

RENDERED: AUGUST 17, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001719-WC

WINGS, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-10-93838

REYNOLDS RODRIGUEZ; HON.  
LAWRENCE F. SMITH, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellant, Wings, Inc., appeals the August 19, 2011, opinion and order of the Workers' Compensation Board, dismissing its appeal of Administrative Law Judge (ALJ) Smith's March 24, 2011, interlocutory opinion,

order, and award awarding medical and temporary total disability (TTD) benefits to Appellee, Reynolds Rodriguez, as well as the May 24, 2011, order overruling the petition for reconsideration. On appeal, Wings argues that the Board's opinion should be reversed because it misconstrued the opinion of this Court in *Tube Turns Division v. Logsdon*, 677 S.W.2d 897 (Ky.App. 1984). Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Below, Rodriguez filed a motion to dismiss the appeal filed by Wings to the Board, asserting that because the opinion of the ALJ was interlocutory in nature, it could not be appealed to the Board. In a document titled Interlocutory Opinion, Order, and Award, the ALJ determined that Rodriguez had given due and timely notice of the alleged injury; had sustained an injury as defined by the Kentucky Workers' Compensation Act; and, due to the effects of the injury, had not yet attained maximum medical improvement. Accordingly, the ALJ granted an interlocutory award of medical and TTD benefits, and stated as follows:

This matter shall be placed in abeyance until Plaintiff has reached maximum medical improvement as determined by her treating physician. Once plaintiff has reached MMI, upon motion of either party, the matter shall be removed from abeyance for the purpose of taking proof relating to plaintiff's functional impairment, if any.

Wings then filed a petition for reconsideration, which was overruled by the ALJ.

Wings then appealed to the Board, and Rodriguez filed a motion to dismiss which the Board granted in its opinion and order of August 19, 2011.

Therein, the Board found that pursuant to the precedent of the Commonwealth following the statutory amendments in 1988, and, particularly, in light of the holdings in *Transit Authority of River City v. Saling*, 774 S.W.2d 468 (Ky.App. 1989),<sup>1</sup> and others, that the order entered by the ALJ *sub judice* was clearly interlocutory and, thus, the appeal was properly dismissed. Upon so holding, the Board remanded this matter for additional proceedings before the ALJ. Wings has appealed the Board's dismissal to this Court.

On appeal, Wings argues that as held in *Tube Turns Division v. Logsdon*, the Board's award of temporary total benefits and medical payments operates as a final order. Wings argues that *sub judice* if this Court does not reverse the order of the Board, then it will be subject to exorbitant medical expenses without any manner in which to recoup same. While acknowledging that this Court is without authority to review an interlocutory award of temporary total disability benefits, Wings argues that because medical benefits are also at stake, this Court has the authority to review and remand this matter to the Board for consideration on the merits.

In response, Rodriguez argues that Wings has not established any errors of law, and that, accordingly, the opinion and order of the Board should be affirmed pursuant to *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). Rodriguez argues that the Board correctly held that appellate authority is limited to review of a final award, order or decision, pursuant to 803 Kentucky

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<sup>1</sup> See discussion of same herein, *infra*.

Administrative Regulations (KAR) 25:010 Section 21(2)(b), and Kentucky Rules of Civil Procedure (CR) 54.02(1) and (2). Thus, he argues that the order of an ALJ is appealable only if it: (a) terminates the action; (b) acts to decide all matters litigated by the parties; or (c) operates to determine all the rights of the parties so as to divest the ALJ of authority. See *KI USA Corp. v. Hall*, 3 S.W.3d 355 (Ky. 1999); *Ramada Inn v. Thomas*, 892 S.W.2d 593 (Ky. 1995); and *Transit Authority of River City v. Saling*, 774 S.W.2d 468. Rodriguez argues that in this case, the ALJ's opinion did not terminate Rodriguez's original claim, did not decide all matters litigated by the parties, and did not determine all of the rights of the parties so as to divest the assigned ALJ of authority. Thus, Rodriguez argues that the Board properly dismissed the appeal of Wings.

Concerning the arguments made by Wings with respect to the holding in *Tube Turns Division v. Logsdon*, Rodriguez argues that Wings erroneously relies upon same. Rodriguez asserts that the workers' compensation statute changed in 1987 because the legislature did not want appeals to be permitted from awards of interlocutory benefits. To that end, Rodriguez directs the attention of this Court to our holding in *Transit Authority of River City v. Saling*, in which we specifically overruled *Logsdon*. Rodriguez also notes the later holding of our Kentucky Supreme Court in *Ramada Inn v. Norma Janece Thomas, Rolbert L. Whitaker, Acting Director of Special Fund, et. al.*, 892 S.W.2d 593 (Ky. 1995), wherein the Court held that appeals are not to be permitted from orders and/or awards of interlocutory benefits.

In addressing the arguments of the parties, we note that pursuant to *Western Baptist Hosp. v. Kelly*, Ky., 827 S.W.2d 685, 687–88 (1992), the function of the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Further, we note that while our review of the Board's statutory interpretations is less deferential than our review of its factual determinations,<sup>2</sup> an administrative agency's construction of its statutory mandate, particularly its construction of its own regulations, is nevertheless entitled to respect and is not to be overturned on appeal unless clearly erroneous. *J.B. Blanton Company, Inc. v. Lowe*, Ky., 415 S.W.2d 376 (1967). We review this matter with these standards in mind.

In reviewing the arguments of the parties, we turn to 803 KAR 25:010§12(4)(a)2, which provides that the purpose of an interlocutory award is to provide immediate relief to the injured worker who would otherwise “suffer irreparable injury, loss or damage pending a *final* decision on the application.” (Emphasis added). Further, we note that what constitutes a “final judgment” in a workers’ compensation matter is also governed by CR 54.02.<sup>3</sup> As this Court has

<sup>2</sup> *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116 (Ky. 1991).

<sup>3</sup> CR 54.02 provides that:

(1) 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 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

previously held, a party cannot appeal from an interlocutory award. *Transit Authority of River City v. Saling*, 774 S.W.2d 468. This was reaffirmed by the holding of our Kentucky Supreme Court in *KI USA Corp. v. Hall*, 3 S.W.3d 355 (Ky. 1999), wherein the Court found that interlocutory temporary total disability awards are not final and appealable.

In its appeal to this Court, Wings argues that the award at issue was not of the “interlocutory” nature as contemplated by the aforementioned cases and rules because it included both TTD and medical benefits. It directs our attention to the holding of *Tube Turns Division v. Logsdon*, which it asserts holds that an award of temporary total benefits and medical payments operates as a final order. Having reviewed *Tube Turns*, we agree that this was the case, noting that our Supreme Court held that:

A final order has been defined as one that “either terminates the action itself, 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.” *North American Refractories v. Day*, 284 Ky. 458, 145 S.W.2d 75 (1940). This definition has been applied to Workers'

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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.

(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.

(3) For the purposes of this rule demands in an action for both injunctive relief and damages may be treated as separate claims.

Compensation cases, *cf. Searcy v. Three Point Coal Co.*, 280 Ky. 683, 134 S.W.2d 228 (1939); *Green River Fuel Co. v. Sutton*, 260 Ky. 288, 84 S.W.2d 79 (1935).

We believe the Board's award to be appealable under this standard. 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. The claimant can still be protected during the pendency of the appeal by the operation of KRS [Kentucky Revised Statutes] 342.300. We also believe KRS 342.285 contemplates judicial review of such an award as presented here.

*Tube Turns* at 897-98.

Had this case arisen prior to the statutory amendments made by our legislature in 1987, we certainly would have agreed with Wings that *Tube Turns* would have clearly indicated the order at issue *sub judice* to be final and appealable. However, in 1987 the legislature intentionally made amendments which we believe overrule the holding in *Tube Turns*, as essentially stated by our Supreme Court in *Transit Authority of River City v. Saling*:

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, or damage pending a *final decision* on the application.” (emphasis added).

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 *finally adjudicating a case*, a party aggrieved by the opinion, order or decision may appeal the opinion, order or decision to the Workers' Compensation Board.

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.

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*.



*Saling* at 468-69. The Kentucky Supreme Court reached the same result in *Ramada Inn v. Thomas*, 892 S.W.2d 593 (Ky. 1995).

*Sub judice*, we believe, particularly in light of the precedent established following the statutory amendments and revisions in 1988, that the order of the ALJ was interlocutory. Ultimately, it did not serve to finally adjudicate the rights of any of the parties, did not terminate the action, and did not decide all matters litigated by the parties. Indeed, the order indicated as much in both its title and its language. Wings has failed to cite any statutory changes or controlling case law authority which permits any present appellate review of the interlocutory opinion and award of benefits made by an ALJ, or which challenges the clear holding of *Saling, et. al.* Accordingly, we affirm the Board's opinion and order of dismissal remanding this claim back to the ALJ.

Wherefore, for the foregoing reasons, we hereby affirm the August 19, 2011, opinion and order of the Kentucky Workers' Compensation Board, dismissing the appeal of Wings, Inc., and remanding this matter back to the ALJ for additional proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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