OPINION ENTERED: November 9, 2012

CLAIM NO. 200578291

ALLIED SYSTEMS LIMITED PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

TIMOTHY J. EAGAN
HON. RICHARD M. JOINER
and HON. THOMAS G. POLITES
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Allied Systems Limited ("Allied") appeals from the June 19, 2012, opinion, order, and award of Hon. Richard M. Joiner, Administrative Law Judge ("ALJ Joiner") and the July 25, 2012, order overruling Allied's petition for reconsideration of Hon. Thomas G. Polites, Administrative Law Judge ("ALJ Polites").

Due to the complexity of the procedural history, a summary of the procedural history is necessary.

The Form 101 alleges on June 6, 2005, Timothy Eagan ("Eagan") injured his left and right shoulders while working for Allied. The injury occurred in the following manner: "Chain broke while unchaining a vehicle from [sic] truck, pulling me between the vehicle and the side rails of the truck."

The September 13, 2007, benefit review conference ("BRC") order lists the following contested issues:

> What is the appropriate period of Temporary Total Disability?
>
> Is the claimant Permanently Totally Disabled?
>
> What is the extent of permanent partial disability?
>
> Is the defendant liable for certain medical expenses?
>
> Does the claimant have the physical capacity to return to the type of work performed at the time of the injury?
>
> The medical expense issue relates to prospective treatment for the right shoulder?

In a November 6, 2007, order, opinion, and award, ALJ Joiner set forth the following legal conclusions:

> **What is the appropriate period of Temporary Total Disability?** Temporary

total disability is defined in the Acts as 'the condition of any employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.' KRS 342.0011(11)(a). The employer paid temporary total disability benefits from July 6, 2005 through May 2, 2007. Dr. Kelly has opined that the maximum medical improvement with regard to the left shoulder was achieved on October 14, 2006. Dr. Hasan has opined that maximum medical improvement with regard to the left shoulder was achieved on December 18, 2006. He believes that the right shoulder needs further assessment and may be the subject of surgical repair. Dr. Kelly believes that the right shoulder tendinitis and impingement syndrome has 'essentially resolved' and that there is no impairment of the right shoulder. I conclude that during the time from the date of injury, June 6, 2005 until December 18, 2006, Timothy J. Eagan had not reached maximum medical improvement and had not reached a level of improvement that would permit a return to employment. As of December 18, 2006 Mr. Eagan had achieved a [sic] maximum medical improvement with respect to his left shoulder. He is still in need of further assessment (the recommended MRI would be appropriate) and may require surgery. However, if surgery is not required, then his maximum medical improvement date will have been December 18, 2006. If surgery is required, then another period of temporary total disability will be appropriate.

Is the claimant Permanently Totally Disabled? Permanent total disability under the Kentucky Workers' Compensation Act means the condition of

an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. 'Work' means providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. Thus, in order to be found permanently totally disabled, an employee must demonstrate that he has a complete and permanent inability to perform any services to another in return for remuneration on a regular and sustained basis in a competitive economy. Mr. Eagan is precluded from performing much of the work that he had done in the past. However, I believe neither the restrictions of Dr. Hasan, the results of the FCE, nor the restrictions on Dr. Kelly demonstrate a complete and total inability to perform work. I believe that there are likely to be jobs that Timothy J. Eagan can do even being mindful of these restrictions.

What is the extent of Permanent Partial Disability? Inasmuch as I have not found Timothy J. Eagan to be totally disabled, I must consider whether there is a permanent partial disability. Permanent partial disability is the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work. A permanent disability rating is the permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730(1)(b) and a permanent impairment rating means the percentage of whole body impairment caused by the injury or the occupational disease as determined by 'Guides to the Evaluation of Permanent Impairment, American Medical Association, latest available edition.'

Timothy J. Eagan has an impairment rating. It is either 13% based on the report of Dr. Hasan, or 17% under the report of Dr. Kelly. Dr. Kelly's assessment appears to be more complete than Dr. Hasan's. He includes a 10% upper extremity impairment or distal clavicle resection that does not appear to be included in Dr. Hasan's assessment. I therefore accept the impairment assessment of 17% established by Dr. Kelly. This is a whole body impairment but it relates only to the injury to the left shoulder. I conclude that Timothy J. Eagan has a 17% whole body impairment as a result of the injury of June 6, 2005, in accordance with the *Guides*.

Is the defendant liable for certain medical expenses? The defendant disputes whether any additional medical treatment is required for the right shoulder. When Mr. Eagan appeared at the Georgetown Community Hospital he reported injuries to both of the upper extremities. When he was first seen by Dr. Siegel he explained to him that he injured his right shoulder. Dr. Siegel thought that there was a possible tear in the right shoulder and recommended that if the shoulder did not get better then an MRI would be requested. Having completed the treatment with respect to the left shoulder, Dr. Hasan's recommendation is for an MRI of the right shoulder in order to assess that. Given the duration of the complaints with respect to the right shoulder, it is appropriate for the employer to provide that test with respect to the injury to the right shoulder. Decisions as to future treatment may very well depend on what the MRI shows.

After careful consideration of the lay and medical testimony herein, the

Administrative Law Judge finds persuasive the testimony of the Plaintiff, and Dr. Hasan and therefore finds that the Plaintiff has met his burden of proving that his right shoulder condition was causally related to his June 6, 2005 injury. Snawder vs. Stice, 576 S.W.2d 276 (Ky. App. 1979).

Therefore this issue is resolved in favor of the Plaintiff.

Does the claimant have the physical capacity to return to the type of work performed at the time of the injury? There are two factors which must be determined in order to properly calculate the benefit for permanent partial disability. The first factor is whether or not the claimant retains the physical capacity to perform the type of work done at the time of the injury. In this case, Mr. Eagan clearly does not retain the capability of performing the type of truck driving that he did at the time of the injury. If Mr. Eagan can find employment in the future, it is unlikely that he will be able to command the same wage that he earned at the time of his injury. Therefore, the 'three' multiplier will apply.

Conclusions

1. Timothy J. Eagan sustained a work-related injury to both his left shoulder and his right shoulder on June 6, 2005. He gave due and timely notice of this injury.

2. As a result of the injury, Timothy J. Eagan was temporarily totally disabled from July 6, 2005 through December 18, 2006.

3. Timothy J. Eagan is entitled to assessment for possible surgical

treatment of his right shoulder with respect to the injury of June 6, 2005. If surgery is required, another period of temporary total disability will be payable.

4. Timothy J. Eagan has a permanent disability rating of 17% which is 17% impairment under the AMA *Guides* multiplied by 1.0, the factor contained in KRS 342.730.

5. Timothy J. Eagan has a post-high school education which allows for no enhancement of benefits under KRS 342.730(1)(c)3.

6. On the date of injury Timothy J. Eagan was 56 years of age which allows for an enhancement of benefits by four-tenths under KRS 342.730(1)(c)3.

7. Because Timothy J. Eagan does not retain the physical capacity to perform the type of work performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three pursuant to KRS 342.730(1)(c)1 plus the four-tenths factor identified in KRS 342.730(1)(c)3.

AWARD

It is hereby ORDERED AND ADJUDGED by the Administrative Law Judge as follows:

1. The plaintiff, Timothy J. Eagan, shall recover of the defendant/employer, Allied Systems Limited, and/or its insurance carrier, temporary total disability benefits at the rate of $607.23 per week from July 6, 2005 through December 18, 2006, and thereafter the sum of $263.23 per week for 17% permanent disability rating for

> so long as he is so disabled or until he becomes eligible for normal social security retirement benefits together but for a period not to exceed 425 weeks together with interest at the rate of 12% per annum on all past and unpaid installments of compensation and defendant shall take credit for any compensation heretofore paid.
>
> 2. The plaintiff shall further recover of the defendant/employer and/or its insurance carrier for the cure and relief from the effect of the injuries to both shoulders such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability. This specifically includes an MRI examination of the right shoulder.
>
> 3. All motions for approval of attorneys' fees shall be filed within 30 days of the date this decision becomes final.

Neither party filed a petition for reconsideration or a notice of appeal.

By order dated January 3, 2008, ALJ Joiner approved Eagan's motion for attorney fees.

On April 17, 2008, Eagan filed "Plaintiff's Motion to Reopen and Award TTD Benefits for Determination of Additional Impairment and to Compel Issuance of a Medical Card." In his motion to reopen, Eagan stated as follows:

Comes the Plaintiff, by and through counsel, and pursuant to KRS 342.125(1)(b)(d) and (3) moves the Court for an order reopening this claim and ordering Defendant/Employer to pay him TTD from December 18, 2006 through the date of surgery on his right shoulder, currently scheduled for April 25, 2008, and during the period after the surgery until he reaches MMI, to determine his additional impairment and to compel issuance of a medical card. As grounds therefore, Plaintiff states in reference to his right shoulder, that the Administrative Law Judge, on page fifteen of his Opinion and Award, found that Mr. Eagan 'is still in need of further assessment (the recommended MRI would be appropriate) and may require surgery. However, if surgery is not required, then his maximum medical improvement date will have been December 18, 2006. If surgery is required, then another period of temporary total disability will be appropriate' (Exhibit 'A', p. 15) The Administrative Law Judge ordered the MRI on the right shoulder. (Exhibit 'A', p.18) Defendant/Employer deducted overpaid TTD from Mr. Eagan's back benefits based on the December 18, 2006 date, however, after this Court's Order, Mr. Eagan had an MRI and based on this MRI surgery on Mr. Eagan's right shoulder has been authorized by the Defendant/Employer. (Exhibit 'B') Accordingly, Plaintiff could not have been at MMI with regard to his right shoulder as of December 18, 2006 and therefore is entitled to TTD from December 18, 2006 through his date of surgery and for the period of recovery thereafter until he reaches MMI.

In further support of this Motion, Plaintiff attaches a report from Dr. Hasan dated March 28, 2008. (Exhibit

> 'C')[1] Dr. Hasan issued this report after the MRI, and has found that Mr. Eagan in fact was not at MMI as of December 18, 2006, is scheduled for surgery on April 25, 2008, and has not yet reached MMI. It is further anticipated that after the surgery Mr. Eagan will have an additional impairment.
>
> Further, although the surgery has been authorized, Plaintiff has yet to receive the medical card required by 803 KAR 25:096 §3(2), despite repeated requests, and is concerned about obtaining his pre and post surgery treatment and medication. (See Affidavit of Timothy Eagan attached as Exhibit D) Plaintiff also attaches an updated Form 106 Medical Waiver and Consent.
>
> Wherefore it is respectfully requested that this matter be reopened for reconsideration of Mr. Eagan's underpaid TTD, TTD from December 18, 2006 through his surgery and for a period until he reaches MMI after the surgery, for consideration of his additional impairment expected after his right shoulder surgery and to compel issuance of a medical card.

On May 20, 2008, ALJ Joiner rendered the following order:

> This case comes before the Administrative Law Judge on plaintiff's motion to reopen. An award was entered on November 6, 2007 granting the plaintiff temporary total disability benefits and a permanent partial disability benefit relating to injuries of June 6, 2005. The finding was made

[1] Surgery has been rescheduled to April 25, 2008 from April 18, 2008.

that both shoulders were injured at that time. The plaintiff has filed along with the motion to reopen the report from Dr. Samer S. Hasan indicating that the plaintiff is scheduled for surgery on April 18, 2008 involving the repair of a large rotator cuff tear affecting the right shoulder. Findings were previously made about the need for treatment with respect to the right shoulder and the prospect that surgery would occur.

The plaintiff asks for the claim to be reopened, TTD benefits to be awarded, consideration of additional impairment, and the issuance of a medical card. I had previously found that maximum medical improvement had been achieved as of December 18, 2006. Consequently, the award of TTD benefits can only be prospective from the date of surgery. (The surgery has been changed from April 18, 2008 to April 25, 2008). The change in income benefits cannot begin before the date the motion to reopen was filed on April 17, 2008. The prospect of surgical repair of a large rotator cuff tear affecting the right shoulder is enough evidence to warrant reopening the claim based upon change of condition. This surgery will produce a period of temporary total disability. Whether it provides an increase in impairment can only be determined after maximum medical improvement is achieved following the surgery.

The administrative law judge, having been sufficiently advised, does hereby order as follows:

1. The motion to reopen is sustained.

2. Temporary total disability benefits can only begin as of the date of surgery, April 25, 2008.

> 3. The employer is directed to suspend the payment of permanent partial disability benefits under the prior award as of April 25, 2008.
>
> 4. The employer is directed to institute the payment of temporary total disability benefits in connection with the surgical procedure on the plaintiff's right shoulder. These benefits are to be made at the rate of $607.23 per week from April 25, 2008 with interest at the rate of 12% per annum on all past and unpaid installments of compensation.
>
> 5. The employer is directed to observe the regulations found at 803 KAR 25:096, section 3(2) involving the issuance of a medical card.
>
> 6. The reopening proceedings are placed in abeyance pending achievement of maximum medical improvement following the right shoulder surgery.
>
> 7. Both parties are to report within 60 days as to the status of the claim and continue reporting every 60 days thereafter so long as the claim remains in abeyance.
>
> 8. The reopening proceedings will address whether or not there is any increase in impairment following the achievement of maximum medical improvement with respect to the right shoulder surgery.

By order dated January 12, 2011, ALJ Joiner removed the claim from abeyance.

The August 11, 2011, BRC order lists the following contested issues: “benefits per KRS 342.730” and “TTD.”

In the record is a Form 110 Agreement as to Compensation and Order Approving Settlement dated March 26, 2012. The Form 110 indicates Eagan was injured on June 6, 2005, in the following manner: "Jerked between vehicle and truck while unloading." The nature of injuries is "bilateral shoulders." The Form 110 lists "status right rotator cuff repair and partial hemiarthroplasty" as the diagnoses. The Form 110 indicates Eagan is to be paid $543.50 weekly for 187 weeks and four days. Under "other information" is the following:

> The agreed-upon weekly benefit of $543.50 per week is calculated based upon a combined impairment rating of 26% (17% as determined by the ALJ for the left shoulder and a compromise 11% for the right shoulder.
>
> The agreed-upon weekly benefit of $543.50 per week shall be paid from November 11, 2010 until June 14, 2012.
>
> The Plaintiff shall be entitled to interest at the rate of 12% on all past due indemnity payments.
>
> The contested issue of entitlement to temporary total disability benefits from December 19, 2006 through April 25, 2008 shall be submitted to the Administrative Law Judge for a decision on the merits.

In an opinion and order dated June 19, 2012, ALJ Joiner determined as follows:

> This is a claim for temporary total disability benefits, permanent total disability benefits, or, in the alternative, permanent partial disability benefits, and medical benefits which are alleged to be due as a result of an injury of June 6, 2005. An Order, Opinion, and Award was rendered on November 6, 2007. The plaintiff filed a motion to reopen on April 17, 2008. The claim was reopened by order dated May 20, 2008. Status reports were ordered. During the pendency of the reopening proceedings the parties agreed on the disposition of the claim with the exception of entitlement to temporary total disability benefits from December 19, 2006 through April 25, 2008. This agreement was approved on March 26, 2012. The employer disputes entitlement to any additional temporary total disability benefits.
>
> In the previous decision, this ALJ found that Mr. Eagan had achieved maximum medical improvement as of December 18, 2006 relating to his left shoulder. An award of temporary total disability benefits was made from June 6, 2005 through December 18, 2006 and an award of permanent partial disability benefits was made from December 18, 2006 until the date of the motion to reopen filed April 17, 2008. A subsequent surgical procedure was performed on April 25, 2008.
>
> The November 6, 2007 decision was interlocutory [sic] nature. It contemplated that further treatment may be required for the right shoulder which was found to be compensable.

Surgical treatment was ultimately required for the right shoulder and there had been no return to work during the disputed time period from December 18, 2006 until the date of surgery April 25, 2008. The Order, Opinion, and Award of November 6, 2007 was inartfully worded. It did not clearly state that it was interlocutory on its face and was somewhat ambiguous as to whether the period of temporary total disability applied to both shoulders or just the agreed to be compensable left shoulder. The effect of the Order, Opinion and Award of November 6, 2007 was, in view of the subsequent surgery, interlocutory in nature. Because of this, I believe it is appropriate to award temporary total disability benefits during the disputed time period of December 18, 2006 until the date of surgery April 25, 2008.

AWARD

It is hereby **ORDERED AND ADJUDGED** by the Administrative Law Judge as follows:

1. The plaintiff, Timothy J. Eagan, shall recover in addition to the benefits previously awarded, of the defendant/employer, Allied Systems Limited, and/or its insurance carrier, temporary total disability benefits at the rate of $607.23 per week from December 18, 2006 through April 25, 2008 together with interest at the rate of 12% per annum on all past and unpaid installments of compensation and defendant shall take credit for any compensation heretofore paid.

2. The plaintiff shall continue to recover of the defendant/employer and/or its insurance carrier for the cure and relief from the effects of the

> injury such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability.
>
> 3. All motions for approval of attorneys' fees shall be filed within 30 days of the date this decision becomes final.

On July 5, 2012, Allied filed a petition for reconsideration asserting as follows:

> Comes the Defendant, Allied Systems Limited, by counsel, by counsel, [sic] and in support of its Petition for Reconsideration states the following:
>
> 1. The November 6, 2007 Order, Opinion & Award was not interlocutory in nature;
>
> 2. Had the Administrative Law Judge intended the Opinion to be interlocutory in nature, it would have been captioned Interlocutory Order, Opinion & Award;
>
> 3. Had the Administrative Law Judge intended the Opinion to be interlocutory in nature, the claim would have been placed in abeyance;
>
> 4. Had the Administrative Law Judge intended the Opinion to be interlocutory in nature, the Award would not have read, 'all motions for approval of attorney's fees shall be filed within 30 days of the date this decision becomes final';
>
> 5. Had the Opinion been interlocutory in nature, there would have been no need for Plaintiff's counsel to file a

> motion to reopen the claim on April 14, 2008;
>
> 6. Had the Opinion been interlocutory in nature, the Administrative Law Judge would certainly not have found on May 20, 2008, in response to the Plaintiff's motion to reopen that 'the change in income benefits cannot begin before the date the motion to reopen was filed on April 17, 2008'; and
>
> 7. If the Opinion was interlocutory in nature (which this Defendant does not concede), then the ALJ's ruling on May 20, 2008, i.e. that the change in income benefits cannot begin before April 17, 2008, would have been patently erroneous, and the Plaintiff failed to file a Petition to [sic] Reconsider [sic] from that order, as required by KRS 342.281.

By order dated July 13, 2012, this case was reassigned to ALJ Polites effective July 16, 2012.

In an order dated July 25, 2012, ALJ Polites denied Allied's petition for reconsideration stating as follows:

> Upon Petition for Reconsideration filed by Defendant/Employer, Plaintiff having filed a Response, and the Court being in all ways sufficiently advised;
> IT IS HEREBY ORDERED as follows:
>
> 1) Defendant/Employer's Petition for Reconsideration on the issue of additional TTD benefits is DENIED.

On appeal, Allied sets forth two arguments. First, Allied argues the November 6, 2007, order, opinion,

and award of ALJ Joiner was not interlocutory. Allied asserts as follows:

> As basis for the award of TTD benefits from December 19, 2006 to April 25, 2008, AJL [sic] Joiner found that the original Order, Opinion and Award entered on November 6, 2007 was interlocutory in nature. Allied submits that the November 6, 2007 Order was final and not interlocutory.
>
> ...
>
> There is nothing in the November 6, 2007 Order, Opinion and Award that even alludes that such Order was to be considered interlocutory. There is no use of the word 'interlocutory' anywhere in the Order. In fact the very language of the Order suggests it was not intended to be interlocutory by stating that 'all motions for approval of attorney's fees shall be filed within 30 days of the date this decision becomes final.' (Exhibit 5 at page 19). The only mention of additional TTD benefits appears on page 15 of the Order where ALJ Joiner states that 'if surgery is required, then another period of temporary total disability will be appropriate.' ALJ Joiner did not order TTD to be paid, only that TTD benefits would be appropriate should surgery be performed. The only income benefits awarded by ALJ Joiner's November 6, 2007 Order were PPD benefits pursuant to KRS 342.730. There is no award of income benefits to be paid under the interlocutory scheme as found under 803 KRS 25:010(12).
>
> If the November 6, 2007 Order was intended to be interlocutory, there would be some indication within the

Order. Furthermore, if the Order was intended to be interlocutory because further treatment was needed or the Respondent was not at MMI, then the claim should have been placed in abeyance with status reports ordered pursuant to 803 KAR 25:010(12). ALJ Joiner never placed the claim in abeyance or requested that status reports be filed to 'closely monitor the claim.'

Furthermore, the Respondent never requested interlocutory relief during the original litigation of this claim, nor did he show the requisite irreparable injury, loss or damage entitling him to such relief as required by 803 KAR 25:010(12). The issue of entitlement to interlocutory relief was never raised or addressed by ALJ Joiner during the original claim, and no Petition for Reconsideration or Appeal was filed by the Respondent. As such, the November 6, 2007 Order became final after the passage of thirty (30) days.

The fact that the November 6, 2007 Order was never intended to be interlocutory is further substantiated by the May 20, 2008 Order which found that no TTD benefits were due for the period of December 18, 2006 to April 25, 2008. ALJ Joiner specifically stated that the Respondent was found to be at maximum medical improvement as of December 18, 2006, and appropriately ordered TTD benefits to be reinstated prospectively from the date of surgery. Allied promptly reinstated TTD benefits from the date of surgery as ordered.

It is also evident that the Respondent did not believe the November 7, 2007 order was interlocutory. The Respondent filed a Motion to Reopen the claim in

> April 2008, which would not have been procedurally necessary if the November 7, 2007 Order was intended as interlocutory. In addition, there was no Petition for Reconsideration filed by the Respondent regarding the May 20, 2008 Order denying TTD benefits for the disputed time frame. If the Respondent felt the November 6, 2007 Order was interlocutory, a Petition for Reconsideration of the May 20, 2008 Order should have been filed as required by KRS 342.281.
>
> There is simply no indication in the record that the November 6, 2007 Order was intended to be interlocutory. Furthermore, the Order does not comply with any of the requirements for interlocutory relief found in 803 KRS 25:010(12). As such, ALJ Joiner's finding that the November 6, 2007 Order was interlocutory should be reversed.

Second, Allied maintains Eagan is only entitled to temporary total disability ("TTD") benefits from the date of surgery, April 25, 2008, through November 10, 2010, arguing as follows:

> KRS 342.125(4) governs the reopening of a worker's compensation claim. According to KRS 342.125(4), any change in the amount of compensation shall be ordered only from the date of filing to the motion to reopen. As such, any changes in the amount of benefits, including an award of TTD benefits, are to be prospective from the date of the motion to reopen. Lincoln Coal C. v. Watts, Ky., 120 S.W.2d 1026 (1938) and Rex Coal v. Campbell, Ky., 281 S.W.103 (1922).

> Any award of additional TTD benefits to the Respondent can only be prospective beginning from the date the Respondent's motion to reopen was filed. There can be no award for TTD benefits from December 18, 2006 to April 25, 2008, a period prior to the Plaintiff's motion to reopen.
>
> ALJ Joiner properly adhered to KRS 342.124(4) by finding the Respondent was not entitled to any additional TTD benefits until the date of his surgery in his May 20, 2008 Order. Allied did reinstate TTD benefits on April 25, 2008 and paid until November 10, 2010, when the Respondent was placed at MMI. The Respondent is not entitled to TTD benefits from December 18, 2006 to April 25, 2008.

Clearly, ALJ Joiner created a quagmire of confusion through a series of errors and oversights. ALJ Joiner's characterization of the November 6, 2007, order, opinion, and award being "inartfully worded" is accurate. Additionally, ALJ Joiner's erroneous statements in the May 20, 2008, order stating TTD benefits for Eagan's right shoulder can only begin *after* Eagan's April 17, 2008, motion to reopen added to the confusion.

Further, in the July 25, 2012, order, ALJ Polites should have addressed Allied's July 5, 2012, petition for reconsideration which focused exclusively on the issue of whether the November 6, 2007, order, opinion, and award was interlocutory in nature.

803 KAR 25:010 Section 21(2)(b) expressly provides that, "[a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2)." CR 54.02 (1) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims of parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Applicable case law, mirroring the requirements of CR 54.02, is clear in stating an order is final and 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).

ALJ Joiner's November 6, 2007, order, opinion, and award did not decide all matters litigated by the parties. While ALJ Joiner awarded medical benefits for Eagan's right shoulder, the need for surgery, entitlement to income benefits and permanent medical benefits for the right shoulder injury *were left pending*. The following language in the November 6, 2007, order, opinion, and award clearly sets out the aspects of Eagan's claim which remained to be decided:

- "He [Dr. Hasan] believes that the right shoulder needs further assessment and may be the subject of surgical repair."

- "He [Eagan] is still in need of further assessment (the recommended MRI would be appropriate) and may require surgery. However, if surgery is not required, then his maximum medical improvement date will have been December 18, 2006. If surgery is required, then another period of temporary total disability will be appropriate."

- "The defendant disputes whether any additional medical treatment is required for the right shoulder. When Mr. Eagan appeared at the Georgetown Community Hospital he reported injuries to both of the upper extremities. When he was first seen by Dr. Siegel he explained to him that he injured his right shoulder. Dr. Siegel thought that there was a possible tear in the right

> shoulder and recommended that if the shoulder did not get better then an MRI would be requested. Having completed the treatment with respect to the left shoulder, Dr. Hasan's recommendation is for an MRI of the right shoulder in order to assess that. Given the duration of the complaints with respect to the right shoulder, it is appropriate for the employer to provide that test with respect to the injury to the right shoulder. Decisions as to future treatment may very well depend on what the MRI shows."
>
> - "Timothy J. Eagan is entitled to assessment for possible surgical treatment of his right shoulder with respect to the injury of June 6, 2005. ***If surgery is required, another period of temporary total disability will be payable."*** (emphasis added).

While the November 6, 2007, order, opinion, and award did not, as conceded by ALJ Joiner in the June 19, 2012, order, say it is "interlocutory on its face," this Board will not choose form over substance. The *substance* of the November 6, 2007, order, opinion, and award clearly causes it, as a matter of law, to be interlocutory as it failed to fully adjudicate all issues. We understand Allied's frustration due to the wording in the November 6, 2007, order, opinion, and award and the May 20, 2008, order ruling on the motion to reopen. However, this does not change the fact that the November 6, 2007, order, opinion,

and award did not fully adjudicate all of the issues in this claim. Consequently, it is an interlocutory order.

ALJ Joiner's award of TTD benefits from December 18, 2006, until the date of surgery, April 25, 2008, is supported by substantial evidence. Allied's argument the start date for TTD benefits must begin *after* Eagan's motion to reopen is not valid in this specific case. Again, we must look at substance over form. Because the November 6, 2007, order, opinion, and award is interlocutory, Eagan's motion to reopen was, in reality, a pre-mature motion to remove the claim from abeyance- as Eagan had yet to achieve maximum medical improvement from the right shoulder injury. In light of the interlocutory nature of the November 6, 2007, order, opinion, and award, procedurally Eagan’s motion cannot be a motion to reopen. Thus, the law pertaining to when TTD benefits can be initiated in the context of a motion to reopen is inapplicable.

The contested period of TTD benefits spans from December 18, 2006, the date TTD benefits for Eagan's left shoulder were terminated, to April 25, 2008, the date of Eagan's right shoulder surgery. The record reveals Eagan did not return to work during this period of time. Additionally, there was no ruling by ALJ Joiner that Eagan reached maximum medical improvement for his right shoulder

condition at any point during this period of time. As the award of TTD benefits is supported by substantial evidence, it cannot be disturbed.

Accordingly, the June 19, 2012, opinion, order, and award of ALJ Joiner and the July 25, 2012, order overruling Allied's petition for reconsideration of ALJ Polites, are **AFFIRMED**. That portion of ALJ Joiner's May 20, 2008, order stating TTD benefits for Eagan's right shoulder "cannot begin before the date the motion to reopen was filed on April 17, 2008," and "temporary total disability benefits can only begin as of the date of surgery, April 25, 2008," is, *sua sponte*, **VACATED**. Additionally, we **REMAND** for the ALJ to amend the November 6, 2007, order, opinion, and award to include conspicuous language clearly indicating the order is interlocutory.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, CONCURS IN RESULT ONLY.

COUNSEL FOR PETITIONER:

HON JO ALICE VAN NAGELL
3151 BEAUMONT CENTRE CIR #200
LEXINGTON KY 40513

COUNSEL FOR RESPONDENT:

HON CARL E GRAYSON
504 ERLANGER RD
ERLANGER KY 41018

ADMINISTRATIVE LAW JUDGE:

HON THOMAS G POLITES
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DR
LEXINGTON KY 40511