

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 12, 2014

CLAIM NO. 200785050

TERESA FINKE

PETITIONER

VS.

APPEAL FROM HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE

COMAIR
and HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

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

STIVERS, Member. Teresa Finke ("Finke") seeks review of the July 29, 2013, opinion, order, and award of Hon. Grant Roark, Administrative Law Judge ("ALJ") finding she sustained a work-related right shoulder injury and awarding temporary total disability ("TTD") benefits and permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ also

awarded medical benefits. Finke also appeals from the August 27, 2013, order denying her petition for reconsideration.

On appeal, Finke challenges the portion of the decision which reaffirmed the ALJ's October 16, 2012, order suspending the claim on August 29, 2012, extending the suspension through January 28, 2013, and ordering Comair is not responsible for income benefits and incurred medical expenses during this period.

Finke's Form 101 alleges on May 26, 2007, she was injured when she caught her hand in the door of the airplane on which she worked as a flight attendant. She experienced excruciating pain. Her hand was extricated from the door, and she performed no duties during the round trip flight from Cincinnati, Ohio to Charleston, West Virginia. She sought immediate care and ultimately came under the care of Dr. Thomas Due for her hand and Dr. Forest Heis, his partner, for her right shoulder problems.

On September 28, 2009, Finke filed a motion seeking an extension of time in which to complete her proof. On October 23, 2009, Comair filed a response to Finke's motion for an extension of time, a motion for costs, a motion to compel Finke to appear for an independent medical examination ("IME"), and a motion to

suspend any potential benefits until Finke appears for an IME. Comair had no objection to Finke's motion. However, Comair asserted it had scheduled an IME with Dr. Ronald Burgess on September 23, 2009, and Finke appeared but refused to fill out the form Dr. Burgess requires of his examinees or to go into the examination room without her father. It represented Dr. Burgess does not permit any other individuals to be present in the examination room. Consequently, he did not examine Finke, and Comair was forced to pay Dr. Burgess' \$1,350.00 fee for the canceled examination. Comair moved for costs to be assessed against Finke and requested an order compelling Finke to appear at a subsequent IME with Dr. Burgess. It argued to allow Finke to refuse to see Dr. Burgess effectively permitted her to dictate its medical expert. Comair also requested any potential benefits be suspended until such time as Finke agreed to the examination by Dr. Burgess.

On October 30, 2009, Finke filed a response admitting she appeared and refused to fill out the questionnaire regarding her medical history and the work injury because she did not feel comfortable providing the answers without counsel present or an attorney reviewing the document and her answers. She asserted the questionnaire was akin to interrogatories utilized by Dr.

Burgess to file a report against her interest. Finke also admitted she refused to be examined by Dr. Burgess without her father being present. Except for examinations by her treating physician, Finke did not wish to be examined by any other physician without a family member being present.

Finke argued the Rules of Civil Procedure and the regulations do not require her to be examined without first answering a questionnaire. Likewise, they did not require her to be examined without a family member present. Finke noted the civil rules permit videotaping of evaluations and/or having another physician present. She contended Dr. Burgess' fee was excessive and the statute and regulations do not permit an assessment of "no show fees" against claimants. Since Dr. Burgess canceled the IME, Finke argued the statute and regulations do not permit suspension of benefits when the examiner cancels the IME.

On December 8, 2009, the ALJ entered an order granting the parties additional time to take proof and passing the motion for costs. The ALJ sustained Comair's motion to compel Finke to appear for an IME with Dr. Burgess and follow his protocol.

On December 30, 2009, Finke appealed from the December 8, 2009, order. On March 1, 2010, finding the

order was not final and appealable, the Board dismissed the appeal.

On April 22, 2010, Comair filed a motion to dismiss the claim with prejudice if Finke failed to affirm in writing that she will attend a new IME with Dr. Burgess and follow his protocol. In support of the motion, Comair asserted it cannot schedule another examination with Dr. Burgess unless Finke affirms in writing through her counsel she will attend.

On April 28, 2010, Finke filed a response asserting the statute and regulations do not permit dismissals with prejudice for failure to appear at an IME and do not require written confirmation a claimant will attend an IME. She noted the ALJ is only permitted to suspend benefits.

On May 13, 2010, the ALJ entered an order noting Finke's objections to Comair's motion to dismiss and that a teleconference had been held on May 12, 2010. The ALJ ordered the December 8, 2009, order set aside and stated Finke shall not be compelled to attend an IME with Dr. Burgess. Proof would remain open for ninety days after which time either party may move for a benefit review conference ("BRC").

On July 28, 2010, Comair filed a motion seeking a telephonic conference and a motion for an extension of proof time. It stated it had been unable to schedule an IME with either Dr. Thomas Gabriel or Dr. Burgess, the experts it prefers to use in upper extremity claims, since neither would examine Finke with a friend or relative present in the examination room. Comair noted Dr. Gabriel stated he might consider allowing someone in the examination room if Finke could provide proof of a documented phobia which would require this.

Although the ALJ had not ordered the claim placed in abeyance, on October 11, 2010, Comair filed a status report indicating Dr. Richard Dubou had agreed to perform an IME on November 2, 2010, and would allow Finke's father to be present in the examination room as long as he did not attempt to participate in the examination by answering questions for Finke.

Pursuant to Finke's motion to hold the claim in abeyance for various medical reasons, on November 24, 2010, the ALJ ordered the claim held in abeyance and the parties to file status reports every sixty days thereafter.

On his own motion, on March 21, 2011, the ALJ ordered the claim removed from abeyance and set a proof schedule.

On June 24, 2011, Comair filed Dr. Michael Best's report concerning the June 7, 2011, IME, medical records review, and functional capacity evaluation.

Comair introduced the June 21, 2011, deposition of Dr. Best. During his deposition, Dr. Best testified he had no problem permitting Finke's father to be present and would allow a spouse or parent to be present during the examination. He indicated in 98% of the examinations, family members are present.¹

On November 14, 2011, Comair filed a motion to abate the claim because Finke had undergone surgery in September 2011, and a motion to continue the BRC. Finke filed an objection to the motion asserting although she was not at maximum medial improvement ("MMI") after the shoulder surgery, because the compensability of the shoulder claim had been denied she preferred the BRC not be canceled so the parties could discuss bifurcation regarding compensability of the shoulder injury or, in the alternative, to discuss issues for which proof may be introduced.

¹Comair also introduced Dr. Best's October 6, 2011, deposition. Dr. Best stated in the course of performing evaluations he will allow the spouse of the person being examined to be present during the examination. On very rare occasions he will allow other people to be present at the express request of the examinee. He acknowledged there would be no problem with Finke's father attending the examination.

By order dated December 21, 2011, the ALJ sustained the motion to bifurcate and ordered a formal hearing be held on January 19, 2012.

The January 19, 2012, hearing transcript reflects Comair's entitlement to reimbursement for no show fees and the suspension of benefits during the time there was a dispute concerning the IME examination were among the contested issues.

At the hearing, Finke testified she was seen by Drs. Bilkey and Best and both allowed her father to be present during the examination. Dr. Burgess did not want to permit her father to participate in the examination and she did not feel comfortable without her father, husband, or someone else with her. She takes this position concerning any doctor with whom she is not treating.

Finke testified she was a trustee for the executive board and a "chief bace rep" with Teamsters Local 513 and was involved in its day-to-day operations. As such she was aware it had "issues" concerning Dr. Best's examinations. It was her understanding "from former leadership" that Comair had agreed not to use Dr. Best for any more "flight attendant IMEs." At that point, based on a previous objection, the ALJ prohibited any further

testimony concerning the issue of Dr. Best performing IMEs on flight attendants.²

On March 5, 2012, Finke's November 1, 2011, deposition was introduced which contains no discussion regarding her failure to attend scheduled IMEs. However, on direct examination Finke was asked extensively about her position with the Teamsters Local #513 and the complaints she received regarding the IMEs performed by Dr. Best on flight attendants. Finke provided the name of the flight attendant whose file contained the pertinent information regarding this issue.³ She reiterated her testimony that she understood there was some agreement that Comair would not use Dr. Best any longer. Finke testified complaints about Dr. Best "were very prevalent" among flight attendants. She also reiterated that Dr. Best had allowed her father to be present at the examination and described the manner in which Dr. Best conducted himself during the IME.⁴

On March 19, 2012, the ALJ entered an interlocutory opinion, award, and order determining Finke's right shoulder condition and resulting surgery were

² See pages 30-32 of the January 19, 2012, hearing transcript.

³ See pages 37-39 of the deposition.

⁴ See page 40 of the deposition.

compensable. The ALJ awarded TTD benefits from May 1, 2011, until she reached MMI or was capable of returning to her regular customary work.

The ALJ denied Comair's request for no show fees and its motion to suspend benefits, concluding as follows:

Having considered the matter and each party's arguments, the Administrative Law Judge first concludes plaintiff did not unreasonable [sic] fail to present for and cooperate with her scheduled examination. She appeared at the appropriate time and she wanted her father to be able to attend her examination, which Dr. Burgess refused. While plaintiff's insistence on having her father present may be unusual, it does not render the request unreasonable. Indeed, both Dr. Bilkey and Dr. Best allowed plaintiff's father to attend their examinations. Accordingly, the Administrative Law Judge is not persuaded plaintiff acted unreasonably in insisting on having her father present, particularly when this was the first time her father's attendance was an issue with any examining physician. Because plaintiff was not unreasonable in her actions, she is not responsible for any no-show fees and her benefits shall not be suspended or forfeited for the period between Dr. Burgess' scheduled examination and Dr. Best's examination.

The ALJ placed the matter in abeyance until Finke attained MMI or the claim is returned to the active docket. The parties were to file status reports every sixty days.

On June 4, 2012, Finke filed a status report stating she had presented herself for a scheduled IME at the office of Dr. Daniel Primm on May 25, 2012, and Dr. Primm refused to permit her father to be present during the examination and refused to proceed with the IME. She noted the ALJ had previously resolved this issue. Finke represented her treating orthopedic surgeon has not placed her at MMI.

On June 4, 2012, Comair filed a motion requesting an order "suspending benefits" from May 25, 2012, the date Dr. Primm's IME was scheduled, until Finke completes the IME with Dr. Primm. It represented Finke would not undergo the IME without her father present, which is contrary to Dr. Primm's policy. Comair posited if Finke insisted her father attend the IME, it should have known to work through this issue and not wasted time and money. It sought a telephonic status conference or an order compelling Finke attend the IME.

On June 11, 2012, Comair filed a status report again asserting Dr. Primm did not conduct an IME on May 25, 2012, because Finke would not undergo the examination without her father present. Comair noted Finke claimed the ALJ resolved this issue in her favor because Dr. Best allowed her father to be present during his examination.

Comair asserted two doctors have shown it is not unreasonable for medical professionals to refuse to let others be present during the examination. It maintained Finke has complete authority to direct which IME she attends, at the expense of Comair's right to choose its own independent evaluator.

On June 15, 2012, Finke filed an objection stating the issue of whether her father was entitled to be present during the medical evaluations had previously been addressed and ruled upon and Comair should have known this. Finke believed the issue had been discussed with Dr. Primm prior to his examination. Therefore, there is no authority for the ALJ to suspend TTD benefits or back date the suspension to the date of Dr. Primm's scheduled IME.

Comair filed a supplement restating much of its previous position and re-emphasizing it was entitled to choose its own evaluator and did not have to request a status conference before an IME was performed in order to obtain authorization to use a specific evaluator. This would result in delay and continued payment of TTD benefits. Comair also took issue with Finke's assertion this issue had previously been resolved in her favor. Comair contended that based on the current posture of the case, its only option was to return to Dr. Best and

continue to pay TTD benefits. On the other hand, if it is allowed to choose its own evaluator then it can reset the evaluation with Dr. Primm and not get charged another cancelation fee.⁵

By order dated July 6, 2012, the ALJ granted Comair's motion to compel but denied the motion to suspend benefits. The ALJ directed Finke "shall comply with IME physician protocols."

On July 9, 2012, Finke filed a petition for reconsideration arguing the issue of her being examined in the presence of her husband or father was discussed in earlier proceedings. Finke also noted that in an order dated May 12, 2012, the ALJ set aside his December 8, 2008, order compelling her to be examined by Dr. Burgess pursuant to his examination protocols. Finke also referenced the fact Dr. Best had allowed family members to be present and that in almost all cases Dr. Best had permitted family members to be present during examination. Finke cited the March 19, 2012, opinion and interlocutory order and award which specifically held she did not fail to present herself

⁵ Finke also filed an objection asserting Comair had unilaterally terminated her TTD benefits on May 25, 2012, the date of Dr. Primm's scheduled IME. This generated a response from Comair indicating there had not been any suspension of TTD benefits and if it had there was a mistake. Comair attached copies of checks reflecting its continued payment of TTD benefits.

and cooperate with Dr. Burgess' examination, the request her father be present was not unreasonable, and she was not responsible for any no show fees and her benefits were not suspended. It argued that decision is the law of the case. Finke noted that instead of sending her to Dr. Best again, Comair scheduled an IME with Dr. Primm, she appeared for the IME, but Dr. Primm refused to allow her father to be present. She argued the July 6, 2012, order was inconsistent with the ALJ's findings in the March 19, 2012, interlocutory decision. Therefore, Finke asserted the July 6, 2012, order was erroneous, and she requested additional analysis so as to permit a meaningful appeal.

In an August 2, 2012, order denying the petition for reconsideration, the ALJ agreed Finke's position was well taken and stated he was not insensitive to her concerns about attending an IME. However, the ALJ stated the issue was simpler when it was only one physician who would not examine Finke with her father present. Since Dr. Primm would not agree to allow her father attend the IME, Finke's request has become a significant obstacle to allowing Comair to obtain the IME physician of its choosing. Therefore, unless Finke could provide some other compelling reason to excuse her from submitting to an IME without her father present, her request is too great a

burden on Comair's ability to get an examination to which it is entitled. However, in the event Finke could provide a reason to allow her father to attend the IME more compelling than just not being comfortable without him, the ALJ would consider that information in a renewed motion. Therefore, Finke was to submit to an examination properly scheduled and noticed by Comair.

On September 12, 2012, Comair filed a motion to dismiss the claim and terminate TTD benefits. It asserted that contrary to the August 2, 2012, order, it had received an August 29, 2012, letter from Finke's counsel, which it attached, indicating Finke will not attend Dr. Primm's examination on September 7, 2012. It asserted Finke's letter was tantamount to a failure to prosecute and the ALJ should dismiss her claim.⁶ Finke's objection noted the statutes and regulations do not permit dismissal of the claim with prejudice without a hearing on the merits.

On October 12, 2012, Comair filed a renewed motion asserting the claim should either be dismissed with or without prejudice or the TTD benefits stopped. It

⁶ The letter attached to motion reflects as follows: Second, my client will not be attending the examination by Dr. Primm on September 7. She will only submit for examination with her father present. I wanted to inform you ahead of time so your client could cancel the appointment with Dr. Primm and not incur any additional no show fees.

asserted at a minimum the claim should be held in abeyance and TTD benefits stopped until Finke follows the ALJ's order.

In an order dated October 16, 2012, citing to Finke's August 29, 2012, letter, the ALJ found Finke's refusal to attend the IME in violation of KRS 342.205(3) and forfeited her entitlement to compensation so long as she refuses to attend an IME. Citing to KRS 342.0011(14) which defines compensation as the sum of income benefits, medical benefits, and related benefits, the ALJ concluded Finke was not entitled to payment of income benefits or medical expenses incurred from August 29, 2012, and continuing for so long as she refuses to cooperate and attend a defense IME. Accordingly, the ALJ ordered Finke's benefits terminated immediately. The ALJ also ordered any additional income benefits to which Finke may otherwise be entitled by future award forfeited from August 29, 2012, and continuing so long as Finke refused to submit to a defense IME. Comair was not responsible for payment of any medical expenses incurred after August 29, 2012, unless and until Finke cooperated by attending the defense IME. The ALJ ordered if Finke never cooperates in attending a defense IME, she is fully divested of all claims to any

benefits under KRS Chapter 342. The ALJ placed the claim in abeyance with status reports due every ninety days.

Finke filed a petition for reconsideration making many of the same arguments she now makes on appeal. She again cited to the fact that the ALJ has previously addressed this issue in an interlocutory opinion and order. By order dated November 16, 2012, the ALJ denied the petition for reconsideration for several reasons. Concerning Finke's assertion her father should be present at the IME examination, the ALJ stated the reasons were set forth in the August 2, 2012, order which he set out verbatim. The ALJ noted that despite this order, Finke's counsel advised Comair's counsel she would not be attending an IME unless her father could be present. Because Finke made it clear she would not comply with the August 2, 2012, order, the ALJ remained persuaded forfeiture of benefits begins as of August 29, 2012. Regarding Finke's argument her right to benefits should merely be temporarily suspended and later reinstated retroactively, the ALJ indicated this issue was squarely addressed in the October 16, 2012, order. The ALJ again emphasized KRS 342.0011(14) defined compensation as both income and medical benefits and Kentucky law requires an actual forfeiture of any benefits during the period Finke refuses to submit to an

IME. The ALJ remained persuaded Finke's refusal to comply with his order and submit to an IME without her father requires forfeiture of any income and medical benefits for so long as her refusal continues. Finke appealed from this order and in an opinion and order issued January 3, 2013, this Board ordered the appeal dismissed.

On January 28, 2013, Finke served a motion to schedule a hearing stating among other things that without waiving her right to litigate the issues presented she will reluctantly submit to Dr. Primm's IME. Finke requested the ALJ grant Comair a reasonable period to schedule the IME with Dr. Primm, and tentatively schedule a hearing in Louisville. On March 11, 2013, the ALJ scheduled a BRC and formal hearing for March 30, 2013.

On March 15, 2013, Finke filed a motion to terminate the forfeiture of benefits noting she had previously stated her reluctant willingness to be examined by Dr. Primm without her father present and the IME is now scheduled for April 19, 2013, and Dr. Primm's deposition is scheduled for May 10, 2013. She asserted she should not be penalized for these unusual delays in scheduling the IME and Dr. Primm's deposition. Comair objected on the basis that Finke has forfeited her benefits until she submits to the IME. On April 19, 2013, Comair filed a supplement to

its response indicating Finke was advised she attained MMI in July 2012 thereby rendering her motion to terminate forfeiture of TTD benefits moot.

At the May 30, 2013, hearing, Finke indicated she saw Dr. Primm on April 19, 2013. She again reiterated her father had been present for all IMEs performed by non-treating doctors. She explained her husband was always working and her father was present until she felt comfortable with a doctor who was not treating her. Finke reiterated her testimony that when she appeared with her father, Dr. Primm declined to see her, and noted Dr. Best had allowed her father to be present. She testified in January 2013, she authorized her counsel to tell Comair she would submit to an examination without her father being present. When she was seen by Dr. Primm she prepared notes concerning the examination. She prepared a summary of her notes, a copy of which was attached to her testimony.

On July 29, 2013, the ALJ entered an opinion, order, and award finding Finke sustained no impairment as a result of the injury to her finger but had a 10% impairment due to a work-related injury to her right shoulder. The ALJ awarded TTD benefits from May 27, 2007, to June 13, 2007 and again from May 2011 when she was taken off work by Dr. Heis through July 12, 2012, the date Dr. Heis stated

she reached MMI. Concerning the suspension of Finke's benefits from August 29, 2012, to January 28, 2013, when she agreed to submit to an examination, the ALJ stated he had previously addressed Finke's arguments in his previous order. The ALJ stated he was persuaded by KRS 342.205(3) which requires actual forfeiture of benefits rather than a temporary hold on any such benefits to be fully reinstated upon compliance. Therefore, Finke was not entitled to income benefits or medical expenses from August 29, 2012, through January 28, 2013. No-show fees were not assessed.

Finke filed a petition for reconsideration making the same arguments she now makes on appeal. Comair also filed a petition for reconsideration pertaining solely to the computation of Finke's PPD benefits. By order dated August 27, 2013, the ALJ denied Finke's petition for reconsideration. The ALJ sustained Comair's petition for reconsideration and recalculated Finke's PPD benefits.

Finke first argues employers do not have an unfettered and unrestricted right to have IMEs and she is not required to submit to the protocol of the examining physician and therefore can have a family member present during the IME examination arranged by Comair. Citing Stearns Coal & Lumber Co. v. Roberts, 168 S.W.2d 573, 578 (Ky. 1943), Finke asserts although the facts are extreme it

stands for the proposition that the rights of the employer under KRS 342.205 are not unlimited. She asserts the issue of the right to have a family member present during IMEs is one of first impression.

In addition, Finke notes the regulations specifically incorporate the Civil Rules of Procedure 26 through 37 which include the civil rule concerning IMEs. She argues other jurisdictions impose limits on medical examinations in workers' compensation and personal injury cases. Finke cites a number of cases which permit the examinee to tape record the proceedings, have an attorney or a third party present, or have a reporter present to transcribe what was said. Finke argues the rationale for permitting the claimant to have another person or counsel is to prevent "swearing matches" regarding what occurred during the IME and so counsel can adequately prepare for an effective and meaningful cross-examination of the physician.

Finke contends the doctor performing the IME is not obstructed from doing anything which he would normally do during the examination, and having a third party present to witness the examination merely upholds the individual liberty and privacy of the person being examined. She asserts the "weight of national authority" favors the

claimant having a means of witnessing and controlling the invasion of his or her privacy and obtaining proof of what happened at the IME. Finke requests the Board recognize the various interpretations applied in other jurisdictions and provide the examinee a measure of protection.

Finke next argues the ALJ erred by requiring her to provide a compelling reason for having a family member present during the IME. She argues the burden on the employer to schedule an IME with a third party present is not "too great." Finke surmises there are very few doctors who perform IMEs for employees, but there are numerous doctors who perform IMEs for employers. She posits since the employers have a business relationship with the doctors, in order to preserve the relationship, the doctors will accede to the employee's request for a third party to be present. Finke notes that earlier in the case the ALJ permitted her to have a third party present, and Dr. Best testified in almost all of his examinations a family member is permitted in the examination room. Finke argues the right to have a third party present should be a fundamental right in workers' compensation cases. Further, there is no compelling reason for an IME doctor to refuse to conduct an examination because the patient desires to have a family member in the examining room. Finke indicates a claimant

may want a family member present for religious, safety, or other extremely personal reasons. Since these proceedings are a matter of public record, she asserts requiring a claimant to provide a compelling reason would require disclosure on the record of something which is extremely personal. Finke contends a requirement of "some other compelling reason," is outside the scope of reasonableness and raises ethical concerns for all concerned including the ALJ. Consequently, since the ramifications of asking someone to disclose their compelling reasons is potentially very severe, Finke argues in such instances the compelling reasons should be presumed and a third party should be permitted to be present for such an evaluation.

Finke argues the correct standard is not whether she has a compelling reason but whether she acted reasonably in refusing to be examined without her father present. Finke points out the ALJ did not require the physician to provide the reason why her father should not be present. Therefore, she asserts in balancing the interests of the parties, a claimant should be allowed to have family members present during such medical examinations.

Finke also asserts the ALJ committed reversible error by ordering forfeiture of all benefits as opposed to

suspension of benefits. She argues the ALJ misinterpreted KRS 342.205(3) which requires suspension of the benefits until the refusal or obstruction ceases. By using the word "suspended" and the phrase "[n]o compensation shall be payable," she espouses the legislature clearly intended to impose a penalty whereby the claimant was unable to receive benefits during the obstruction. Finke notes the word "forfeiture" is not contained in the statute and she argues forfeiture of benefits is too harsh a penalty and goes against the spirit of the workers' compensation system. Conversely, suspension of benefits adequately penalizes a claimant and provides incentive for cessation of the obstruction in order to "reclaim their benefits." Therefore, that portion of the opinion determining she forfeited her benefits should be vacated and the ALJ directed to properly apply KRS 342.205(3).

Finally, Finke argues the ALJ committed reversible error in commencing the forfeiture of benefits on August 29, 2012, and should have commenced the forfeiture on October 16, 2012, the date of the order. Since the ALJ previously permitted Finke to have her father present for the IME, she contends any suspension or forfeiture should commence upon entry of the order instead of retroactively.

Alternatively, should the Board determine the statute permits forfeiture of benefits, Finke argues TTD benefits are the only benefits affected. Finke cites the following language in B.L. Radden & Sons, Inc. v. Copley, 891 S.W.2d 84, 85 (Ky. App. 1995):

Certainly placing the case in abeyance and ordering the cessation of temporary benefits, if any, are the only appropriate sanctions available to the ALJ for a claimant's failure to appear at a scheduled medical exam.

She argues her right to medical treatment is not a temporary benefit but is retained for as long as the injury exists. Further, an award of PPD benefits should not be affected as it is not a temporary benefit. Finke argues the ALJ committed reversible error in retroactively commencing the penalty and in applying the penalty to medical benefits.

Concerning Finke's first two arguments, the applicable statute is KRS 342.205(1) which reads as follows:

After an injury and so long as compensation is claimed, the employee, if requested by a party or by the administrative law judge, shall submit himself or herself to examination, at a reasonable time and place, to a duly-qualified physician or surgeon designated and paid by the requesting party. The employee shall have the right to have a duly-qualified

physician or surgeon designated and paid by himself or herself present at the examination, but this right shall not deny the requesting party's physician or surgeon the right to examine the injured employee at all reasonable times and under all reasonable conditions.

The above-statute, as contended by Finke, does not grant employers an unrestricted right to have IMEs in Kentucky, as the statute gives the employee the right to have a duly qualified physician or surgeon present during the examination. Finke seeks to expand the employee's right at IMEs. However, we believe KRS 342.205(1) is unambiguous on its face, and a rule of statutory construction long accepted by 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 construction in interpreting it.'" Hall v. Hospitality Resources, Inc., 276 S.W.3d 775, 784 (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). We acknowledge what is at issue is in part a specific statute, KRS 342.205(3), versus certain provisions of the civil rules, the rule regarding specific versus general statutory construction is still persuasive and decisive. Equally persuasive and decisive is the following language from CR 1(2) which states as follows:

These Rules govern procedure and practice in all actions of a civil nature in the Court of Justice **except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over an inconsistent procedures set forth in the Rules.**

(emphasis added).

Civil Rules 26-37 are trumped by the specific statute regarding the employer's right to have the employee

examined. As the statute only permits Finke to designate a physician to be present, we find no error.

Finke's reliance upon Zabkowitz v. West Bend Co., 585 F. Supp. 635, (D.C. Wis. 1984) is misplaced as it pertains to a personal injury action. The federal judge permitted the plaintiffs, at their option, to have a third party, including counsel, or a recording device at the examination. Most of the cases cited by Finke in support of her position are personal injury cases from various jurisdictions dealing with the plaintiff's rights in the course of a defense IME. Some jurisdictions permit the attorney to be present, and others, although not allowing the attorney to be present, allow the presence of a reporter or a tape recording of the examination.

In contrast, in workers' compensation actions the Administrative Law Judge is the judge and jury; as such, he determines the evidence to be admitted and considered. Thus, the need to guard against what is revealed is lessened or even obviated as the ALJ is aware of the evidence which the parties attempt to introduce and determines what is to be excluded and admitted. Clearly, the possibility of any prejudice is much less. In addition, we would be extremely naïve were we to believe the ALJ is not fully familiar with the propensities and

leanings of the doctors who conduct IMEs for both employees and employers. The ALJ routinely reviews these doctors' reports and is fully aware of their biases and leanings.

Finke's reliance on Jacob v. Chaplin, 639 N.E.2d 1010 (Ind. 1994) is also misplaced as it also concerns a personal injury action. There, the Indiana Supreme Court permitted a tape recording of the conversations with the examining doctor during the examination. This case is inapplicable as it involves a personal injury action and Finke did not seek to record the examination. In fact, we note Finke's hearing testimony of May 30, 2013, establishes she took extensive notes during the examination, summarized the notes, and introduced her summarization at the hearing.

Concerning Finke's assertion the weight of the authority nationally favors the employee having the means of witnessing or controlling invasion of her privacy during an IME and obtaining proof as to what happened at the examination, we note KRS 342.205(1) affords her some protection by permitting a physician or surgeon of her choosing to be present. In addition, the ALJ gave her the opportunity to establish why an additional safeguard was needed.

We will address some of the other cases cited by Finke which deal with workers' compensation cases.

Although it concerns a workers' compensation claim, we do not believe Chavez v. J & L Drywall & Travelers Ins. Co., 858 So.2d 1266, (Fla. App. 1 Dist. 2003), has any bearing on the issue. In Chavez the employer and the IME physician agreed to Chavez's attorney being present during an IME; however, the employer's attorney also sought to be present during the IME. The Court did not allow the defendant's counsel to be present.

In Burton v. Industrial Com'n of Arizona, 166 Ariz. 238, 801 P.2d 473 (Ariz. App. 1990), the Arizona Court of Appeals upheld the claimant's right to have a tape recorder during the medical examination. The Arizona Court of Appeals concluded "a tape recorder operates silently, asks no questions, and merely records any audible sounds." Id. at 477. Thus, we conclude Burton provides no support for Finke's position as she did not seek permission to tape record the examination.

Similarly, in Hewson v. Asker's Thrift Shop, 120 Idaho 164, 814 P.2d 424 (Idaho 1991), the Idaho Supreme Court granted a request to record a "surety medical evaluation." Idaho has a statute significantly similar to Kentucky's as it permitted the employee to have a physician or surgeon designated and paid by the employee to be present at the examination. The Idaho Supreme Court

stated the statute did not expressly state the persons who can or cannot attend a medical evaluation or examination; rather, it merely guarantees the employee's right to attend a compelled medical examination with the physician of his or her choice. Consequently, the Court concluded the statute did not "automatically or necessarily exclude all others." Id. at 167. However, the Idaho Supreme Court only permitted a tape recorder to be used in order to dispel the fears the claimant might have concerning the examination. Thus, Hewson has no bearing on the issue as there was no request to permit Finke to have a tape recorder at the examination.

In Tri-Met, Inc. v. Albrecht, 777 P.2d 959 (Oregon 1989), the Oregon Supreme Court permitted an attorney to be present during an IME. However, we note the statute granting the employer the right to have the employee submit to an IME is not similar to the Kentucky statute as it does not permit the worker to have a physician present during the examination. Thus, the holding is inapplicable in this case. Further, in Tietjen v. Department of Labor and Industries, 13 Wash. App. 86, 534 P.2d 151 (Wash. App. 1975), the Washington Court of Appeals allowed the attorney to be present but did not allow the spouse to be present. There is no discussion

regarding the existence of a statute pertaining to the employer's right to an IME conducted by its designated physician and employee's right to have someone present. Therefore, Tietjen provides no guidance.

We conclude the ALJ did not err in requiring Finke to provide a compelling reason for having a family member present during the IME. As pointed out, the statute affords Finke certain protections by permitting her to have a physician present. In order to expand that right, Finke was required to provide the ALJ with a compelling reason. When she was unable to provide such a reason, the ALJ properly refused to allow her father to be present.

In addition, Finke's concerns about having to supply such a reason are unconvincing as the claimant could provide the reason under seal or in camera for review by the ALJ. However, we note any germane medical history of the employee is admissible and would be set out in the report. We understand Finke's concern over revealing reasons pertaining to sexual molestation, religious beliefs, or other peculiar problems. However, we emphasize those concerns can be dealt with by allowing the employee to file under seal the basis for the request for a third party to be present.

We are also unpersuaded by Finke's argument the ALJ should have required the medical examiner to provide a reason why her father should not be present. The statute does not require such a showing. It grants the employer the right to examine the employee at all reasonable times and under all reasonable conditions. Here, before requiring Finke to follow Dr. Primm's protocol, the ALJ gave her the opportunity to provide other reasons for having her father present.⁷ We believe the ALJ could easily conclude Finke's desire to have her father present was not reasonable or compelling. The only stated reason she provided was that she was uncomfortable with a non-treating doctor. We would venture to guess almost every employee is uncomfortable prior to and during an IME conducted by the employer's physician. Therefore, we find no error in the ALJ's refusal to allow her father to be present and in requiring Finke to provide a compelling reason for her father's presence. This is consistent with the wording of KRS 342.205(1).

Finke cites to a portion of the following language in Wood v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 353 N.W.2d 195, 197-8 (Minn. App. 1984):

⁷ See the August 2, 2012, order ruling on Finke's petition for reconsideration.

The discovery rules are designed to be tools for the elicitation of truth. To require routinely that attorneys be present during adverse medical examinations is to thrust the adversary process itself into the physician's examining room. The most competent and honorable physicians in the community would predictably be the most sensitive to such adversarial intrusions. The more partisan physicians might feel challenged to outwit the attorney. Thus, we fear that petitioner's suggested remedy would only institutionalize the abuse, convert adverse medical examiners into advocates, and shift the forum of controversy from the courtroom to the physician's examination room. We leave the decision to allow an attorney's presence during adverse examination to the sound discretion of the trial court. We also note that the *Code for Interprofessional Relations*, § 1B (1980), speaks to this suggestion:

It is not desirable for a lawyer to be present when his client is being examined by an examining physician whether the physician is employed on behalf of his client or on behalf of an adverse party, but there is no reason why the lawyer should not discuss with the physician either before or after the examination, any aspect of the examination that may be pertinent.

The Minnesota Court of Appeals went on to state:

Thus, we conclude that the court did not abuse its discretion in ordering petitioner to submit to an

adverse medical examination
unaccompanied by his attorney.

The above-language is insightful. We believe the Minnesota Court of Appeals' discussion concluding there was no abuse of discretion is applicable here. For the same reasons discussed in Wood, we believe to grant the employee the absolute right to have a non-physician present would expand the "forum of controversy" to the physician's examination room. The ALJ did not *per se* decline to permit a third party to be present. In fact, the ALJ initially determined Finke's insistence upon her father being present was not unreasonable. However, as the claim progressed the ALJ changed his mind. In doing so, the ALJ did not automatically exclude a third person. Instead, he gave Finke the opportunity to provide a reason other than her stated reason. Finke was not able to provide any other reason. She was permitted to take notes during Dr. Primm's examination and introduce a summary of those notes at the May 2013 hearing. Ironically, Finke provided extensive testimony concerning the problems with Dr. Best's IME, yet she attended his IME without objection and in one pleading appeared to suggest she could return to Dr. Best for

another IME.⁸ Consequently, there was no abuse of discretion.

Concerning Finke's third and fourth argument, the applicable section is KRS 342.205(3) which reads 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 continues.

Finke not only refused to submit to an examination, she refused to comply with the ALJ's order. Consequently, the statute mandates her right to prosecute any proceedings under the chapter shall be suspended until the refusal or obstruction ceases and no compensation shall be payable for the period during which the refusal continues. We are unpersuaded by the argument Finke's right to receive the benefits during the period of obstruction is merely suspended and once the obstruction ends she is entitled to receive the benefits payable during the suspension period. In essence, Finke's interpretation of the statute results in no penalty as she would not be deprived of any benefits

⁸ See Finke's petition for reconsideration filed July 9, 2012.

due to her obstruction. Since the statute does not allow the ALJ to assess the costs incurred by the employer due to the willful failure to attend an employer's IME, we believe it is clear the legislature concluded the appropriate penalty was to deny compensation to the employee, temporary or permanent, during the period the proceedings were suspended. Consequently, Finke was not entitled to the benefits payable during the period of suspension and she forfeited those benefits by her actions.

We also disagree with Finke's assertion there is no forfeiture of medical benefits and forfeiture only applies to temporary benefits. KRS 342.0011(14) reads as follows: "'Compensation'" means all payments made under the provisions of this chapter representing the sum of income benefits and medical and related benefits." KRS 342.205(3) directs that no compensation shall be payable during the time the refusal or obstruction continues. Subsection (3) does not distinguish between income and medical benefits. Rather, it specifically references compensation which includes income benefits, medical benefits and related benefits. Similarly, Section (3) makes no distinction between temporary or permanent income benefits. The language relied upon by Finke in B.L. Radden & Sons, Inc. v. Copley, supra, does not direct that only temporary

benefits are subject to the provisions of KRS 342.205(3). Rather, we believe the Court of Appeals was discussing an available remedy as a result of Copley's failure to submit to an employer's medical examination. Subsection 3 of the statute mandates all compensation shall not be payable during the period of the refusal or obstruction. In the same vein, Stearns Coal & Lumbar Co. v. Roberts, supra, and B.L. Radden & Sons, Inc. v. Copley, supra, uphold the forfeiture of all compensation payable during the period of the refusal or obstruction. As such, the ALJ correctly determined Finke was not entitled to any benefits; temporary or permanent income benefits and medical benefits during the period she refused or obstructed the proceedings. Consequently, we find no error in the ALJ's determination Finke is not entitled to income and medical benefits during the period the proceedings were suspended.

Finally, we find no error in ordering the forfeiture to begin as of the date of Finke's counsel's letter. The refusal to submit to the examination began on August 29, 2012, when Finke's counsel advised Comair she would not comply with the ALJ's previous order directing her to comply with the IME physician's protocol. The order was not entered until a month and a half after Finke's stated refusal. The statute clearly contemplates the proceedings

shall be suspended at the point the employee refuses to submit to or obstructs the examination. In this case, Finke's refusal to submit began on August 29, 2012, and continued for over a month and a half before the ALJ entered the October 16, 2012, order. The statute contemplates the proceedings shall be suspended from the date of the employee's refusal and shall continue until the refusal or obstruction ceases.

Favorable to Finke, the ALJ chose the date Finke's attorney informed the ALJ she would reluctantly attend Dr. Primm's IME without her father present as the date of cessation. The ALJ did not wait to see if Finke attended Dr. Primm's examination approximately two months later. The ALJ took Finke at her word and terminated suspension of the proceedings based on her representation. The ALJ's decision regarding the suspension of the proceedings and the compensation to which Finke is not entitled shall be affirmed.

Accordingly, the October 16, 2012, "Abeyance Order," the November 16, 2012, order ruling on the petition for reconsideration, the July 29, 2013, opinion, order, and award, and the August 27, 2013, order ruling on Finke's petition for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

COUNSEL FOR PETITIONER:

HON CHED JENNINGS
455 S FOURTH ST STE 1450
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON JAMES COMPTON
P O BOX 0095
FLORENCE KY 41022

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
410 WEST CHESTNUT ST
SEVENTH FLOOR
LOUISVILLE KY 40202