**OPINION ENTERED: APRIL 12, 2013**

CLAIM NO. 201288141

BRIGGS AND STRATTON CORPORATION PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

JEFFREY DAVIS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION & ORDER DISMISSING**

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

**ALVEY, Chairman.** Briggs & Stratton Corporation ("Briggs & Stratton") seeks review of an order entered January 25, 2013 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") placing the claim in abeyance, and awarding Jeffrey Davis ("Davis") interlocutory relief in the form of temporary total disability ("TTD") benefits, payable until he reaches maximum medical improvement ("MMI"), and medical

benefits. Briggs & Stratton also appeals from the February 15, 2013 order denying its petition for reconsideration.

Briggs & Stratton paid TTD benefits until Davis was released to return to work by his treating physician, Dr. Richard Muench in July 2012. Davis subsequently returned to work for Briggs & Stratton, and continues to work there. Davis was evaluated by Dr. Thomas Gabriel, who recommended medical treatments for bilateral carpal tunnel syndrome.

Davis filed a Form 101, Application for Resolution of Injury Claim, on October 4, 2012 alleging injuries to both hands and wrists and identifying an onset date of March 22, 2012. The Form 101 further indicates Davis continues to work for Briggs & Stratton. On January 7, 2013, Briggs & Stratton filed a motion to place the claim in abeyance until Davis reaches MMI from his carpal tunnel condition. On January 23, 2013, Davis responded he had no objection to the claim being placed in abeyance, but requested TTD benefits be paid until he reached MMI. On January 25, 2013, the ALJ entered an order placing the claim in abeyance, and ordered TTD benefits be paid until Davis reaches MMI. On February 1, 2013, Briggs & Stratton filed a petition for reconsideration requesting the ALJ amend the order placing the claim in abeyance, requiring

TTD benefits be paid only when Davis was actually unable to work. On February 15, 2013, the ALJ entered an order overruling and denying the petition for reconsideration.

Because we conclude the ALJ's ruling is interlocutory and does not represent a final and appealable order, we dismiss Briggs & Stratton's appeal. 803 KAR 25:010 Sec. 21 (2)(a) provides as follows:

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

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

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

> (1) When more than one claim for relief is presented in an action . . . the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the

> parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
>
> (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

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

While we are sympathetic to Briggs & Stratton's position, in this instance, the ALJ's order merely places the claim in abeyance, without making a determination on the merits. Clearly, the orders entered by the ALJ on

January 25, 2013 and February 15, 2013, are not final and appealable as they do not operate to terminate the action or to finally decide all outstanding issues. Likewise, they do not operate to determine all the rights of the parties so as to divest the ALJ once and for all of the authority to decide the merits of the claim.

That said, we respectfully suggest the ALJ to review the award of TTD benefits in accordance with applicable case law. KRS 342.0011(11)(a) defines TTD as follows:

> [T]he condition of an 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. (Emphasis added)

The above definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the

> local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Supreme Court further explained:

> [i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she was performing at the time of his injury.

In other words, where a claimant has not reached MMI, TTD benefits are payable until such time his level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.

Id. at 580-581.

Based upon the holdings in W.L. Harper Const. Co., Inc. v. Baker, supra; Central Kentucky Steel v. Wise,

supra; and Magellan, supra, even though Davis may not have attained MMI, the ALJ must also determine whether Davis is precluded from performing his usual customary work, or the work he was performing at the time of the injury and is therefore entitled to a conformity of the award of TTD benefits.

Finally, on March 27, 2013, Davis filed a motion requesting sanctions be levied against Briggs & Stratton pursuant to KRS 342.310(1). Briggs & Stratton filed a response to the motion for sanctions on March 28, 2013. After reviewing the appeal, and being otherwise sufficiently advised, the request for sanctions is **DENIED**.

Accordingly, the appeal seeking review of the orders entered January 25, 2013 and February 15, 2013, by Hon. William J. Rudloff, Administrative Law Judge, is hereby **DISMISSED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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