OPINION ENTERED: April 24, 2012

CLAIM NO. 200870062

UNITED PARCEL SERVICE, INC. PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

ANTHONY WOODS
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
SUSTAINING MOTION TO DISMISS
AND REMANDING
* * * * * *

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

STIVERS, Member. On April 10, 2012, Anthony Woods ("Woods") filed a motion to dismiss United Parcel Service Inc.'s ("UPS") appeal asserting UPS has appealed from an interlocutory opinion, order, and award. Woods argues the November 18, 2011, "Opinion, Order, and Award of Interlocutory Relief" ("Interlocutory Order") by Hon. R.

Scott Borders, Administrative Law Judge ("ALJ") did not adjudicate all the issues and is clearly designated by the ALJ as interlocutory. Woods states the November 18, 2011, Interlocutory Order placed various "issues in abeyance until such time" as Woods reached maximum medical improvement ("MMI"). Woods asserts the ALJ's opinion did not "terminate the original claim," "decide all matters litigated by the parties," and operate "to determine all of the rights of the parties so as to divest the ALJ of authority." We agree and dismiss UPS' appeal.

Woods filed a claim against UPS alleging a work-related lumbar injury on October 8, 2008. As reflected in the benefit review conference ("BRC") order, the parties agreed the contested issues were as follows: "work-relatedness/causation, notice, unpaid or contested medical expenses, injury as defined by the ACT, credit for short term disability, and TTD." Immediately after the list of contested issues is the following sentence: "Other: Case bifurcated to address the issue of causation of the low back injury, all other issue [sic] preserved for further adjudication." The BRC order states a hearing is to be held on September 20, 2011, and proof is extended for both parties through September 20, 2011. This order, signed by counsel for both parties and the ALJ, is dated September 6,

2011. Accordingly, all proof introduced by the parties is related to these issues.

In the November 18, 2011, Interlocutory Order, after summarizing the lay and medical evidence, the ALJ determined Woods sustained a work-related injury and gave due and timely notice of the injury. The ALJ found Woods is entitled to medical benefits pursuant to KRS 342.020 and temporary total disability ("TTD") benefits. The ALJ then stated as follows:

> In addition, the medical evidence reflects Mr. Woods has not reached a state of maximum medical improvement as a result of his low back injury and subsequent surgery and therefore this claim shall be placed in Abeyance [sic] until such time as Mr. [sic] reaches maximum medical improvement.
>
> All other issues not addressed herein are preserved for further adjudication.

Accordingly, the ALJ ordered as follows:

> This claim shall be and the same is hereby placed in abeyance. Status reports shall be due 45 days from the date of this order and every 45 days thereafter reflecting Mr. Woods' current medical status and when maximum medical improvement has been achieved or is expected to be achieved.
>
> The Plaintiff, Anthony Woods, shall recover from a [sic] Defendant/Employer, United Parcel Service, and/or their [sic] insurance carrier, TTD benefits payable at a rate

> of $320.79 per week commencing August 11, 2010, and continuing through December 7, 2010, recommencing January 15, 2011, and continuing until Mr. Woods reaches maximum medical improvement and an order is entered by the undersigned Administrative Law Judge, or any other Administrative Law Judge to whom this claim may be assigned, relieving the Defendant Employer of the responsibility of paying TTD benefits.
>
> The Plaintiff, Anthony Woods, shall recover from the Defendant Employer, United Parcel Service, for the cure and relief from the effects of his lumbar spine condition, such medical, and surgical supplies and appliances, as may be reasonably required at the time of the injury and thereafter during disability.
>
> All motions for approval of attorney fees shall be filed with the Department of Worker's Claims within thirty days following the final disposition of this Order.
>
> All remaining issues not specifically addressed herein are preserved for further adjudication.

UPS filed a petition for reconsideration requesting the ALJ to reconsider certain evidence and conclude Woods did not meet his burden of proving an injury to his back. In the alternative, UPS requested further findings of fact by the ALJ explaining why the evidence UPS cited was disregarded. In a January 5, 2012, order the ALJ summarily overruled UPS' petition for reconsideration. On

February 3, 2012, UPS filed a Notice of Appeal appealing the November 18, 2011, Interlocutory Order.

In Fulton County Fiscal Court v. Robert E. Hopper, Jr., 2005-CA-000024-WC, rendered December 29, 2005, Designated Not To Be Published, an opinion dealing with procedural facts similar to this, the Court of Appeals affirmed this Board's dismissal of an appeal of an ALJ's decision determining Hopper's injury occurred in the course and scope of his employment and his average weekly wage. The ALJ also ordered the parties had 45 days from the date of the opinion and order to agree on further litigation plans, to settle the case, or to show cause why a final hearing should not be scheduled at the earliest available date. Finding the appeal from that decision was interlocutory, this Board dismissed the appeal. The Court of Appeals affirmed stating:

> 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 that would except the case *sub judice* 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), "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,

[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.

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.

<u>Tube Turns</u> 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 opinion, order, and award 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)

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

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)."

In this instance, the ALJ's November 18, 2011, Interlocutory Order plainly does not address with finality "all" of the outstanding contested issues in Woods' case. The opinion is styled "Opinion, Order, and Award of Interlocutory Relief," (Emphasis added). In the "Introduction" of the opinion, the ALJ states:

> This case was bifurcated by order of the undersigned Administrative Law Judge to address whether or not Mr. Woods [sic] lumbar spine condition is causally related to the October 8, 2008, work-related injury, whether he gave due and timely notice of the lumbar spine injury, and if so whether he is entitled to TTD benefits and medical benefits until he achieves maximum medical treatment.

In the Findings of Facts and Conclusions of Law, the ALJ reaffirmed this is an interlocutory order stating:

> The parties agreed to bifurcate this case to address the issues of whether or not Mr. Woods' low back condition is causally related to his work, and is therefore an injury as defined by the Act, whether due and timely notice was given, entitlement to medical benefits and TTD benefits, with all other issues preserved for further adjudication.

The last sentence in the Findings of Facts and Conclusions of Law reads as follows:

> All other issues not addressed herein are preserved for further adjudication.

Under the heading "Order," the ALJ ordered the claim be "placed in abeyance" and directed status reports to be filed forty-five days from November 18, 2011, and every forty-five days thereafter. Each status report is to provide Woods' current medical status and advise when MMI had been achieved or is expected to be achieved. Significantly, the award of TTD benefits commencing on January 15, 2011, is open-ended and continues until Woods reaches MMI, and an order is entered relieving UPS of its responsibility to pay TTD benefits. The last sentence of the Interlocutory Order directs that all remaining issues not specifically addressed are preserved for further review. In addition, the language required by CR 54.02 is not contained in the ALJ's decision.

Based on the above, no other conclusion can be drawn other than the November 18, 2011, Interlocutory Order is not a final and appealable award but is interlocutory in nature, and no appeal may be taken from that order. Accordingly, UPS' appeal is **DISMISSED** and this claim is

REMANDED to the ALJ for further proceedings in accordance with his November 18, 2011, Interlocutory Order.

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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