the Administrative Law Judge within a statutorily mandated period of time following a "hearing on the matters at issue" which follows the "prehearing conference." 803 KAR 25:011(12) governs these appeals:
>
> Appeals to the Workers' Compensation Board. (1) Within thirty (30) days after the date of filing of a written opinion, order or decision <u>finally adjudicating a case</u>, a party aggrieved by the opinion, order or decision may appeal the opinion, order or decision to the Workers' Compensation Board.

(Emphasis added).

This language, coupled with the language of 803 KAR 25:011(9) above, leads us to believe that no appeal was intended by the General Assembly from an award of interlocutory relief in the

form of temporary total disability benefits.

Tube Turns indicates that such an award is final because it

> . . . decides some matter litigated by the parties or operates to divest some right, in such a manner as to put it out of the power of the court making the order after the expiration of the term to place the parties in their original condition.... To conclude otherwise would subject an employer to the danger of paying an award of temporary disability and medical expense which might amount to a large sum of money and then being unable to collect back the monies paid if a reviewing court determines that the injury was unconnected to the claimant's employment or that the award is erroneous in some other fashion.

Tube Turns, supra, at 898 (citations omitted).

We are unwilling to assume that under the new statute any amount paid under an interlocutory order would perforce be uncollectable from the claimant if the final decision found that such an award was erroneous. It is further our considered opinion that, from the above quoted statutes and regulations promulgated thereunder, the legislature has considered both sides of this conflict and has made a policy decision in favor of protecting the injured worker (where he is subject to immediate and irreparable injury, loss

> or damage) by deleting the appeal and supersedeas provisions from the statute and regulations. Further, by imposing upon the administrative law judges and the Workers' Compensation Board rather stringent time limits in these cases, it would appear that the legislature's intent was that the amounts paid by the employer for temporary disability and medical expenses would not amount "to a large sum of money," as feared in Tube Turns.
>
> It is not our prerogative to disturb such a policy decision in the absence of constitutional violations, and none have been argued here.

Id. at 468-469.

The Kentucky Supreme Court reached the same result in Ramada Inn v. Thomas, supra, quoting verbatim the language contained in the next to the last paragraph quoted above, and then simply added the sentence “We agree.” *Id.*, at 594.

While the regulations relied upon by the Courts in Transit Authority of River City v. City of Saling, supra, and Ramada Inn v. Thomas, supra, have since been renumbered and to some extent revised with regard to the precise language used, the prerequisite of finality of an order before an appeal may be undertaken remains unchanged. 803 KAR 25:010 Section 21(2)(a) continues to authorize an appeal to the Workers’ Compensation Board within 30 days of “a final award, order, or decision rendered by an

administrative law judge."[2] (Emphasis added) Moreover, 803 KAR 25:010 Section 21(2)(b) now expressly provides that, "[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)." The language in Transit leads us to conclude the same principle applies to an Interlocutory Order which only partially resolves a medical fee dispute.

The above language establishes at this time Turner cannot appeal the ALJ's February 19, 2012, interlocutory Opinion and Order, and his appeal must be dismissed. In this instance, the ALJ's decision plainly does not address with finality "all" of the outstanding contested issues raised in Richardson's medical fee dispute. We also note the language required by CR 54.02 is not contained in the ALJ's decision. Further, the ALJ specifically stated in the opinion that the claim was placed in abeyance during the pendency of Turner's rehabilitation, and the ultimate determination of his need for continuing pain management would be made following that process. Accordingly, both parties were directed to file a status report within thirty (30) days of February 19, 2012, "to update the ALJ on the plans for [Turner's]

[2] At the time Saling was decided, the regulation referred to "a written opinion, order or decision . . . finally adjudicating a case."

rehabilitation/weaning." Status reports were due every sixty (60) days thereafter while the claim remained in abeyance. Accordingly, the appeal of Turner is **DISMISSED** and this case is **REMANDED** to the ALJ for entry of a final decision on all issues.

We point out our dismissal of this appeal does not in any manner affect the enforceability of the ALJ's interlocutory opinion and award. The parties are required to comply with all terms and conditions of that order until amended or set aside by the ALJ.

ALL CONCUR.

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FRANKLIN STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

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