Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 15, 2014

CLAIM NO. 200497275

TECHNICAL STAFFING SOLUTIONS PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

BILLY J. BLACKETER, JR.
DR. JONATHAN RUBY
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Technical Staffing Solutions ("Technical Staffing") seeks review of the July 31, 2013, opinion and order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") resolving a post-award medical fee dispute in favor of Billy J. Blacketer, Jr. ("Blacketer").

On appeal, Technical Staffing argues the ALJ erred in summarily resolving the medical fee dispute without adjudicating the causation issues in this case.

In a September 6, 2006, opinion, award, and order, Hon. Andrew Manno, Administrative Law Judge ("ALJ Manno") determined Blacketer sustained a work-related low back injury on August 21, 2007. That finding was not disputed. The primary issues in the claim were whether Blacketer's work-related low back injury merited an impairment rating and the compensability of proposed L5-S1 discectomy and fusion surgery recommended by Dr. Amr El-Naggar. Rejecting the opinions of Dr. Russell Travis and Dr. Daniel Primm and relying upon the opinions of Dr. El-Naggar and Dr. Thad Jackson, ALJ Manno determined Blacketer had an 8% impairment as a result of the injury. However, with respect to the reasonableness and necessity of the proposed surgery, ALJ Manno determined as follows:

> In this case, this ALJ is presented with varied medical opinions from qualified physicians. After careful consideration of the evidence, this ALJ finds that, based upon the opinions of Dr. Travis and Dr. Primm, that the proposed fusion surgery is not reasonable or necessary treatment for the effects of the August 21, 2003 work injury. This ALJ found most credible the opinions of Dr. Travis and Dr. Primm that the recommended fusion surgery is not indicated. Both noted

> there was no objective pathology to indicate surgery was necessary. This ALJ agrees with the conclusions of Dr. Travis and Dr. Primm.

There was no appeal of the September 6, 2006, opinion, award, and order.

The record reveals Dr. El-Naggar treated Blacketer during and after pendency of the claim. In a September 28, 2006, record, Dr. El-Naggar noted Blacketer's surgery had not been approved. He noted Blacketer continued to have severe mechanical low back pain and believed his best option was L5-S1 fusion surgery. He expressed hope that at some point Blacketer would be allowed to receive the appropriate treatment. At that time, Dr. El-Naggar referred Blacketer to Dr. Lynd for pain control and indicated he may consider more lumbar epidurals or physical therapy. At the request of Dr. El-Naggar, on July 20, 2007, a lumbar MRI was performed which revealed "single level disc degenerative changes at L5-S1 with reactive inplate edema though without significant spinal canal, lateral recess or foraminal narrowing or disc protrusion." Dr. El-Naggar's August 9, 2007, medical report notes Blacketer had undergone a lumbar MRI and as a result he believed Blacketer should undergo L5-S1 fusion

surgery, as he had recommended in the past.[1] Dr. El-Naggar believed the surgery in the form of L5-S1 fusion would be recommended in this situation. He indicated he would refer Blacketer to Dr. Weber for pain management.

Dr. El-Naggar's January 10, 2008, note reflects Blacketer had severe low back pain which is consistent with his L5-S1 degenerative disk disease with loss of disk height at anterior osteophytes. Dr. El-Naggar strongly recommended an L5-S1 posterior lumbar interbody fusion as opposed to anterior lumbar interbody fusion. He noted Blacketer continues to have significant low back pain with intermittent spasms in the lower lumbar region. Blacketer would be kept off work, and Dr. El-Naggar wanted to evaluate him after two months.

The record contains a fax cover sheet dated January 30, 2008, from Dr. El-Naggar's office, the Lake Cumberland Neurosurgical Clinic, from Melissa to Mary Burchett regarding "Billy Blacketer, Claim No. 040843." Under the heading "Comment" is the following: "We are requesting pre-cert for a L5-S1 ALIF on 2-28-08 at Lake Cumberland Regional Hospital CPT Codes 22630, 22851, 22840

[1] A copy of the July 20, 2007, lumbar MRI report and the August 9, 2007, report of Dr. El-Naggar were introduced by both parties.

& ICD – 9 Codes are 722 52, 722 2. Thanks for your help! Melissa."[2]

The record contains a notice of denial dated January 31, 2008, addressed to the attention of Melissa at Lake Cumberland Neurosurgical Clinic regarding Blacketer. The notice of denial reads as follows:

> This is a notice of denial for the surgical request for L5-S1 ALIF. The denial is based on the opinion and award dated 10/5/06. Unfortunately, we will not be responsible for payment for the proposed surgery.
>
> If you have any questions or need clarification on any of these matters please do not hesitate to call me at 859-425-7800. Fax number 859-425-7822.
> Thank you.
> Mary Burchett Ext. 1215
> Claims Examiner

Dr. El-Naggar's relevant treatment notes dated March 20, 2008, May 12, 2008, February 7, 2009, February 23, 2009, July 27, 2009, and September 10, 2009, documenting his treatment of Blacketer's low back injury were introduced. In the September 10, 2009, note, Dr. El-Naggar states Blacketer was there for a pre-operative evaluation, to discuss the operation, and he wanted to proceed with "a right L5-S1 PLIF." He noted on that date

[2] This document was attached to Technical Staffing's motion to reopen.

Blacketer still complained of low back pain with right lower extremity pain at S1 nerve root distribution.

The operative note of Lake Cumberland Regional Hospital dated September 16, 2009, reveals Dr. El-Naggar's post-operative diagnosis of intractable low back pain with L5-S1 degenerative disk disease and diskogenic low back pain. Dr. El-Naggar performed the following surgery:

> 1. Right L5-S1 hemilaminectomy and diskectomy followed by posterior lumbar interbody fusion, L5-S1 using PEEK PR cages and BMP.
>
> 2. Placement of bilateral percutaneous Sextant pedicle screws and percutaneous rods of posterolateral stabilization, L5-S1.

Dr. El-Naggar continued to see Blacketer in 2009 and in 2010. His last treatment note in the record is dated July 12, 2010. At that time, Dr. El-Naggar stated the CT scan showed good progress with the fusion at L5-S1. Blacketer's back and leg pain were better than before the surgery but he was still having residual back and leg pain especially in the left leg. He did not recommend further surgery. Blacketer was to let him know if he had any recurrence of pain.

It appears Blacketer was treated, thereafter, by Dr. Ruby at Lake Cumberland Medical Associates. The records reveal Dr. Ruby first saw Blacketer on February 23,

2010, and he treated Blacketer intermittently in 2010, 2011, and 2012. The most recent note of Dr. Ruby contained in the record is dated March 15, 2012, in which he noted Blacketer had come for medication refills. He noted Blacketer was to have a “heart cath” in Henderson, Tennessee. He also noted Blacketer still had issues with chronic back pain which was generally well controlled by his medications. The relevant assessment was chronic lumbago. Dr. Ruby prescribed refills of his medications which included Lorcet 7.5.

On November 20, 2012, Technical Staffing filed a Motion to Reopen to File a Form 112. It cited to the September 6, 2006, opinion, award, and order which also included the resolution of a medical fee dispute. It stated the medical dispute pertained to Dr. El-Naggar’s request for pre-approval of an L5-S1 anterior cervical diskectomy and fusion, and ALJ Manno found the proposed surgery was not reasonable and necessary treatment of the August 21, 2003, work injury.

Technical Staffing stated a July 20, 2007, lumbar MRI was ordered which revealed degenerative changes at L5-S1 without disk bulge compression or nerve root impingement. It argued Dr. El-Naggar “continued to seek a source of funding for pre-approval” of the lumbar fusion

surgery. Technical Staffing noted that on January 31, 2008, its medical payment obligor denied Dr. El-Naggar's request for pre-approval based on ALJ Manno's September 6, 2006, decision. However, on September 16, 2009, Dr. El-Naggar performed an L5-S1 hemilaminectomy and discectomy followed by posterior lumbar interbody fusion at L5-S1 using PEEK cages, pedicle screws and percutaneous rods. Technical Staffing asserted it was being billed by Blacketer and Dr. Ruby "for treatment of back pain, hardware problems, loosened hardware, a spinal cord or bone stimulator, prescriptions, and a TNS unit." It contended the records of Dr. Ruby indicate Dr. El-Naggar dismissed Blacketer to follow-up with his primary care physician for his pain. As a result, Dr. Ruby prescribed Lorcet, Naproxen, chronic pain treatment, Neurontin, Lortab, and Zoloft. Technical Staffing attached the medical report of Dr. F. Albert Olash in which he opined the medical treatment from Dr. Ruby cannot be causally related to the work injury. Technical Staffing concluded with the following:

> In addition, Defendant-Employer will contend in this litigation that all Dr. Ruby's medical billing is for the consequences of an unreasonable and unnecessary surgery performed by Dr. El-Naggar, for which Defendant-Employer has no liability. The September 6, 2006

> holding of the Administrative Law Judge is final and *res judicata*. Defendant Employer requests relief from liability for the medical treatment of an unreasonable and unnecessary spine surgery.

Attached to the motion to reopen is a Form 112 medical fee dispute which restates what was already stated in the motion to reopen, including the argument the doctrine of *res judicata* not only relieves Technical Staffing from liability for the surgery performed by Dr. El-Naggar but also the consequences and medical treatment of the surgery. Technical Staffing concluded by stating as follows:

> Relief from liability from this and any other medical billing that is for the effects of an unreasonable and unnecessary surgery or from medical billing which is not covered under that open medical obligation is respectfully requested.

On January 4, 2013, Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") entered an order reassigning the matter to the ALJ. On January 8, 2013, the ALJ entered an order finding Technical Staffing had made a *prima facie* showing for reopening, sustained the motion to reopen, and assigned the dispute to himself. The ALJ joined Dr. Ruby as a party to the medical fee dispute,

granted the parties twenty days to file proof, and set a telephonic benefit review conference.

Thereafter, Blacketer filed the March 12, 2013, statement of Dr. Ruby in which he stated Lorcet was reasonable and necessary treatment for Blacketer's work injury. He noted Blacketer had been receiving Lorcet since 2007. Blacketer also filed the medical records of Dr. El-Naggar spanning the period from January 12, 2004, through August 9, 2007. Various other medical records were also filed in the record by the parties.

The April 22, 2013, benefit review conference ("BRC") order reflects Dr. Ruby's bills and treatment were at issue and the contested issue was the work-relatedness of Lorcet.

After the parties submitted briefs, on May 9, 2013, the ALJ entered an order removing the claim from submission, reopening the proof time, and scheduling a telephonic BRC. The ALJ requested the parties address the fact a motion to reopen and medical fee dispute was not filed after the claim examiner denied the request for pre-certification of the surgery by Dr. El-Naggar in January 2008. A subsequent BRC order was entered dated June 24, 2013, mirroring the previous BRC order.

In the July 31, 2013, opinion and order, after summarizing the parties' arguments, discussing the utilization report ("UR") report of Dr. Olash and portions of the records of Dr. El-Naggar, the ALJ determined as follows:

> On January 30, 2008, Dr. El-Naggar's office faxed a request for authorization of an L5-S1 fusion. The claims examiner responded the next day with a denial "based on the opinion and award dated 10/5/06." Blacketer had been awarded social security disability benefits, and proceeded with the surgery, and had the charges submitted to Medicare.
>
> Dr. Ruby established care with Blacketer on February 23, 2010, and took over writing his medications, including Lorcet. Dr. Ruby said the review of Dr. El-Naggar's records indicate a prescription for Hydrocodone/Lorcet dating back to 2007, and that his current prescription for Lorcet is related to the 2003 work injury.
>
> This dispute was originally submitted following an April 22, 2013 Benefit Review Conference. The ALJ initially found merit to the Plaintiff's argument that this dispute had not been timely filed, and by Order dated May 9, 2013 removed the claim from submission, reopened proof, and scheduled another telephonic BRC with counsel to hear further argument on that issue. No further evidence was filed, and the ALJ again took the matter under submission after the conference on April 22, 2013.
>
> As expressed in the May 9, 2013 Order, the ALJ finds that the Defendant

did not timely initiate Utilization Review and file a medical dispute when Dr. El-Naggar resubmitted a request for authorization of surgery to the carrier on January 30, 2008. Upon receipt of the preauthorization request, the Defendant was required to initiate the UR process, pursuant to 803 KAR 25:190§5(1)(a), and to timely file a motion to reopen if it obtained a supportive report. *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther*, 330 S.W.3d 456 (Ky. 2010); *Lawson v. Toyota Motor Manufacturing Kentucky, Inc.,* 330 S.W.3d 452 (Ky. 2010). The Defendant improperly denied surgery based on the prior Opinion of non-compensability issued over 16 months prior.

It is important to note that the prior finding of non-compensability was based on medical necessity, not causation. A finding of causation would be, as the Defendant argues, res judicata. But as with all findings related to medical necessity, the prior ALJ's Opinion was a "snapshot" decision as to the compensability of surgery at the time. The Defendant can no more rely in perpetuity on a prior finding of a lack of medical necessity any more than a claimant can forever rely on a finding of present medical necessity; if so, employers and their carriers would be foreclosed from forever challenging, for example, the continued necessity of a narcotic pain medication any time after it had previously been found medically necessary.

The basis for the Defendant's pending medical dispute is that the Lorcet is not related to the original work injury, but to the ill effects of unwarranted surgery. But by not timely contesting the surgery, the Defendant

> waived its defenses and is liable for it. And since it is liable for the surgery, it is liable for any medicine that may be prescribed as a result of it, notwithstanding Plaintiff's argument that he was on the drug as early as 2007. And since there is no evidence that the Lorcet prescription is not medically necessary, there is no defense to payment.

Technical Staffing's motion was overruled and the medical fee dispute was resolved in favor of Blacketer. No petition for reconsideration was filed.

On appeal, Technical Staffing asserts the medical fee dispute was timely filed and "the ALJ should have resolved the causation and liability issues." Technical Staffing argues "issuing a written notice of denial of liability" to Dr. El-Naggar on January 30, 2008, was not improper. Thus, it contends the ALJ's decision that its failure to file a medical fee dispute in 2008 precludes the filing of this medical fee dispute is reversible error.

Technical Staffing also argues *res judicata* applies as ALJ Manno's decision on the merits regarding the compensability of the surgery proposed by Dr. El-Naggar precluded further litigation on this issue. Further, the actions of the payment obligor in denying liability in January 2008 did not bar Technical Staffing from filing a Form 112 as this medical fee dispute involves an entirely

different physician, Dr. Ruby. Therefore, the fact a medical fee dispute was not filed "against Blacketer and Dr. El-Naggar" in 2008 does not prohibit the filing of the current medical fee dispute regarding the services of Dr. Ruby.

Technical Staffing also makes the following argument:

> The pending Form 112 involved billing from Dr. Ruby for treatment of back pain, hardware problems, loosened hardware, a spinal cord or bone stimulator, prescriptions, and a TNS unit. Dr. Olash found that this medical treatment from Dr. Ruby cannot be causally related to the August 21, 2003 work injury. In addition, Dr. Ruby's medical billing was for the consequences of an unreasonable and unnecessary surgery performed by Dr. El-Naggar.

Technical Staffing concludes by arguing as follows:

> The trier of fact must therefore weigh the medical evidence causally related the current medical billing to the work injury. The analysis of a causal connection was not carried out, and the burden of the claimant concerning work-relatedness or causation of the condition was erroneously shifted to the employer. [citation omitted]

Because we find no error in the ALJ's analysis, we affirm.

In Kentucky Associated General Contractors Self-Insurance Fund v. Lowther, 330 S.W.3d 456 (Ky. 2010), the claimant, Wallace, sustained a work-related low back injury

while in the employ of Back Construction. KAGC insured Back Construction's workers' compensation liability. Wallace entered into an agreement settling his claim. However, the agreement entitled him to continued payment of medical expenses as a result of the injury through April 12, 2008. Wallace's treating physician requested pre-authorization from Ladegast and Heffner Claims Service, Inc. ("Ladegast") to perform a series of injections. Ladegast submitted the request for utilization review and based on the reviewer's recommendation, issued a notice of denial. Wallace appealed and a second review concluded the recommended injections were not reasonable and necessary treatment. Ladegast then issued Wallace and his treating physician a written final decision denying pre-authorization. The employer did not file a medical fee dispute or motion to reopen in order to contest the compensability of the proposed treatment. Similarly, Wallace did not avail himself of the reopening procedure in order to compel the employer to pre-authorize the treatment. Instead, Wallace and/or his treating physician contacted the Office of Workers' Claims ("OWC") complaining about the actions of KAGC and Ladegast. KAGC and Ladegast were provided an opportunity to respond to the allegation they had committed unfair claims settlement practices.

Ultimately, after a hearing, the OWC's Executive Director determined KAGC and Ladegast committed unfair claims settlement practices by failing "'to meet the time constraints for rectifying and paying workers' compensation claims established in KRS 342 and the administrative regulations.'" Id. at 458. The Executive Director based the decision on the Workers' Compensation Board's "longstanding interpretation of the applicable regulations" which equated a final utilization review decision to grant or deny pre-authorization with a "statement for services" that an employer must contest within thirty days or pay. Id. The Executive Director's decision was affirmed by the Franklin Circuit Court and a divided Court of Appeals affirmed the Franklin Circuit Court. The Supreme Court identified the issues as follows:

> The courts have construed KRS 342.020(1) as placing on an injured worker's employer the burden to contest a post-award medical bill within 30 days or to pay it. [footnote omitted] At issue presently is whether a final utilization review decision refusing to pre-authorize medical treatment is equivalent to a "statement for services" to which the 30–day requirement pertains.

Id. at 459.

In affirming the Court of Appeals, the Supreme Court held as follows:

> In cases involving a post-award medical dispute, the regulation requires a motion to reopen and medical dispute to be filed within 30 days of receipt of "a complete statement for services" unless utilization review has been initiated.[footnote omitted] If a contested expense is subject to utilization review, such as in the case of a pre-authorization request, the regulation prohibits a medical dispute from being filed before the process is exhausted [footnote omitted] but gives the "[t]he employer or its medical payment obligor" 30 days after the final utilization review decision in which to file a medical dispute.[footnote omitted]
>
> . . .
>
> Neither KRS 342.020 nor the regulations states explicitly that an employer must file a medical dispute and motion to reopen within 30 days of receiving a final utilization review decision denying pre-authorization or pay for the medical treatment to which it pertains. We note, however, that the Board has interpreted the regulations since 2001 as equating a final utilization review decision to grant or deny pre-authorization with a "statement for services" that an employer must contest within 30 days or pay. [footnote omitted] We find no error in the Board's interpretation, having concluded that it is consistent with the authorizing statute as well as the regulatory language and being mindful of the principle that the courts give great deference to an administrative agency's reasonable interpretation of its own regulations.[footnote omitted]

Id. at 460.

In Lawson v. Toyota Motor Mfg., Kentucky, Inc., 330 S.W.3d 452 (Ky. 2010), Lawson filed a motion seeking post-award temporary total disability ("TTD") benefits prospectively for the recovery period following a surgery which had been pre-authorized. The ALJ denied the motion based on a finding the surgery was not compensable because it was unreasonable and unnecessary. This Board reversed and remanded with respect to the request reasoning the employer failed to file a medical dispute and motion to reopen within thirty days after the surgery was pre-authorized in order to contest its reasonableness and necessity.

On appeal, the Court of Appeals reversed and remanded to the Board to determine whether substantial evidence supported the finding surgery was non-compensable. The Supreme Court reversed the decision of the Court of Appeals stating the ALJ erred by denying Lawson's request based on a finding concerning the reasonableness and necessity of the surgery. Id. at 452-453.

Significantly, the surgeon performing surgery had requested pre-authorization for surgery to stabilize Lawson's right knee cap which the insurance carrier pre-authorized. After receiving the pre-authorization, Lawson filed a motion to reopen seeking TTD benefits. On the date

Lawson filed her motion, the surgeon was notified the employer decided to seek an independent medical evaluation. Upon evaluation, the reviewing physician opined Lawson's knee problem was work-related; however, he recommended the surgery not be performed. Relying upon the physician's opinions, the ALJ determined the surgery was not compensable as it constituted neither reasonable nor necessary treatment for the work-related knee injury.

This Board reversed reasoning the injured worker had the burden in a post-settlement medical dispute to prove work-related causation, but the employer had the burden to institute the formal medical dispute and prove that the treatment at issue is unreasonable and/or unnecessary. The Board relied upon the definition of pre-authorization contained in 803 KAR 25:190 § 1(5), and equated the utilization review decision that pre-authorizes medical treatment with a medical bill and concluded KRS 342.020(1) requires an employer to contest such a decision within thirty days of receipt or pay the resulting bill. The Board further determined the claimant's motion seeking TTD benefits did not place issues concerning the reasonableness and necessity of the procedure before the ALJ. Thus, the employer's failure to file a medical dispute and motion to reopen within thirty days in order to

contest the pre-authorization decision resulted in a waiver of its right to contest the procedure.

Agreeing with the Board, the Supreme Court reversed, holding as follows:

> We determined today in *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther*. [footnote omitted] that an employer wishing to contest liability for a proposed medical procedure must file a medical dispute and motion to reopen within 30 days of a final utilization review decision that recommends refusing pre-authorization. The rationale of *KAGC v. Lowther* applies with even greater force to a utilization review recommendation to grant pre-authorization. We conclude that in either instance an employer, having failed to invoke an ALJ's jurisdiction by filing a timely medical dispute and motion to reopen, may not circumvent KRS 342.020 and the regulations by engrafting such a dispute onto a worker's pending motion for TTD. [footnote omitted]

Id. at 456.

The holding in KAGC v. Lowther, supra, and Lawson v. Toyota Motor Mfg., Kentucky, Inc., supra, are controlling in the case *sub judice*. When the claims examiner for the workers' compensation carrier for Technical Staffing, issued a denial on January 31, 2008, denying the January 30, 2008, request for pre-certification, Technical Staffing or its carrier was then required to file a medical fee dispute within thirty days

of January 31, 2008. As noted earlier, the carrier took no action after that date. Consequently, the subsequent surgery performed by Dr. El-Naggar was compensable, and treatment of the effects of that compensable surgery is also compensable.

Technical Staffing's assertions to the contrary, we agree with the ALJ that the doctrine of *res judicata* does not apply in this case. As noted by the ALJ, ALJ Manno's opinion was merely a snapshot decision as to compensability of surgery at that time. That determination by ALJ Manno was not *res judicata* as to reasonableness and necessity of that surgery in the future. To hold otherwise would mean that under no circumstances could Blacketer be entitled to surgical treatment of his back in the future. Significantly, ALJ Manno's decision only pertained to the necessity and reasonableness of the surgery and was not based on a lack of causal connection to the injury. Clearly, facts may later arise which may cause the surgery to be reasonable and necessary treatment of Blacketer's work-related injury. As pointed out in Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000):

> Workers' compensation is a creature of statute. As set forth in Chapter 342, workers' compensation proceedings are administrative rather than judicial. Although the principles

> of error preservation, *res judicata,* and the law of the case apply to workers' compensation proceedings, they apply differently than in the context of a judicial action. For that reason, authority based upon judicial proceedings is not necessarily binding in the context of proceedings under Chapter 342.

Id. at 143.

In the case *sub judice*, we think the above applies. What may not have been reasonable and necessary surgical treatment at the time ALJ Manno rendered his decision in 2006 may well be reasonable and necessary treatment in 2008 or 2009. Consequently, ALJ Manno's decision was not *res judicata* as to the need for the surgery proposed by Dr. El-Naggar in 2008 which he ultimately performed in 2009.

The ALJ's decision is well-founded in light of the position taken by Technical Staffing in its motion to reopen, wherein it stated it will contend Dr. Ruby's medical billing is the consequence of unreasonable and unnecessary surgery performed by Dr. El-Naggar. Since the holdings in Lawson v. Toyota Motor Mfg., Kentucky, Inc., supra, and KAGC v. Lowther, supra, render the surgery compensable, the treatment of the effects of the surgery must also be compensable.

Accordingly, the July 31, 2013, opinion and order of Hon. Douglas W. Gott, Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON W BARRY LEWIS
P O BOX 800
HAZARD KY 41702

COUNSEL FOR RESPONDENT:

HON MARK D KNIGHT
P O BOX 49
SOMERSET KY 42502

RESPONDENT:

DR JONATHAN RUBY
350 HOSPITAL WAY
SOMERSET KY 42503

ADMINISTRATIVE LAW JUDGE:

HON DOUGLAS W GOTT
400 E MAIN ST STE 300
BOWLING GREEN KY 42101