

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-002530-WC

KATHY SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-94773

WAL-MART STORE, INC.;  
WORKERS' COMPENSATION BOARD and  
HON. THOMAS DAVIS, ADMINISTRATIVE  
LAW JUDGE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON,<sup>1</sup> SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: In December 2003, Kathy Smith filed an application for adjustment of claim (Form 101) alleging that on October 4, 2002, she sustained a work-related injury while in the employ of Wal-Mart. On October 15, 2004, an "Opinion, Award and Order" was issued. No award was made for a permanent impairment; Smith was, however, awarded a period of temporary total disability benefits and medical benefits. No appeal was taken. In March 2005, Kathy filed a motion to reopen the claim

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

alleging a change of condition. She appeals the denial of that motion and reconsideration orders rendered by the administrative law judge.

The ALJ who considered Kathy's initial claim denied her permanent disability benefits because there was no evidence submitted that she suffered any permanent impairment. On December 15, 2004, however, she filed a motion pursuant to CR<sup>2</sup> 60.02 and tendered a Form 107 completed by Dr. Greg Rennirt. After Wal-Mart objected to Smith's motion on the basis that CR 60.02 relief is unavailable in a workers' compensation proceeding, the motion was denied on February 3, 2005. Smith did not appeal.

Smith filed a motion to reopen alleging that since the 2004 award, she suffered a change in her physical condition and is now permanently disabled. In support of her motion she tendered the same Form 107 as she did in December 2004. Over Wal-Mart's objection, on April 28, 2005, her motion for reopening was assigned to an ALJ for further adjudication.

On May 6, 2005, Wal-Mart filed a petition for reconsideration and, on June 2, 2005, the ALJ assigned to the claim granted Wal-Mart's petition and denied the motion to reopen.

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<sup>2</sup> Kentucky Rules of Civil Procedure.

Smith filed a petition for reconsideration of the order granting Wal-Mart's petition arguing that the regulations do not allow for a petition for reconsideration on a motion to reopen and further that, because the reopening had been assigned to an ALJ for adjudication, she had presented a prima facie case; she argues, therefore, that the ALJ did not have authority to grant Wal-Mart's petition. Wal-Mart filed a written response arguing that reconsideration of the order was permitted pursuant to KRS 342.281 and that Smith failed to submit evidence of a change of impairment.

Before the ALJ ruled on Smith's petition, she filed a notice of appeal appealing from the orders of April 28, 2005, and June 2, 2005. On June 27, 2005, the ALJ reaffirmed the June order but suggested that a response to Wal-Mart's petition would be considered. Smith again filed a petition for reconsideration, this time of the order of June 27, 2005. That petition was not ruled upon. Considering Smith's pending appeal, the Board denied her request to remand the case to permit the ALJ to consider the pending petition and the case was set for briefing. Smith then filed a second notice of appeal to the Board appealing the orders of April 28, June 2, and June 27.

Following the submission of briefs, the Board affirmed the ALJ. It concluded that the KRS 342.125(1)(d) requires a prima facie showing of a change of impairment and that the Form

107 submitted did not address whether there had been such a change. The Board further found that the ALJ could properly reconsider the order assigning the case to an ALJ. The order, the Board noted, was merely interlocutory and, therefore, subject to reconsideration by the ALJ.

The findings of an ALJ will be reversed only if the evidence is so overwhelming that a different decision is compelled.<sup>3</sup> Our review of the Board is likewise limited and its decision will be upheld unless it has misinterpreted or disregarded controlling law.<sup>4</sup>

A reopening of a workers' compensation claim is governed by KRS 342.125 which, after the 1996 amendments, requires that the movant offer prima facie evidence of one of the grounds listed in KRS 342.125(1).<sup>5</sup> One of those grounds is a "change of disability as shown by objective medical evidence of a worsening or improvement of condition caused by the injury since the date of the award or order."<sup>6</sup> It is a procedural device for invoking the jurisdiction of the Department of Workers' Claims. As recently stated by our Supreme Court, the

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<sup>3</sup> Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984).

<sup>4</sup> Daniel v. Armco Steel Company, L.P., 913 S.W.2d 797, 798 (Ky.App. 1995).

<sup>5</sup> Dingo Coal Co. Inc. v. Tolliver, 129 S.W.3d 367 (Ky. 2004).

<sup>6</sup> KRS 342.125(1)(d).

analysis of a reopening claim requires a comparison of impairment measured at two points in time.<sup>7</sup>

We agree with the Board that Smith failed to submit proof of a change of impairment. Although the Form 107 submitted assigned a three percent impairment rating, this is the same Form 107 submitted in December 2004. And Dr. Rennirt's office notes reflect that as early as June 30, 2004, he was willing to provide an impairment rating but that he received no request for a Form 107 or other impairment rating from Smith's counsel. Thus, the Form 107 merely demonstrates that she had a 3% impairment in 2004 but reveals nothing in regard to the crucial question of whether since that time she has had a change in impairment. Whether due to her own fault or lack of response from Dr. Rinnert, it is clear that this same information was available in 2004 and she is now improperly attempting to submit the Form 107 pursuant to a motion to reopen. The Form 107 is totally insufficient to establish a prima facie case for reopening.

We agree with the Board that the order ruling on the motion to reopen and assigning the claim for further adjudication is an interlocutory order. The order did not determine whether Smith was entitled to an increased award and

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<sup>7</sup> Hodges v. Sager Corp., 182 S.W.3d 497 (Ky. 2005).

did not automatically entitle her to benefits.<sup>8</sup> It was merely a preliminary finding that there was the existence of a substantial possibility of the presence of one or more of the prescribed conditions that warranted a change in the Board's decision.<sup>9</sup>

The ALJ's decision on a petition for reconsideration is "limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision...."<sup>10</sup> The ALJ is without authority to reconsider a case on the merits.<sup>11</sup> However, where a case has been assigned for adjudication, we know of no rule of law or statute which precludes the dismissal of the claim for failure to meet the statutory requirements of proof. The order assigning the case to an ALJ merely opened the case for the presentation of evidence and a decision on the merits. It did not determine the outcome. Once it became apparent that Smith could not prove a change in her impairment rating since the initial award, it was well within the authority of the ALJ to deny the reopening.

The decision of the Workers' Compensation Board is affirmed.

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<sup>8</sup> See Tuttel v. O'Neal Steel, Inc., 884 S.W.2d 661 (Ky. 1994).

<sup>9</sup> Stambaugh v. Cedar Creek Mining Company, 488 S.W.2d 681,682 (Ky. 1972).

<sup>10</sup> KRS 342.281.

<sup>11</sup> Garrett Mining Company v. Nye, 122 S.W.3d 513 (Ky. 2003).

ALL CONCUR.

BRIEF FOR APPELLANT:

Wayne C. Daub  
Louisville, Kentucky

BRIEF FOR APPELLEE:

David L. Murphy  
Clark & Ward, PLLC  
Louisville, Kentucky