SUPREME COURT OF KENTUCKY
2007-SC-000688

ST. JOSEPH HOSPITAL — APPELLANT

v.

BRIEF ON BEHALF OF THE APPELLANT, ST. JOSEPH HOSPITAL

PAMELA LITTLETON-GOODAN;
HON. R. SCOTT BORDERS, ALJ;
and WORKERS' COMPENSATION BOARD — APPELLEES

*** *** *** *** *** ***

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was sent via U.S. Mail, first class postage pre-paid, to the following on this the 26th day of November, 2007:

Hon. McKinnley Morgan
921 South Main Street
London, Kentucky 40741

Hon. William Emrick, Executive Director
Office of Workers' Claims
657 Chamberlin Avenue
Frankfort, Kentucky 40601

Hon. R. Scott Borders
Administrative Law Judge
8120 Dream Street
Florence, Kentucky 41042

And the original and nine copies hand-delivered to:

Hon. Susan Stokley-Clary, Clerk
Kentucky Supreme Court
209 Capitol Building
700 Capital Avenue
Frankfort, Kentucky 40601-3488

Roberta K. Kean for
Hon. Ronald J. Pohl

INTRODUCTION

This is an appeal from the decision of the Court of Appeals of Kentucky and the Workers' Compensation Board affirming the reliance by an Administrative Law Judge with the Office of Workers' Claims on a medical report attached to the claimant's original Application for Benefits that was never designated by the parties to be considered as evidence in the claim on reopening as solely persuasive evidence in resolution of the issues raised.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant does not request any Oral Argument in this case and does not believe that such an argument would be helpful to the Court in considering the issues presented.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

From a procedural standpoint, the claimant/Appellee in this case initiated a workers' compensation claim in 1996 against St. Joseph Hospital seeking benefits for alleged bilateral carpal tunnel syndrome, rotator cuff impingement, and bilateral thoracic outlet syndrome, all of which, according to the claimant, arose out of her employment with St. Joseph as a phlebotomist. After the initial claim was filed, the parties entered into a Settlement Agreement indicating an injury date of May 19, 2001 with an alleged disability date of May 15, 1996 due to the cumulative nature of the alleged condition. In the Settlement Agreement the parties specifically included the following language:

> This is a disputed claim in which the employer and Special Fund have denied that Plaintiff sustained a work-related injury. However, the parties have agreed to a compromise settlement of this claim, in exchange for which the employer will pay a lump sum equivalent to 5% disability, or $4,019.35, and the Special Fund will contribute a lump sum of $1,000.00. This is not a medical buyout and plaintiff does not waive her right to future medical expenses from the Def./Employer.

This Settlement Agreement was approved by an Administrative Law Judge on or about April 14, 1997. After approval of the settlement, St. Joseph continued to pay medical expenses pursuant to the Kentucky Worker's Compensation Act. On or about April 11, 2005, however, the employer/Appellant, St. Joseph Hospital, filed a Motion to Reopen to Resolve a Medical Fee Dispute in this case. Specifically, this Appellant challenged its liability for ongoing medical care, noting that a recent review of this claim had revealed that the claimant's continued care and treatment did not relate to any work-related injury or to her employment as a phlebotomist for the employer.

In support of it Motion to Reopen to Resolve Medical Fee Dispute, the Appellant submitted a report from Dr. Daniel Primm in which he opined that plaintiff's continued need for medication did not arise out of her work activity. He diagnosed a "probable psychosomatic illness." Dr. Primm specifically stated, "I cannot find any explanation of her multiple symptoms and diagnoses in relation to her work as a phlebotomist. I have observed, as well as performed, the work of a phlebotomist, and in my opinion it does not fall under the category of a repetitive harmful type of physical work with the upper extremities." Dr. Primm went on to state that he could not explain Ms. Goodan's continued subjective complaints in light of her normal objective findings, and did not see the need for ongoing medical care as a result of any work-related injury or condition. Yet, as was argued by the Appellant, it was being called upon to pay for approximately $500.00 per month in medication treatment.

On or about April 14, 2005, Hon. Zaring P. Robertson of the law firm of Morgan, Madden, Brashear & Collins, filed an Entry of Appearance on behalf of the Appellee in this matter, and requested "at least 45 days to obtain reports and evidence from the Plaintiff's treating physician regarding the herein medical fee dispute."

The Motion to Reopen was sustained by Order of the Chief Administrative Law Judge (CALJ) on June 10, 2005. In that Order the CALJ stated that the case would be assigned to an Administrative Law Judge for further adjudication. The CALJ also ordered that the medical providers, Carrington Drug, Inc. and Dr. E. Atasoy/Kleinert, Kutz & Associates be joined as parties to this claim on reopening.

A Scheduling Order was issued by the Office of Workers' Claims on July 8, 2005 assigning this claim to Hon. Scott Borders. Proof time was set. On or about July 19,

2005 the employer/Appellant filed a Notice of Claim Denial and also filed a Notice of Designation of the report of Dr. Daniel Primm, as attached to the defendant/employer's Memorandum supporting the Motion to Reopen, to be considered as evidence in this case.

The time for the introduction of evidence continued. The Appellant obtained the deposition of the claimant, Pamela Littleton-Goodan on August 29, 2005, and obtained the deposition testimony of Dr. Daniel Primm on October 17, 2005. The Appellant also filed a report of Dr. Ronald Burgess on or about January 11, 2006. A report from Dr. Bart Goldman was also filed by the Appellant.

This Appellant filed its Statement of Proposed Stipulations and Notice of Contested Issues on or about October 18, 2005. It specifically listed the issues of whether plaintiff's medical care and treatment is reasonable and necessary and whether the plaintiff's medical care is related to the work injury.

A Benefit Review Conference was held in this claim on November 2, 2005 with the claim being placed in abeyance at that time by agreement of the parties pending settlement discussions. When the claim was not resolved, another Benefit Review Conference was held on March 24, 2006. At that time the parties agreed that the issues to be determined by the Administrative Law Judge included "reasonableness/necessity and/or work relatedness of continued medical treatment and outstanding medical charges."

The claim ultimately proceeded to a Hearing on August 2, 2006. At that time a Hearing Order was signed by the parties. The Hearing Order noted that the plaintiff was to file the records of Drs. Atasoy and Briedenbach to be considered as evidence. It was

further noted that the defendant had filed the plaintiff's deposition, the records of Dr. Burgess, the report and deposition of Dr. Primm and the report of Dr. Goldman. There was no reference to any Form 107 of Dr. Atasoy at any time and the copy of the submission of Dr. Atasoy's records by the Appellee on or about September 14, 2006, after the case had been submitted, did not contain said Form 107.

The claim was submitted for decision to the Administrative Law Judge on September 2, 2006 after the filing of written arguments in the form of Briefs to the ALJ. A review of the Brief submitted by the Appellee contains no reference to the Form 107 of Dr. Atasoy. Indeed the summary of the evidence and the argument presented by the Appellee contain no reference to the issue of work-relatedness of the ongoing treatment; addressing in large part the issue of reasonableness and necessity of the ongoing medical care being provided by Dr. Atasoy some fifteen (15) years after the alleged work injury.

Administrative Law Judge Borders issued his Opinion and Award on October 2, 2006. In that Opinion he stated that the claimant had established a causal connection between her complaints and work as a phlebotomist at St. Joseph Hospital, citing a Form-107 issued by Dr. Erdogan Atasoy and a report from Dr. Warren Briedenbach as the basis for his finding regarding causation.

In the Opinion, the ALJ noted that Ms. Littleton-Goodan had submitted medical proof of Dr. Atasoy "who in his Form 107 opined that Plaintiff's condition is causally related to her work." (Opinion, 10). The ALJ later noted in his Opinion that "it is further clear from reviewing Dr. Atasoy's records and the underlying record in the original claim

that the Plaintiff clearly suffered from bilateral carpal tunnel syndrome and thoracic outlet compression." (Opinion, 12)

The Appellant, believing that the ALJ had mistakenly assumed the Form-107 had been filed or designated, filed a Petition for Reconsideration on the issue. The Appellant made clear that the evidence upon which the ALJ relied and cited had not been designated or resubmitted or even mentioned upon reopening. The Appellee filed a Response to the Petition stating that the Appellant was "only seeking to reargue the merits of the claim, rather than pointing out patent errors of fact." ALJ Borders summarily overruled the Petition without explanation. St. Joseph then proceeded with an appeal to the Workers' Compensation Board.

In the appeal to the Board, the Appellant argued that the ALJ had committed reversible error by relying upon evidence that was outside of the record (the Form 107 of Dr. Atasoy) and by mistakenly characterizing Dr. Briedenbach's report as supportive testimony of causation. The Board agreed with this Appellant that Dr. Briedenbach's report did not express a supportive opinion as to work-relatedness. Therefore, on this issue, which had been raised in the Petition for Reconsideration as well, the case was remanded to the ALJ for additional findings based upon an accurate understanding of Dr. Briedenbach's opinion.

As to the first issue, however, the Board found that ALJ Borders did not err in relying upon Dr. Atasoy's report. In support of this determination the Board stated as follows:

> At the time of the reopening, there was no longer a paper file; however, all pleadings and filings were preserved by electronic imaging. **As a practical matter,** once a motion to

> reopen is filed, the "Case Files" section of the Office of Workers' Claims **must reconstruct a paper file for the ALJ** if the original claim file no longer exists. This reconstructed file consists of: 1) the Form 101 and attachments; 2) any settlement agreement or opinion rendered by the ALJ; 3) an attorney's fee order, if any; 4) any orders on petition for reconsideration; 5) orders directing that additional parties either be added or dismissed; 6) amended claims, and 7) final order of the Board, Kentucky Court of Appeals, or Kentucky Supreme Court.

See Board Opinion, p. 7 (Emphasis added).

The Board then went on to note that since the Form 107 of Dr. Atasoy was attached to the Form 101, it was included in the **reconstructed file** and the Appellee was not required to designate that medical report in order for the ALJ to properly consider it in the context of **comparing** the evidence in the original claim to the evidence on reopening. See Board Opinion, p.7 (Emphasis added). The Board then concluded that "since Dr. Atasoy's opinion was available to the ALJ and, because it was probative of the issue of causation and part of the record, there was no error in considering the Form 107. This is true even though Littleton-Goodan may have never intended to rely on that particular piece of evidence."

The Court of Appeals affirmed the decision of the Workers' Compensation Board noting that the Board had properly interpreted its regulations as placing the duty upon the moving party in a reopening case to designate all relevant evidence from the original proceedings into the reopening record. The Court of Appeals also noted that the Regulation relied upon by the Board further provided that "except for good cause shown at the time of the filing of the designation of evidence, a party shall not designate the entire record from the claim for which reopening is sought." The Court of Appeals

concluded that the "regulations plainly contemplate that the movant in a reopening case will sift through the record and, in good faith, designate those portions relevant to the issues raised upon rehearing. If causation is an issue, and a particular item of evidence in the original record relates to causation, including a Form 107 introduced into the original record by the nonmoving party, the duty is upon the movant to detect the evidence and designate it into the rehearing record. St. Joseph appears to suggest that it was entitled to pick and choose the evidence it wished placed into the reopening record, and then shift the burden to Littleton-Goodan to do her independent review and designate the evidence she wanted placed before the ALJ. We believe that interpretation is contrary to the plain language, and intent, of the regulations." (Court of Appeals' Opinion, 8). This appeal follows.

To the extent that the Court would like a review of the underlying evidence in the claim on reopening before the Administrative Law Judge, this summary is provided. Pamela Littleton Goodan, the claimant in this case, is 54 years old with a GED and vocational training as a medical assistant, EKG technician, and phlebotomist. (Goodan, 5-7). She testified that she began working for St Joseph Hospital in 1986 as a phlebotomist, although from time to time she would perform other jobs, particularly during her initial period of employment. (Goodan, 8). Prior to that time she had worked as a supervisor in a department store (approximately 4 years); for the Sheriff's Department in Montgomery County during one tax season (approximately 6 months); and as the co-owner and manager of a gift and card shop (approximately 5 years). She has not worked anywhere since leaving St. Joseph Hospital in 1996, and currently

receives social security disability benefits in the amount of $510.00 per month. (Goodan, 16).

When the claimant was deposed on August 29, 2005 as part of the reopened claim she was asked to describe her job at St. Joseph during the tenure of her employment there. She stated that she would come to a patient, roll up the sleeve, put on a tourniquet and find a vein. She would wipe a needle with alcohol, let it air dry, "stick" the patient, draw the blood, make sure the patient quit bleeding and apply a Band-Aid. (Goodan, 13). She further testified that she generally worked third shift and would "sometimes" see as many as 75 to 80 patients per day. She later clarified, however, that this was the number of patients she would see when she worked day shift, and she worked this shift from 1986 to around 1989. She stated that day shift was always worse. (Goodan, 39). Other times, she would see 30 patients. Allegedly she could see as many as thirty different patients in the course of an hour. (Goodan, 14). Of course, this would mean that she was completing her tasks with each patient in two minutes or less. She last worked in 1996, stating that she quit when she remarried. (Goodan, 15). She later testified, however, that she last worked in 1996 when she was fired. (Goodan, 39).

The claimant has numerous health conditions unrelated to her employment for which she seeks regular treatment. She has heart problems, having undergone quadruple bypass surgery, and had, according to her testimony, stents placed in her kidneys. She also has high blood pressure and a thyroid condition. It appears that she has blockage of the carotid arteries as well. (Atasoy records).

According to the claimant her "symptoms" began in approximately 1991. This would have been when she was on third shift. She testified that she began to experience numbness in the base of her palm, pain in her arms, and pain in her right shoulder. She also felt as if her right arm and hand were "going to sleep". (Goodan, 19). She alleges that her arms hurt her every morning when she got up and they were swollen. (Goodan, 19). Yet she did not seek any medical treatment until approximately 1992. She was ultimately referred to Dr. Charles Combs and had a surgery on her right shoulder and then surgery on her right hand and her left hand. These surgical interventions resulted in no improvement at all. In fact, according to the claimant, they made her worse. (Goodan, 21). In 1995 she switched her care over to Dr. Atasoy. (Goodan, 23).

In terms of her treatment at the time of her deposition, the claimant was still seeing Dr. E. Atasoy for medications. She was taking, according to her testimony at the time of her deposition, Soma, Zanaflex, Nexium, Darvocet, Skelaxin, Synthroid, Lispril, Aspirin, Plavix, Lasix, potassium pills, and Zocor. Many of these are prescribed for her other health conditions. Additionally, she testified that she has a lidoderm patch and utilizes a "thoratic cane," which she uses to rub her back. (Goodan, 25). These medications help her to sleep and to make it through her daily activities. (Goodan, 24).

Dr. Daniel Primm examined the plaintiff on January 7, 2005. He noted that although the claimant had not worked since 1996 she reported no improvement in her condition. He also conducted a physical examination of the claimant's upper extremities and found no objective abnormality. Specifically Roos and Adson's maneuver were negative. (Primm, 8). There was no evidence of any type of impingement.

Following his examination of the claimant Dr. Primm noted "somatic" complaints. He stated that in his opinion this claimant "may be manifesting some underlying probable unconscious psychological distress or psychological trauma expressing that through somatic complaints, through physical illness complaints." (Primm, 11). He further testified that he could find no evidence of any upper extremity entrapments, be it carpal tunnel syndrome, thoracic outlet compression syndrome, cubital tunnel syndrome or de Quervain's syndrome. (Primm, 11). There was no atrophy of the small muscles of either hand. There was no atrophy in either arm. According to Dr. Primm if a patient had truly been "this disabled from any of these various upper extremity problems for ten or more years" you would expect to see such abnormalities and they were not present here. (Primm, 12).

As for the ongoing medical care, Dr. Primm opined that such treatment was neither reasonable nor necessary and in actuality was detrimental to the patient. (Primm, 12). Dr. Primm went on to testify that if an individual has a truly "organic based illness" you would expect to see improvement, especially with cessation of the activity alleged to have aggravated the symptoms. (Primm, 13). Additionally, Dr. Primm expressed the well known fact that if a patient truly has carpal tunnel syndrome, for example, and surgery is performed, 95% of those patients report either complete resolution of their symptoms or at least some improvement. (Primm, 14).

In terms of causation, Dr. Primm first acknowledged that he was very familiar with the job duties of a phlebotomist. In fact, he performed this very job as a medical student during his third and fourth year of medical school. (Primm, 15). He stated that the claimant's work as a phlebotomist did not cause or contribute to cause the current

symptom complex. According to Dr. Primm, he knew of "no even anecdotal report" that has ever indicated that phlebotomy-type work would be something that would cause or even provoke any type of an impingement syndrome. (Primm, 16). Dr. Primm further stated that there was no way the job could be done repetitively at a fast pace "just by the nature of the job, the task". Dr. Primm went on to say that he "was really surprised to hear this person feels that her work as a phlebotomist caused all of these symptoms." (Primm, 16).

Dr. Ronald Burgess evaluated the claimant on December 29, 2005. At the time of his examination the claimant complained of "constant pain in her upper extremities with pain and numbness to both hands." She confirmed to Dr. Burgess that she has not worked since 1996.

After performing a physical examination, Dr. Burgess concluded that the patient falls into "a chronic pain profile". He did not believe that any ongoing treatment was indicated.

The report of Dr. Bart Goldman was filed as evidence. Dr. Goldman conducted a records review on April 21, 2001. He noted that the claimant has been given a diagnosis of thoracic outlet compression syndrome. He further noted that it had been reported to him that the claimant had an acromioplasty (right shoulder) by Dr. Charles Combs on October 2, 1991 and had a right carpal tunnel release, Guyon's canal release, flexor tendon synovectomy and internal neurolysis by Dr. Combs on June 12, 1992. Dr. Combs performed a left carpal tunnel release on July 2, 1993.

Interestingly, Dr. Goldman stated that he had no history of any traumatic injury, but "as I understand the job of phlebotomy, I see no way to relate her current complaint,

including her bilateral carpal tunnel and her right shoulder problems to the phlebotomist's job."

Dr. Goldman went on to note that at the time of his review, the claimant was taking Skelaxin, Soma and Zanaflex. All three of these medications are muscle relaxants and there would be no reason for her to take three separate muscle relaxants at the same time. He further stated that at this time it is apparent that the claimant is now in a "pain management situation". He noted that the only reason she needed to see a physician at all was to make sure that she was not having any side effects from the medication that was being prescribed. He also recommended that unless the cause of her pain had been verified by objective medical testing, she should be given a "drug holiday" to see if her pain is changed at all by her medications. If not, then her medications are not necessary.

Dr. Warren Briedenbach saw the claimant on January 13, 2006. She was complaining of "bilateral minimal sensation in her hands, bilateral neck, chest and shoulder muscle pains and headaches." Dr. Briedenbach noted that the claimant had been treated by Dr. Erdogan Atasoy for several years and has had a scalene muscle injection in 1995 as well as multiple trigger point injections. The claimant reported to Dr. Briedenbach that "she feels" that her symptoms are secondary to repetitive motions that she performed during her previous job as a phlebotomist. She further reported that her symptoms were exacerbated by activities of daily living such as driving, cooking and cleaning.

Dr. Briedenbach recorded a history of an acromioplasty in October of 1991, right carpal tunnel release, Guyon's canal release, flexor tendon synovectomy, and internal neurolysis in June of 1992 and a left carpal tunnel release in July of 1993.

On physical examination Dr. Briedenbach noted that her hands were warm bilaterally and appeared well perfused with good capillary refill. There was no evidence of any atrophy in the hand. The claimant did have some complaints of tenderness over her bilateral thumb carpal metacarpal joints with a positive grind test on the right. He believed that compression signs were positive at the carpal tunnel, pronator tunnel, and infraclavicular and supraclavicular areas bilaterally. Dr. Briedenbach offered an assessment of thoracic outlet compression and noted that the patient "may benefit from scalenectomy for first rib resection, however due to her multiple comorbidities I would advise caution with surgery."

Finally, we have the treatment records of Dr. E. Atasoy. These records indicate that the claimant was first seen at that facility on June 9, 1994 and reported a "spontaneous onset" of numbness in both hands with pain. The claimant was still working at that time. Dr. Atasoy recommended thoracic outlet compression exercises and posture instructions. He prescribed Soma and Talacen. He further noted that she could work but should avoid overhead work (defined as keeping her hand below heart level) and should work at her own pace. The only statement regarding causation was that "she was attributing her symptoms to the repetitive work activities that she performs at work." At that time Dr. Atasoy offered an initial diagnosis of thoracic outlet compression.

Dr. Atasoy has continued to see the claimant on a regular and routine basis since June 9, 1994. He initially saw her every six to eight weeks. In 1997 he started seeing her every three months. In 1999 he began to see her every six months. That level of treatment has arguably continued to this time. He has continued with a diagnosis of bilateral thoracic outlet compression. When he saw the claimant on December 8, 1994 his office added the diagnosis of bilateral myofascitis. On that visit she reported that she was feeling about the same, or maybe a little worse. No other explanation for the additional diagnosis is recorded. On the March 21, 1996 office visit Dr. Atasoy's office added a diagnosis of right rotator cuff tendinitis. Again, no explanation was given for the additional diagnosis.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN FAILING TO REVERSE THE DECISION OF THE WORKERS' COMPENSATION BOARD WHICH HAD DETERMINED THAT THE ALJ DID NOT ACT IN EXCESS OF HIS POWERS IN BASING HIS DECISION UPON EVIDENCE THAT WAS NOT DESIGNATED AND/OR IDENTIFIED AS PART OF THE RECORD ON REOPENING THEREBY DEPRIVING THE APPELLANT OF ANY OPPORTUNITY TO RESPOND TO SAID EVIDENCE.

This appeal involves a narrow question of both substance and procedure, namely, whether an Administrative Law Judge, in a reopening of a workers' compensation claim to resolve a medical fee dispute regarding payment of ongoing medical expenses, may rely upon evidence that was filed in the original claim, purged in terms of a paper file and then reconstructed for the Administrative Law Judge when the reopening was filed, but

was not designated as evidence or resubmitted upon reopening; or even identified as being part of the record by any party to the reopening.

As noted above, the claimant, Pamela Littleton-Goodan, alleged in 1996 that she had suffered a cumulative trauma injury during the course and scope of her employment as a phlebotomist with St. Joseph Hospital. The alleged date of injury was May 19, 1991. While the claim was filed by the claimant, it was settled before any judicial determinations were made by an Administrative Law Judge. In the settlement, the parties noted that this was still a disputed claim and that the employer and the Special Fund both continued to deny that the claimant sustained a work-related injury. The settlement was approved by an Administrative Law Judge on or about April 14, 1997. As there was no judicial determination of any issue, and as provided for by the Reopening statute, specifically KRS 342.125 (7), "no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party. The parties may raise any issue upon reopening and review of this type of award which could have been considered upon an original application for benefits."

When the claim was filed originally in 1996, Ms. Littleton-Goodan apparently attached Dr. Erdagon Atasoy's Form-107 to her Form-101. The Appellant acknowledges that under the current version of 803 KAR 25:010 Section 8 (4) all medical reports filed as attachments to a Form 101 are admitted into evidence without order, unless an objection is filed or the reports are not in the proper form. Therefore, the Appellant does not dispute that the Board and the Court of Appeals correctly noted that the Form-107 in question

was properly entered into evidence as part of the Appellee's original claim. (Board Opinion, 6).

The subject of this appeal, however, is the fact that neither party designated or re-filed the Form 107 of Dr. Atasoy as evidence to be considered in this reopening. The Board and the Court of Appeals both state that the governing regulation places the burden of designating evidence from the original record on the **moving party;** in this case, St. Joseph Hospital. The Court of Appeals states that the interpretation of the applicable regulation urged by this Appellant is "contrary to the plain language, and intent, of the regulations." (Court of Appeals Opinion, 8).

With all due respect to the Workers' Compensation Board and the Court of Appeals, this Appellant would urge this Court to review the "plain language" of the regulation relied upon by the Court of Appeals. 803 KAR 25:010 Section 4 (6) (a) 6, provides that a motion to reopen shall be accompanied by a "designation of evidence from the original record specifically identifying the relevant items of proof which are to be considered as part of the record during reopening." The regulations further provide, however, that "[a] designation of evidence made by **a** party shall list only those items of evidence from the original record that are relevant to the matters raised on reopening." 803 KAR 25:010 Section 4 (6) (b) 1. (Emphasis added). Finally the regulation specifically provides that "[t]he burden of completeness of the record shall rest with the **parties** to include so much of the original record, up to and including the award or order on reopening, as is necessary to permit the administrative law judge **to compare** the relevant evidence that existed in the original record with all subsequent evidence submitted by the parties." 803 KAR 25:010 Section 4 (6) (b) 2. (Emphasis added).

This Appellant respectfully submits that the regulation at no point states that it is the sole duty of the reopening party to review, analyze and designate what evidence is relevant from the original action and what evidence is to be designated for consideration by the ALJ on reopening as "argued" by the Court of Appeals. In fact, it is respectfully submitted that the regulation places an equal burden on the non-moving party to designate "those items of evidence from the original record that are relevant to the matters raised on reopening." Otherwise, 803 KAR 25:010 Section 4 (6) (b) 1 would contain language that a designation of evidence made by the **moving party** shall list only those items of evidence from the original record that are relevant; not language that "a designation of evidence made by **a** party shall list only those items of evidence from the original record that are relevant. (Emphasis added). Additionally, if the interpretation of this regulation by the Appellant is "contrary to the plain language, and intent, of this regulation as determined by the Court of Appeals, why does the regulation further contain the language that "[t]he burden of completeness of the record shall rest with the **parties** to include so much of the original record.....as is necessary"? (Emphasis added). Furthermore, the regulation provides that if the moving party does not designate evidence from the original claim, the non-moving party has the obligation to file a response designating any evidence from the original claim it intends the ALJ to consider. Under 803 KAR 25:010 Section 4 (6)(c) 3, "[a] response (to a motion to reopen) may contain a designation of evidence specifically identifying evidence from the original record not already listed by the moving party that is relevant to matters raised in a response." (Emphasis added).

Another inconsistency with the "plain" language of the regulation and the interpretation of same by the Workers' Compensation Board and the Court of Appeals, is if all medical reports and/or records attached to the Form 101 are automatically designated as evidence in the claim upon reopening, why are other medical reports and/or records that were filed as evidence in the original claim not automatically "designated" as well? While 803 KAR 25:010 Section 8 (4) provides that "all medical reports filed with Forms 101, 102 or 103 shall be **admitted into evidence** without further order", where does the regulation or statute provide that these medical reports after admission attain a different status than other medical reports admitted into evidence? Where does this regulation or any regulation state that the parties are to designate relevant evidence from the original claim with the exception of those records attached to the Form 101 which are already considered "designated" simply because they were attached to the Application? Why is the medical evidence attached to the original Application treated differently upon reopening than any other medical evidence filed in the original claim? Where does the Office of Workers' Claims through any statute or regulation advise the parties or the Administrative Law Judges of this distinction?

The Workers' Compensation Board stated the following in its Opinion:

> At the time of the reopening, there was no longer a paper file; however, all pleadings and filings were preserved by electronic imaging. **As a practical matter,** once a motion to reopen is filed, the "Case Files" section of the Office of Workers' Claims must reconstruct a paper file for the ALJ if the original claim file no longer exists. This reconstructed file consists of: 1) the Form 101 and attachments; 2) any settlement agreement or opinion rendered by the ALJ; 3) an attorney's fee order, if any; 4) any orders on

> petition for reconsideration; 5) orders directing that additional parties either be added or dismissed; and, 7) final orders of the Board, Kentucky Court of Appeals, or Kentucky Supreme Court. Thus, Dr. Atasoy's Form 107, an attachment to the Form 101, was included in the reconstructed file and Littleton-Goodan was not required to designate that medical report in order for the ALJ to properly consider it in the context of comparing the evidence in the original claim to the evidence on reopening.

Emphasis added. Why was Littleton-Goodan not required to designate that medical report on reopening when the movant did not in order for the ALJ to properly consider it? Was it simply because this report was part of the "reconstructed file"? Where are the parties apprised that when a paper file no longer exists only certain documents are reproduced and provided to the Administrative Law Judge? What is noticeably absent from this statement of the Workers' Compensation Board is any citation to a regulation and or statutory provision that bestows this knowledge on practitioners. How are the parties to know when a paper file has been destroyed? How are they to know when a paper file has been reconstructed? More crucially in this context, how are the parties to know what is included in the reconstructed paper file sent to the ALJ? If a request for the file is made to the Office of Workers' Claims, the entire file will be produced. Where are parties apprised of what specific documents have been reconstructed for the Administrative Law Judge? Were other medical reports and/or other submissions of evidence not produced to the ALJ?

This Appellant respectfully submits that the regulation requiring the designation of evidence from the original record to be considered by the Administrative Law Judge on reopening was enacted specifically to avoid the very problem presented here. If the

parties are required to designate the relevant items of evidence from the original record on reopening and if the "burden of completeness of the record shall rest with the **parties** to include so much of the original record...as is necessary", and the **parties** then designate that evidence, if any, independently, then everyone knows without question what evidence the Administrative Law Judge will review in formulating his or her conclusions and/or opinions. There is no guess work. There is no "surprise". All of the evidence to be considered has been specifically designated and identified to the ALJ and to the parties.

Again, with all due respect to the Court of Appeals, while one purpose of the regulation requiring designation of evidence may be to pare down the previous evidence to only that testimony relevant to the issues presented in the interest of judicial economy and convenience, the primary intent of the regulation is to provide the parties and the ALJ with a consensus of what evidence is to be considered. Otherwise, there would be no reason whatsoever to designate evidence from the original record. If the ALJ can consider any evidence in the record, such as the Form 107 of Dr. Atasoy in this case, without a specific designation by either party, then why have any requirement regarding a designation of evidence? All of the evidence in the record is already "designated" for purposes of being available for the ALJ to consider.

The Board indicates in its Opinion that this review of the entire record is indeed proper, citing the case of W.E. Caldwell Co. v. Borders, Ky., 193 S.W. 2d 453 (1946). That case, however, is distinguishable on its facts and does not address in any way the current regulation. First of all, in Borders, it was noted that "no evidence whatever was introduced before the Board save the affidavit of Doctor Johnson." Id. at 846. Both

parties introduced ample evidence in this case for the Administrative Law Judge to review. Secondly, however, and more importantly, however, there is no indication that there was a regulation setting forth the submission and/or designation of evidence from the original record at the time Borders was decided as is the case here. This Appellant respectfully submits that the enactment of the regulation [803 KAR 25:0101 Section 4 (6)], which provides for a designation of evidence negates the authority of the ALJ to look at the entire record made at a former hearing, or hearings, had before with reference to the same accident. Borders, 847. Again, if the Administrative Law Judge is vested with such vast discretion in determining what should be done on a motion to reopen that he "may and should look to the record made at a former hearing, or hearings, had before it with reference to the same accident", then why is there a regulation at all with regard to the designation of evidence? All of the evidence submitted in the original claim can and, according to the Borders decision, should be reviewed in deciding a motion to reopen. (Emphasis added). Why, then, have any language regarding a designation? If the ALJ is to review the entire record, what is the purpose of a designation?

Additionally, it must be remembered here that the reopening filed by this Appellant involved a medical fee dispute; not an argument regarding a change in the occupational disability and/or condition of the claimant. This was not a situation where the Appellant was arguing that the claimant, who may have originally had a 5% occupational disability now had a 3% occupational disability or who was originally deemed totally disabled was now capable of working. When that is the issue presented to an Administrative Law Judge, the evidence existing at the time of the settlement is clearly "relevant" as there can be no determination of a **change** of condition without a comparison of the evidence

"before and after". Even when that is the issue, however, "as a practical matter" to coin the phrase used by the Workers' Compensation Board, the movant in a reopening claim does not always designate evidence from the original claim. In fact, in many claims, when the claimant moves to reopen to allege an increase in occupational disability and to allege an entitlement to increased benefits, there will be a specific statement that the claimant does not designate any evidence from the prior claim. Then, again as a "practical matter" the respondent/employer designates and/or resubmits what evidence from the original claim file it believes should be considered as evidence.

According to the Court of Appeals, this shift in the burden of designation of evidence is not only improper, it is "contrary to the plain language, and intent, of the regulations" as the "regulations plainly contemplate that the movant in a reopening case will sift through the record and, in good faith, designate those portions relevant to the issues raised upon rehearing." In other words, the moving party should designate not only evidence from the original record supportive of its position, but also that evidence that is detrimental to its position. While this Appellant recognizes the duty the parties have to prevent any type of fraud, overreaching and/or deceit before the tribunal, a reopening is still an adversarial procedure, and when the reopening deals with an issue that has never been resolved by a tribunal, it defies the adversarial process to require a party to specifically file and/or designate evidence that may be detrimental to its position.

In this case, the Appellant did not designate any evidence from the original claim in its Motion to Reopen. The Appellee did not to file a response to the Motion to Reopen and did not file any other pleading or notice designating the Form-107 of Dr. Atasoy or any other evidence from the original record to be considered as evidence by the ALJ. In

fact, the Appellee subsequently submitted Dr. Atasoy's entire chart related to her course of treatment, but she did not include the Form-107 in that submission, nor was any reference ever made to it. Moreover, and perhaps most importantly, the Form 107 from Dr. Atasoy, considered as a separate filing, was not listed on the Final Hearing Order. Generally, a Final Hearing Order will list as evidence the attachments to the Form 101 so that all parties are apprised of the recognition that such medical evidence is part of the record and will be considered by the ALJ. See Copar, Inc. v.Rogers, Ky., 127 S.W. 3d 554 (2003) as cited by the Workers' Compensation Board. That was not the case here, however. Additionally, as noted above, neither party referenced the Form-107 in its Brief to the ALJ. In summary, the first mention of the Form-107 in the reopening proceeding came when it was cited in the ALJ's Opinion as the basis for his ultimate conclusion.

The Board concluded that the ALJ did not err in relying on the Form 107 of Dr. Atasoy as evidence since it was part of the original record. (Board Opinion, 7). Again, the Appellant acknowledges that the Form-107 was properly filed as part of the original claim. The Appellant does dispute, however, that the evidence was properly submitted in the reopening. The regulations clearly establish that evidence submitted as part of the original claim may not automatically be considered by the ALJ in a reopening without action by the parties. Instead, 803 KAR 25:010 Section 4 (6) explicitly requires the parties to designate such evidence. Additionally, 803 KAR 25:010 Section 4 (6) (b) 2 specifically provides that

> [t]he burden of completeness of the record **shall rest with the parties** to include so much of the original record, up to and including the award or order on reopening, as is necessary to permit the administrative law judge to compare the relevant evidence that existed in the original

> record with all subsequent evidence submitted by the parties.

Emphasis added. The burden was on the Appellee to designate the Form-107 if she wanted that evidence to be considered by the ALJ; she did not do so.

This Court has held that "in the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and interpretation." Aubrey v. Office of Attorney General, 994 S.W.2d 516, 520 (Ky.App.1998) (citing Revenue Cabinet v. Joy Technologies, 838 S.W.2d 406 (Ky. App. 1992)). A central rule of statutory construction is that statutes should not be construed such that their provisions are without meaning, whether in part or in whole. George v. Scent, Ky., 346 S.W.2d 784 (1961); *see also* Transportation Cabinet v. Tarter, 802 S.W.2d 944 (Ky. App. 1990) ("all statutes should be interpreted to give them meaning, with each section construed to be in accord with the statute as a whole."). To hold that evidence submitted as part of the original claim is automatically considered upon reopening would render 803 KAR 25:010 Section 4 (6) meaningless and contravene basic principles of statutory construction. If the evidence filed in the original claim is automatically considered evidence as purported by the Workers' Compensation Board, then there is no need for the Regulation setting forth the procedure for the designation or submission of evidence on reopening. Furthermore, 803 KAR 25:010 Section 4 (7) (b) 3 specifically states that "except for good cause shown at the time of the filing of the designation of evidence, a party **shall not designate the entire original record from the claim for which reopening is sought.** (Emphasis added). If there is no specific designation of evidence required, and if the parties are prohibited from designating the

entire original record from the original claim except for good cause shown, how are the parties to be apprised of what "evidence" the ALJ is going to consider and what "evidence" is not going to be considered? How do the parties determine what evidence warrants a response and what evidence does not?

The Board's Opinion further concluded that since the ALJ received a copy of the Form-107 as part of the "reconstructed file" and as the evidence had probative value, it was proper for the ALJ to rely upon it in formulating his conclusion regarding a work-related injury. Arguably the report of Dr. Atasoy may have probative value. That is not the issue, however. The issue is that the ALJ should never have even considered that piece of "evidence" as it was never designated as evidence or properly submitted as part of the record on reopening by either party. In fact, it was never even identified or discussed as being in existence.

Again, the Board noted that when a reopened claim is assigned to an ALJ, the "Case Files" section of the Office of Workers' Claims reconstructs a paper file for the ALJ containing, among other things, the Form-101 and attachments. (Board Opinion, 6-7). The Board further noted that ALJ Borders received a copy of the Form-107 as an attachment to the Form-101. (Board Opinion, 7). The Board failed to mention, however, that the parties are not served with a copy of the "reconstructed" paper file, and they have no knowledge of the contents of that file. In fact, the parties have no knowledge by any rule or regulation that such a reconstruction takes place. There is no publication or impartation of knowledge from the Office of Workers' Claims of what information is provided to the ALJ. Furthermore, it is reasonable for the parties to believe that no information of evidentiary value is provided to the ALJ on reopening as the regulations set

forth what documents may be submitted in a reopened claim and how they are to be submitted or designated.

In this case the Appellant was severely prejudiced by the ALJ's reliance on evidence not identified of record. Again, neither party addressed the Form-107 in their Briefs to the ALJ because both were clearly unaware that the Form 107 constituted evidence that would be considered by the ALJ in rendering his Opinion. With all respect to the Board, their Opinion glosses over the fact that this case was decided on evidence that neither party knew existed, thereby denying this Appellant due process. An informed determination of whether or not a witness should be subjected to cross-examination cannot be made unless the entirety of the testimony offered by the witness is presented to the parties. While KRS 342.033 allows for the submission of testimony through medical reports, that statute and the applicable regulations also provide that said reports shall become a part of the evidentiary record, "subject to the right of an adverse party to object to the admissibility of the report and to **cross-examine the reporting physician.** (Emphasis added).

Clearly the opportunity to cross-examine witnesses is a time-honored right in this Commonwealth. As the Supreme Court stated in Kaelin v. City of Louisville, Ky., 643 S.W. 2d 590, 591-592 (1983), "the parties must have the opportunity to subject all evidence to close scrutiny so as to determine its trustworthiness. A trial-type hearing implies the opportunity to impeach witnesses. Cross-examination is a time-tested and unique method of assisting in the quest for truth." The Court went on to state that "without such opportunity, the search for truth may very well be impeded and restricted."

In this case, while the Appellant was not denied the opportunity to cross-examine Dr. Atasoy by way of the denial of any request or attempt to do so, the fact that there was a report from Dr. Atasoy that was never designated or submitted as evidence by either party and yet relied upon by the Administrative Law Judge arose, in effect, to a denial of this right of cross-examination. As noted above, how could the Appellant make an informed decision to proceed with or forego the cross-examination of Dr. Atasoy when the entirety of his testimony was never presented or provided to the Appellant? At the very least the Board and/or the Court of Appeals should have remanded this matter to the Administrative Law Judge with directions that the Opinion be set aside and the Appellant be afforded an opportunity to respond to the Form 107 of Dr. Atasoy as it clearly was considered as evidence only by the ALJ; not the parties.

While a fundamental principle of the workers' compensation system is that the ALJ is afforded considerable deference as finder of fact that deference is not unfettered. Yes, the ALJ has the authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993). Similarly, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/PepsiCo, Inc., Ky., 951 S.W.2d 329, 331 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334, 336 (Ky. App. 1995). The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence even if it comes from the same witness. Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000). The fact-finder, however, does not submit evidence and is required to 'support his or her conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the

basis for the decision.'" Carnes v. Parton Bros. Contracting, Inc., 171 S.W.3d. 60, 67 (Ky.App. 2005) [citing Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d. 440, 444 (Ky.App. 1982) emphasis added].

In this case, ALJ Borders relied on evidence that was outside of the record. The Appellee never designated or submitted the Form 107 of Dr. Atasoy into evidence on reopening, as required by regulation, and ALJ Borders' reliance on that evidence was in error. The Appellant was unfairly prejudiced by the ALJ's reliance on that report.

The Workers' Compensation Board is responsible for appellate review of an ALJ's decision in order to determine if the ALJ "acted without or in excess of his powers." KRS 342.285(2) (a). Clearly, the ALJ's reliance on evidence that was not properly entered into the record is an act in excess of his judicial powers and constitutes reversible error. It should be noted that the Appellant does not contend that the ALJ's action in relying upon the Form-107 was done with any malicious intent. It was mistake; pure and simple. Even so, the Appellant was deprived of the opportunity to rebut Dr. Atasoy's findings in its presentation of proof to the ALJ as it was unaware of the existence of this Form 107 in the record.

The error and resulting prejudice to this Appellant in relying on the Form-107 is clearly not harmless in this case. We know this because of the Board's decision on the other issue presented to it. ALJ Borders concluded in his Opinion that the only evidence submitted in support of causation was the Form-107 of Dr. Atasoy and the records of Dr. Warren Briedenbach. (O&A, 10). As noted above, the Board reversed the finding of the Administrative Law Judge that Dr. Briedenbach's records supported causation. (Board Opinion, 7-9). Without the benefit of Dr. Briedenbach's records, the only evidence

remaining in support of causation is the Form-107 that was erroneously considered by the ALJ. Therefore, the ALJ's reliance upon the Form-107 cannot be said to constitute harmless error and warrants reversal of the Opinion of the Workers' Compensation Board.

Finally, while this Appellant acknowledges that the courts afford deference to the interpretations of the Workers' Compensation Board of the statutes and requlations it is charged with implementing, deference does not equal blanket approval. This Court is ultimately charged with the interpretation of all statutes and regulations in this Commonwealth and this Appellant respectfully submits that the Board and the Court of Appeals have erred in their interpretation of this regulation in this case. In summary, the interpretation of the Board and the Court of Appeals of 803 KAR 25:010 Section 4 (6) renders the "plain language" of that regulation useless and without meaning. The Appellant, therefore, requests that this Court reinstate the validity of this specific regulation by reversing the Opinions of the Workers' Compensation Board and the Court of Appeals.

CONCLUSION

This Appellant respectfully submits that the Administrative Law Judge in this case acted in excess of his powers by considering evidence that was not designated by either party in the reopening claim as evidence of record. The regulations dealing with the reopening of a workers' compensation claim clearly establish that if the parties are desirous of having a piece of evidence from the original claim considered upon reopening, they must make a designation of such evidence. This requirement is not presented as just some unnecessary hoop through which the parties are to jump. It

serves a specific and significant purpose. In the interest of judicial economy, a fact finder dealing with a reopened claim that merely addresses one or two issues does not need to sort through all of the evidence in the original claim that may have been presented on other issues that no longer have relevance or are no longer subject to any dispute. As not everything that was presented in the original claim has relevance, and because not everything that was presented in the original claim is automatically designated as evidence, the Executive Director of the Office of Workers' Claims promulgated a regulation that requires the parties to designate what evidence from the original claim is to be considered. This, then, also provides all parties associated with the litigation of the reopened claim notice and knowledge of the evidence that will be considered by the Administrative Law Judge so as to afford them an opportunity to respond as may be deemed necessary to support and/or enhance their respective positions. If this regulation serves no purpose, then there is no need for its existence. To now say, as the Board and the Court of Appeals have done, that this regulation really has no meaning, as the ALJ can rely upon whatever evidence the Office of Workers' Claims supplies to him as part of their "reconstructed file" or whatever evidence was tendered in the original claim, renders this procedural provision useless. That clearly was not the intention of the Executive Director in promulgating the regulation and is contrary to the plain reading of the regulation.

In the end, this Appellant's claim was "tried" without the opportunity to confront witnesses and address evidence that was presented to the ultimate fact finder. This constitutes reversible error in its most elementary form and this Appellant would request that the Order of the Workers' Compensation Board and the Opinion of the Court of