Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 7, 2018

CLAIM NO. 201071763

LOWELL HARRIS — PETITIONER

VS. **APPEAL FROM HON. BRENT E. DYE, ADMINISTRATIVE LAW JUDGE**

JAMES RIVER COAL;
HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE; and
ATTORNEY GENERAL OF KENTUCKY — RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. Lowell Harris ("Harris") appeals from the August 23, 2018 Opinion and Order rendered by Hon. Brent E. Dye, Administrative Law Judge ("ALJ"), dismissing the reopening of his claim. The ALJ determined the reopening is barred based upon the four-year limitation contained in KRS 342.125, whether utilizing the current or previous version of that statute. Harris also seeks review of the September 24, 2018 Order denying his petition for reconsideration.

On appeal, Harris argues James River Coal failed to timely appeal from the February 7, 2018 Order rendered by Hon. Douglas W. Gott, Chief Administrative Law Judge ("CALJ"), sustaining his motion to reopen to the extent that a *prima facie* case had been established, and assigning the claim to an ALJ. Harris argues the CALJ correctly determined his motion to reopen was timely filed pursuant to KRS 342.125(3) and Hall v. Hospitality Resources, Inc., 276 S.W.3d 775, 777 (Ky. 2008). It argues the ALJ erroneously determined the July 12, 2016 and November 28, 2016 orders did not extend the four-year limitation on reopenings. Harris argues the change to KRS 342.125(3), effective July 14, 2018, is not applicable. Harris challenges the constitutionality of the newest version of KRS 342.125(3). Because we find the ALJ did not err in dismissing Harris' motion to reopen pursuant to the four-year limitation, we affirm.

Harris filed a Form 101 on August 11, 2011, alleging he injured his head, neck, back and shoulders on November 17, 2010, when he was struck by a large motor while exiting the mines in a mantrip. At the time of the accident, Harris worked as a section foreman for Bledsoe Coal Corporation, now James River Coal.

Hon. Grant S. Roark, Administrative Law Judge ("ALJ Roark"), rendered an Opinion and Order on January 28, 2013. ALJ Roark dismissed Harris' neck and low back claims, but found his head injury compensable. ALJ Roark determined Harris was not permanently and totally disabled. He found Harris was entitled to permanent partial disability benefits based upon a 25% impairment rating increased by the three multiplier contained in KRS 342.730(1)(c)1. ALJ Roark also awarded medical benefits for the work-related November 17, 2010 head injury. In an

Order dated February 25, 2013, ALJ Roark denied Harris' petition for reconsideration. There was no appeal from the opinion, or from the order on reconsideration.

Harris filed a motion to reopen on May 11, 2016, alleging his condition had worsened since the January 28, 2013 opinion to the extent he is now totally disabled. In support of his motion, Harris attached an affidavit, as well as the July 6, 2015 neuropsychological report and the March 29, 2016 Form 107-P prepared by Dr. C. Christopher Allen. Hon. Robert L. Swisher, then Chief Administrative Law Judge ("CALJ Swisher") overruled the motion on July 12, 2016, finding Harris failed to set forth a *prima facie* case for reopening.

Harris filed a second motion to reopen on October 6, 2016, alleging his condition had worsened since the January 28, 2013 opinion to the extent he is now totally disabled. In support of his motion, Harris attached an affidavit, as well as an August 2, 2016 independent neuropsychological report from Dr. Dennis Sprague. In an order rendered November 28, 2016, CALJ Swisher noted that pursuant to KRS 342.125(3), a party may not file a motion to reopen within one year of any previous motion to reopen by the same party. CALJ Swisher overruled Harris' motion to reopen since it was filed sooner than one year after his last motion to reopen.

Harris filed a third motion to reopen, which is subject of this appeal, on January 2, 2018, alleging his condition had worsened since the January 28, 2013 opinion to the extent he is now totally disabled. In support of his motion, Harris filed an affidavit, treatment records spanning 2016 and 2017, and the August 2, 2016 independent neuropsychological evaluation by Dr. Sprague. James River Coal

objected, arguing the motion was barred pursuant to KRS 342.125(3) since it was filed in excess of four years from January 28, 2013, the original award and order granting or denying benefits. Harris countered by arguing the subsequent November 28, 2016 order overruling his second motion to reopen amounted to a denial of benefits. Therefore, the four-year limitation period restarted with this subsequent order granting or denying benefits pursuant to Hall v. Hospitality Resources, Inc., supra.

The CALJ issued an order on February 7, 2018. After reviewing the procedural history, the CALJ noted the question of whether the overruling of a motion for failure to satisfy the first step in the motion to reopen process amounts to a denial of benefits under Hall is one of first impression. The CALJ determined Harris' motion was not barred by the four-year limitation, stating as follows:

> The CALJ has coincidentally just addressed this issue on the Frankfort motion docket in Stack v. Clariant, 2014-44665. In that case, the CALJ applied the one-year limitations rule of KRS 342.125(3) to overrule a claimant's recurrent motion to reopen filed shortly after a prior motion was overruled for failing to make a prima facie case. In doing so, the CALJ noted the plaining[sic] meaning of KRS 342.125(3) that "no party may file a motion to reopen within one year of any previous motion to reopen by the same party." The statue[sic] does not distinguish between a motion that is overruled at the first stage versus one that is decided after proof taking before an ALJ. (The former CALJ, now Commissioner Swisher, issued a similar order in Harris' case, finding that an overrule of a motion at the prima facie stage precluded another motion within a year).
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> Harris' case presents the issue from another angle. The Defendant argues that since neither of Harris' motions were decided on a "full litigation of the merits of the case," his time for reopening expired four years after the 2013 decision, and that the orders from the recent

> motions do not start a new four-year clock. For the same reasons expressed above, the CALJ disagrees. The November 28, 2016 Order was a denial of benefits under Hall, and his motion to reopen is timely filed since it was over a year after that Order and within four years of it.

The CALJ determined Harris had made a *prima facie* case with supporting evidence, and he sustained the motion to reopen to the extent it was assigned to the ALJ. James River Coal filed a petition for reconsideration. The ALJ overruled the petition. He noted the issue is whether a prior order, overruling a procedurally deficit motion to reopen, constitutes an order granting or denying benefits pursuant to KRS 342.125(3). After noting the issue is purely a legal question for which there is no direct legal authority, the ALJ stated he "cannot say the chief ALJ committed a patent error."

James River Coal filed a Form 111 on February 21, 2018, asserting Harris' claim was barred by the four-year limitation pursuant to KRS 342.125(3). James River Coal and Harris filed medical evidence regarding whether his condition has worsened since the original opinion. Harris testified by deposition on March 27, 2018, and at the final hearing held July 23, 2018. We note House Bill 2 became effective on July 14, 2018, nine days prior to the final hearing. The June 22, 2018 benefit review conference order and memorandum reflects the following contested issues: whether Harris sustained a worsening of impairment; whether Harris' motion is barred by the applicable statute of limitations; whether the 1996 version or the version effective July 14, 2018 of KRS 342.125(3) applies; if the new version applies, whether the retroactivity aspect is unconstitutional; and if the old version applies,

and whether prior orders on the failed motion to reopen are considered orders granting or overruling benefits for tolling the statutory period to reopen.

The ALJ rendered a decision on August 23, 2018, dismissing Harris' motion to reopen. The ALJ found the motion to reopen was time barred pursuant to both the 1996 and current version of KRS 342.125(3), stating as follows:

> **A) KRS 342.125(3)'s new, amended (2018) version**
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> KRS 342.125(3)'s new, amended (2018) version, in pertinent part, states "…no claim shall be reopened more than four (4) years following the date of the original award or original order granting or denying benefit…[.]" It defines what constitutes an original award or original order. In pertinent part, KRS 342.125(3)'s new, amended (2018) version states, "[o]rders granting or denying benefits that are entered subsequent to an original final award or order granting or denying benefits shall not be considered to be an original order granting or denying benefits…[.]" House Bill 2's non-codified language establishes KRS 342.125 is retroactively applied.
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> ALJ Roark decided Harris' Form 101 injury claim on January 28, 2013. The January 28, 2013 order, awarding PPD and medical benefits, was this claim's original award/order. Harris filed his most recent reopening motion on January 2, 2018. This was four years, eleven months, and six days, after the original award/order. Accordingly, Harris' reopening is time-barred.
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> Adjudicating a statute's constitutionality is an issue reserved for Justice Courts. An ALJ does not have authority to rule on this issue. Blue Diamond Coal Co. v. Cornett, 189 S.W.2d 963 (Ky. 1945). The Kentucky Workers' Compensation Board also does not have authority to address, or decide, constitutional issues. Commonwealth v. DLX, Inc., 42 S.W.3d 624, 626 (Ky. 2001). If Harris wants redress, concerning KRS 342.125(3)'s new, amended (2018) version's constitutionality, he will have to appeal to the Kentucky Court of Appeals.

B) KRS 342.125(3)'s 1996 version

The ALJ finds even KRS 342.125(3)'s 1996 version, which was the effective law when Harris filed his reopening motion, time bars Harris' reopening. The reason is Harris did not file his reopening within four years following an original award/order granting or denying benefits. The ALJ finds the July 12, 2016 and November 28, 2016 orders, which former Chief ALJ Swisher denied, on procedural grounds, did not grant or deny benefits.

These orders, instead, simply denied Harris the opportunity to argue he was entitled to PTD or enhanced PPD benefits. The orders, in-and-of-themselves, did not deny benefits. Denying a claimant the opportunity to argue he is entitled to benefits is not the same as denying him the benefits. The reason is reopening is a two-step process. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972).

The first step is the reopening motion. The moving party has the burden of providing *prima facie*, or sufficient information, demonstrating there is a substantial possibility it will prevail, if an ALJ permits evidence. AAA Mine Service v. Wooten, 959 S.W.2d 440 (Ky. 1998). An ALJ will only reopen the claim, subjecting the opposing party to litigation expenses, if the moving party makes a *prima facie* showing on all the essential elements. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001).

The second step is allowing proof taking, so the ALJ can adjudicate the presented issues, in a decision, on the merits. *Prima facie* evidence is evidence that "if unrebutted or unexplained is sufficient to maintain the proposition, and warrant the conclusion [in] support [of] which it has been introduced…but it does not shift the general burden…[.]" Prudential Ins. Co. v. Tuggle's Adm'r., 72 S.W.2d 440, 443 (Ky. 1934). Sufficient documentation for reopening purposes is not necessarily sufficient to prevail on the merits. *See* Hodges v. Sager Corp., 182 S.W.3d 497, 501 (Ky. 2005).

Harris' prior reopening motions procedurally failed. He never established *prima facie* evidence he was even

entitled to PTD or enhanced PPD benefits. Therefore, if Harris could not even establish *prima facie* evidence that he was even entitled to PTD or enhanced PPD benefits, then it does not make any sense these orders, which simply indicated Harris had not satisfied his procedural requirements, granted or denied him benefits.

The undersigned ALJ finds an order granting or denying benefits, under KRS 342.125(3)'s 1996 version, is one that is based on the substantive merits. That is - one that has proceeded to the second step. In this case, Harris never reached the second step, because Harris did not present substantive *prima facie* evidence he was entitled to the benefits he sought. Again, the July 12, 2016 and November 28, 2016 orders did not deny the benefits Harris sought. They only denied Harris the opportunity to assert he was entitled to the benefits he sought. This is a significant distinction.

If the undersigned ALJ's interpretation is incorrect, then claimants could file meritless, sham motions to self-manufacture a new statute of limitations. For example, a claimant could file a procedurally defunct motion, which contained absolutely no evidence he was entitled to the sought benefits, have it procedurally dismissed, and then move to reopen one year later, with substantive, *prima facie* evidence, and now argue he is entitled to PTD or enhanced PPD benefits. No one is asserting Harris engaged in this dubious practice.

To prevent this practice from even possibly occurring, it is the undersigned ALJ's opinion KRS 342.125(3)'s 1996 version required that the order granting or denying a benefits was a substantive one. That is - one entered after the claimant had successfully established *prima facie* evidence he was entitled to the benefits sought, and reached the second reopening step.

The undersigned ALJ notes the present case is distinguishable from the one in Jones v. Ken Builders Supply, No. 2011-CA-001246-WC (Ky. App. Feb. 10, 2012)(unpublished). In Jones, the Court of Appeals determined that an order dismissing a motion to reopen, as moot, constituted an order granting or denying workers' compensation benefits. However, the ALJ only dismissed the reopening motion as moot, after the

> Defendant admitted liability, and after it began paying the subject benefits.
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> The Jones claimant would have prevailed on the merits, if the ALJ had not dismissed the reopening motion as moot. This is exactly why the Jones Defendant moved to dismiss the case. The Jones Defendant induced the dismissal (as moot) order. Therefore, equity dictated it could not later argue (and benefit) that the dismissal (as moot) order was not one that granted or denied benefits in a subsequent reopening. This case is completely distinguishable from the one the undersigned ALJ faces. In the final analysis, Harris' claim is time-barred under whichever law is applicable.
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> The ALJ recognizes this is different result than the one Chief ALJ Gott expressed in his February 7, 2018 order, as well as the undersigned ALJ in the March 6, 2018 order, denying JRC's petition for reconsideration. The ALJ notes these were not final orders. An ALJ can change an interlocutory order, if there is new evidence, fraud, or mistake, concerning an issue. Bowerman v. Black Equip. Co., 297 S.W.3d 859, 871 (Ky. App. 2009). As Chief ALJ Gott indicated, this is an issue of first impression. The undersigned, after reviewing the applicable statute and case law, as well as the parties' briefs, is convinced this is the correct result.

Harris filed a petition for reconsideration on September 7, 2018, essentially raising the same arguments he now raises on appeal, and requested the ALJ to reconsider his determination. The ALJ first determined Harris untimely filed his petition fifteen days after the August 23, 2018 opinion, rather than within the permitted fourteen days. Despite his untimeliness, the ALJ made the following additional analysis in denying Harris' petition:

> The Plaintiff asserts the ALJ erred, when he indicated the July 12, 2016 and November 28, 2016 Orders, which procedurally denied the Plaintiff's reopening motions, were not orders granting or denying benefits under KRS 342.125(3)'s prior version (as amended in 1996). The ALJ respectfully disagrees.

First, this is a legal question, which an appellate authority will decide. Secondly, the Plaintiff is simply re-arguing the case's merits. The ALJ maintains the aforementioned Orders only denied the Plaintiff's motions to reopen to argue for increased benefits. They did not, in-and-of-themselves, deny the Plaintiff the benefits he sought. The July 12, 2016 and November 28, 2016 Orders do not state that enhanced PPD benefits or PTD benefits are denied. Instead, they only stated that the Plaintiff's motions to reopen were denied.

Because the Plaintiff's first motion did not present prima fascia[sic] evidence, and his second one was untimely, the Plaintiff did not even get the opportunity to argue for increased benefits. The ALJ maintains that an order denying a Plaintiffs[sic] reopening motion only denies the Plaintiff the opportunity to argue he is entitled to increased benefits. It does not deny the actual benefits. This is a significant distinction which deters unscrupulous practices.

If the ALJ is incorrect, then a loophole exists which allows Plaintiffs to self- manufacturer a new statute of limitations with sham motions. As the ALJ previously explained, a claimant could file a completely procedurally defunct motion for TTD benefits, which contains absolutely no evidence he is entitled to the sought benefits, more than 10 years after an ALJ's original decision, have it dismissed, and then move to reopen one year later, with substantive, prima facie evidence, and now argue he is entitled to PTD benefits. Plaintiffs would flood the DWC with these motions, every four years, to maintain a rolling statute of limitations. This completely destroys judicial integrity.

The Plaintiff asserts the ALJ erred, when he indicated KRS 342.125(3)'s newly amended version (effective 7/14/18) applied to this case. The ALJ respectfully disagrees. Even if the ALJ is wrong, this is a harmless error and moot, because KRS 342.125(3)'s prior version (as amended in 1996) bars the Plaintiff's claim.

House Bill 2's final version, which the Governor signed into law, contains sections 19 and 20. These sections explain which amendments are retroactive. In fact, sections 19 and 20 appear in the page just before the

> Governor's signature. These sections establish the legislature intended that KRS 342.125(3)'s newly amended version (effective 7/14/18) retroactively applied. Although retroactively applying it may fail on other grounds, it is the ALJ's opinion sections 19 and 20 are the law, and the ALJ must follow it.
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> The ALJ acknowledges the Kentucky Court of Appeals recently reached a different result. The Holcim v. Swinford, No. 2018-CA-000414-WC (Ky. App. Sep. 7, 2018)(to be published) case, however, is not yet final. Therefore, it is not the law. An opinion is not enforceable, and only has advisory value, until it is final. *See* Kohler v. Commonwealth of Ky. Transp. Cabinet, 944 S.W.2d 146 (Ky. App. 1997); Kentucky National Ins. Co. v. Shaffer, 155 S.W.3d 738 (Ky. App. 2005); CR76.28(4)(c).
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> The ALJ respectively asserts he properly reviewed, summarized, and understood, the evidence. The ALJ made all the appropriate factual findings, as well as sufficiently explained his reasoning, in reaching the ultimate result. For these reasons, the Plaintiff's petition for reconsideration is denied.

On appeal, Harris argues James River Coal failed to timely appeal from the February 7, 2018 Order rendered by the CALJ sustaining his motion to reopen to the extent that a *prima facie* case had been established, and assigning the claim to an ALJ. Harris argues the CALJ correctly determined his motion to reopen was timely filed pursuant to the 1996 version of KRS 342.125(3) and Hall v. Hospitality Resources, Inc., supra. Harris argues he complied with KRS 342.125(3) since the motion to reopen was filed within four years of the July 12, 2016 Order overruling his first motion to reopen and over one year from the November 29, 2016 order overruling his second motion to reopen. He argues the ALJ erroneously determined the July 12, 2016 and November 28, 2016 orders did not deny the benefits he sought pursuant to KRS 342.125(3). Harris also asserts the ALJ

erroneously interpreted Jones v. Ken Builders Supply, No. 2011-CA-001246-WC (Ky. App. Feb. 10, 2012) (unpublished). Harris additionally argues the 2018 version of KRS 342.125(3) is not applicable since his case was pending prior to its enactment, and denies him of his constitutional right to Due Process and Equal Protection under the law guaranteed by the United States and Kentucky Constitutions. Harris asserts a constitutional challenge based upon the retroactive aspect of the newest version of KRS 342.125(3).

We reject Harris' argument that James River Coal failed to timely appeal from the February 7, 2018 Order rendered by the CALJ since it was not a final and appealable order. 803 KAR 25:010 Sec. 22 (2)(a) provides as follows:

> [w]ithin thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers' Compensation Board.

803 KAR 25:010 Sec. 22 (2)(b) defines a final award, order or decision as follows:

> "[a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2)."

Civil Rule 54.02(1) and (2) states as follows:

> (1) When more than one claim for relief is presented in an action . . . the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the

> claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
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> (2) 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 that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Hence, an order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and, 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. Tube Turns Division vs. Logsdon, 677 S.W.2d 897 (Ky. App. 1984); *cf.* Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228 (1939); *and* Transit Authority of River City vs. Sailing, 774 S.W.2d 468 (Ky. App. 1980); *see also* Ramada Inn vs. Thomas, 892 S.W.2d 593 (Ky. 1995).

The February 7, 2018 order was not final and appealable. The procedure for reopening a workers' compensation claim pursuant to KRS 342.125 is a two-step process. Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 216 (Ky. 2006). The first step is the *prima facie* motion, which requires the moving party to provide sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972). It is only after the moving party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening that the adverse party is put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001).

The February 7, 2018 Order only addressed the first step in the motion to reopen process. The CALJ determined the prior November 28, 2016 order amounted to a denial of benefits pursuant to Hall, and that Harris' motion to reopen was timely filed. The CALJ also found Harris made a *prima facie* case with his supporting evidence attached to the motion to reopen. Therefore, "the claim shall be placed in line for assignment to an [ALJ] for a decision on the merits." It is clear the Order did not serve to finally dispose of all issues; therefore, that order was not final and appealable, as it did not terminate the action or finally decide all outstanding issues. Likewise, it did not determine all the rights of the parties divesting the ALJ once and for all of the authority to decide the merits of the claim. To the contrary, the claim was placed in line to be assigned to an ALJ for a decision on the merits. Therefore, the February 7, 2018 Order was not final and appealable.

The ALJ determined the 1996 version of KRS 342.125(3) precluded Harris from reopening his claim. This version was in effect at the time Harris filed each of his motions to reopen subsequent to the January 2013 opinion, including his most recent motion to reopen which is subject to this appeal. It provided that other than certain exceptions not applicable to Harris, "no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits . . . ."

In Hall v. Hospitality Resources, Inc., supra, the Claimant suffered a work-related low back and cervical spine injury on April 9, 1995. On July 22, 1997, the claim was resolved by settlement. The Claimant continued to receive treatment and underwent an additional cervical procedure in 2000. Due to the surgery, on

January 10, 2001, Hall filed a motion to reinstate temporary total disability ("TTD") benefits, which was sustained by the CALJ on February 14, 2001. The CALJ ordered the Claimant's TTD benefits reinstated beginning December 7, 2001, and continuing until she reached maximum medical improvement. The benefits were subsequently terminated on June 7, 2002. On November 7, 2003, Hall filed a motion to reopen alleging a worsening of condition, over four years from the July 22, 1997 agreement but within four years from the February 14, 2011 order reinstating TTD benefits. Id. at 778. The Court held that where an order is subsequently entered granting or denying benefits, the four-year statute of limitations is calculated from the later date, rather than the earlier. Id. at 777. Therefore, the Court stated as follows:

> The Appellant's motion, therefore, was clearly filed within the four year period of the statute of limitations contained in KRS 342.125(3), as the motion to reopen filed on November 7, 2003, was within four years from the February 14, 2001, order *granting* benefits. ***An order denying a motion to reopen under the prima facie principles of Hodges and Stambaugh, on the other hand, would not constitute an order granting or denying benefits, as a denial of a motion to reopen for failure to make a prima facie showing does not deal with benefits, but rather whether or not there are grounds to reopen and take proof akin to a motion to re-docket.*** *Cf., Hodges,* 182 S.W.3d at 500; *see also Stambaugh,* 488 S.W.2d at 681.
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> Id. at 785. (Emphasis ours)

In Toyota Motor Manufacturing, Kentucky, Inc. v. Prichard, 532 S.W.3d 633, (Ky. 2017), the parties entered into a settlement agreement on November 13, 2007. The Claimant subsequently filed a motion to reopen in April 2009, alleging a worsening of condition. In September 2011, the ALJ determined the Claimant's condition had worsened warranting an increase in permanent partial

disability benefits. On August 12, 2014, the Claimant moved to reopen the 2011 award based upon a worsening of condition. The ALJ ultimately determined the Claimant was permanently and totally disabled. The Court determined that despite the situational differences of both cases, the holding in Hall is applicable. Therefore, the Court found the September 2011 order was a subsequent order granting or denying benefits, and that the Claimant timely filed her motion to reopen within four years of that order. Id. at 634-636.

Upon reviewing KRS 342.125(3), Hall v. Hospitality Resources, Inc., supra, and Toyota Motor Manufacturing, Kentucky, Inc. v. Prichard, supra, we find the ALJ correctly found the July 12, 2016 and the November 28, 2016 orders did not grant or deny benefits, and thus did not restart the four-year time period to file a motion to reopen. As noted above, it is well established that the procedure for reopening a workers' compensation claim pursuant to KRS 342.125 is a two-step process. Colwell v. Dresser Instrument Div., supra. The first step is the *prima facie* motion, requiring the moving party to provide sufficient information to demonstrate a substantial possibility of success in the event evidence is permitted to be taken. Stambaugh v. Cedar Creek Mining, supra. "*Prima facie* evidence" is that which "if unrebutted or unexplained is sufficient to maintain the proposition, and warrant the conclusion [in] support [of] which it has been introduced ... but it does not shift the general burden ...." Prudential Ins. Co. v. Tuggle's Adm'r., 254 Ky. 814, 72 S.W.2d 440, 443 (1934).

The burden during the initial step is on the moving party and requires that party to establish the grounds for which the reopening is sought under either

KRS 342.125(1) or (3). Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952); W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (Ky. 1946). If the moving party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening, only then will the adversary party be put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, supra. It is at this point that step two of the reopening process commences, with additional proof time being set so the merits of the reopening can be fully and finally adjudicated. Campbell v. Universal Mines, 963 S.W.2d 623 (Ky. 1998).

An order denying a motion to reopen based upon the failure to establish a *prima facie* case is not a subsequent order granting or denying benefits on its face. It does not address the merits of the case so as to adjudicate the claim, nor award or grant any benefits. Rather, the motion is procedural and serves to establish whether there are grounds to reopen justifying the expense of further litigation. We find the above language contained in Hall v. Hospitality Resources, supra, directly on point and dispositive of this issue. We likewise find the ALJ did not err in finding Jones v. Ken Builders Supply, supra, distinguishable from this factual scenario.

The ALJ also determined the recent changes in KRS 342.125(3), reflected in House Bill 2, signed by the Governor on March 30, 2018, and effective July 14, 2018 control and preclude Harris' motion to reopen. We do not believe the restrictions set forth in the version of KRS 342.125(3) effective July 14, 2018 are applicable to this claim. This claim was already reopened at the time the statutory changes became effective. Clearly, the statutory changes are applicable to those cases resolved prior to the date of its enactment. However, we do not believe they

are applicable to those cases already reopened and being actively litigated at the time of its enactment. Here, we find the 1996 version applies, and the ALJ's analysis pursuant to the new 2018 changes constitutes harmless error since he correctly found that reopening was barred under the previous version of the statute.

Harris has also challenged the constitutionality of the changes to KRS 342.125. However, as an administrative tribunal, this Board has no jurisdiction to determine the constitutionality of a statute enacted by the Kentucky General Assembly. Blue Diamond Coal Co. v. Cornett, 189 S.W.2d 963 (Ky. 1945). *See also* Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011); Abel Verdon Const. v. Rivera, 348 S.W.3d 749, 752 (Ky. 2011). Because this Board has no authority or jurisdiction to reverse rulings of the Kentucky courts, we can render no determination on this issue, and therefore we are compelled to affirm.

Accordingly, the August 23, 2018 opinion and the September 24, 2018 Order on petition for reconsideration rendered by Hon. Brent Dye, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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