

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 26, 2014

CLAIM NO. 201201278

CORNETTE'S LLC

PETITIONER

VS.

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

EVAN DELOACH
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
DISMISSING AND REMANDING

* * * * *

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

STIVERS, Member. Evan DeLoach ("DeLoach") has filed a motion to dismiss the appeal filed by Cornette's LLC ("Cornette's") asserting it has appealed from "interlocutory dispositions." Cornette's notice of appeal states it is appealing from the Interlocutory Amended Opinion and Order on Remand issued November 18, 2013, and the Interlocutory Opinion and Order on Reconsideration

issued December 27, 2013. Cornette's has filed a response asserting the ALJ issued a final and appealable order on March 1, 2013, in which he found DeLoach had a permanent impairment rating and therefore had a permanent disability. The decision was appealed on the issues of work-relatedness/causation, notice and the appropriate permanent disability benefit. It notes that on August 15, 2013, the Board remanded the claim to the ALJ for a limited purpose and did not grant the authority to issue an interlocutory opinion and reverse his previous findings. It contends the "issues of permanency" were finally decided in the ALJ's initial opinion, and neither the Board's opinion nor the case law give the ALJ the authority to change his mind on remand and enter an interlocutory ruling. Therefore, it argues the Board has jurisdiction to review the ALJ's subsequent order on remand to determine whether his decision is consistent with its previous instruction.

In the March 1, 2013, opinion and order, the ALJ provided a limited summary of DeLoach's testimony, the medical records and reports of Dr. Sirinibasan Periyanygam, and the report of Dr. Thomas O'Brien. With respect to Dr. O'Brien's medical report, the ALJ specifically noted as follows:

Dr. O'Brien stated that Mr. DeLoach had reached maximum medical improvement. Dr. O'Brien stated that regardless of causation issues, the plaintiff would have a 5% permanent partial impairment to the whole person under the AMA Guidelines, Fifth Edition. According to Dr. O'Brien, Mr. DeLoach does not require any restrictions on his activities.

In the findings of fact and conclusions of law, the ALJ stated as follows:

Based upon the totality of the evidence, including the plaintiff's testimony and the medical records of Dr. Periyamayagam, the treating physician, I make the factual determination that Mr. DeLoach sustained repetitive motion injuries or cumulative trauma to his back due to his work at the defendant's plant, which became disabling on or about May 24, 2011.

Under the heading "Benefit per KRS 342.730; temporary total disability," the ALJ then found as follows:

In this case, I found persuasive the medical reports of Dr. Periyamayagam regarding the plaintiff's cumulative trauma back trauma, and I also find persuasive the medical report of Dr. O'Brien, who found that and gave the opinion that the plaintiff will sustain a 5% permanent impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

The ALJ found DeLoach permanently totally disabled. Therefore, he awarded permanent total disability

benefits beginning May 24, 2011, and continuing for the duration of the disability. Cornette's appealed to this Board.

In an August 15, 2013, opinion, this Board vacated and remanded stating, in part, as follows:

In summary, we find nothing in the record which supports a finding of a cumulative trauma injury which manifested on May 24, 2011. The record reveals DeLoach was not advised on May 24, 2011, he had sustained an injury and the injury was work-related. The medical records are completely silent regarding a diagnosis of a cumulative trauma injury. Dr. Periyamayagam's records, upon which the ALJ relied, are completely silent regarding a diagnosis of a cumulative trauma injury which manifested on May 24, 2011. DeLoach's testimony clearly establishes he did not sustain a cumulative trauma injury. Therefore, the ALJ's determination DeLoach sustained a cumulative trauma back injury which became disabling on or about May 24, 2011, and the award of PTD and medical benefits must be vacated.

On remand, we believe the ALJ is permitted to determine whether DeLoach sustained a specific acute trauma injury while working for Cornette's. Both parties elicited testimony from DeLoach regarding specific injuries which occurred while he was moving a copier. DeLoach's testimony reveals he may have been injured when he and the general manager were delivering a 400 pound copier. Exhibit 1 introduced at the hearing contains documents generated by Cornette's indicating DeLoach may have been injured on

January 11, 2011, as there are notations regarding a potential injury on that date. Further, Dr. Naimoli's records indicate DeLoach may have been injured in March 2011 while lifting and pulling 400 pounds up the stairs. Therefore, although the Form 101 alleged a cumulative trauma injury, we believe the issue of whether DeLoach sustained a specific injury was tried by consent of the parties. As previously noted, DeLoach testified during his deposition and at the hearing he was injured on a specific date while moving a copier. Further, in his argument to the ALJ at the hearing, DeLoach argued, without objection, as follows:

MR. HAWES: . . .

But for argument sake, I think it's a cumulative case. I think that's obvious. But for argument sake, let's call it a specific injury. And we've got uncontroverted testimony that it happened on a specific date and the injury was witnessed by a supervisor. So when it happened becomes sort of immaterial at that point. But like I say, we probably would have had an injury date if the defendant had done what they were supposed to do.

Maybe this does work best as a specific injury case. We have uncontroverted testimony of the lifting incident with a dramatic increase in symptoms, and went off work after that, and was told he couldn't come back without 100%, and was fired. All

we're missing is the specific date.

And it looks like from the whole record here, what sketchy records they did keep on Mr. DeLoach [sic], shows that there were probably two injuries, if you want to get specific about it. One on 01/11/11, whatever that exhibit says, its' [sic] hen scratched all over the record that he had an injury on that date. And that's not the same, it's not described as the Cal-Maine incident. So there's probably two specific dramatic events if it's an injury case. And if you've got to have a date, then just go with the one they wrote down there, which they didn't turn into DWC.

Therefore, the claim will be remanded to the ALJ for a determination of whether DeLoach sustained a work-related acute trauma injury while in the course of his employment with Cornette's.

We also concluded the ALJ's analysis as to whether DeLoach was totally occupationally disabled was deficient explaining as follows:

Further, we find the ALJ did not provide the basis for his determination DeLoach is totally occupationally disabled. In making the determination DeLoach was totally disabled, the ALJ made the general statement he relied upon the severity of the injury, DeLoach's age, his work history, his education, and his testimony as well as

the opinions of Drs. Periyamayagam and O'Brien. Leaving aside the fact Dr. Periyamayagam did not diagnose an injury of any type, a review of his records reveals he indicated surgery was necessary but did not impose any physical restrictions nor provide any limitations on DeLoach's ability to work. In short, aside from stating DeLoach needed surgery, Dr. Periyamayagam's records contain no opinions.

. . .

In summary, the ALJ did not identify substantial evidence in the record which supports his finding of permanent total disability. Dr. Periyamayagam's opinions do not support the ALJ's decision, and Dr. O'Brien's opinions are contrary to the ALJ's conclusion DeLoach is totally occupationally disabled. Similarly, the mere reference to the various factors and DeLoach's testimony without further explanation and citation to specific testimony does not provide a sufficient basis for the ALJ's decision.

In remanding, we instructed:

Accordingly, the ALJ's determination DeLoach sustained a cumulative trauma injury while working for Cornette's which became disabling on May 24, 2011, and the award of PTD benefits as set forth in the March 1, 2013, opinion and order, and the April 8, 2013, order ruling on Cornett's petition for reconsideration are **VACATED**. This claim is **REMANDED** for additional findings of fact and rendition of an amended opinion consistent with the views expressed herein. The ALJ shall specifically address whether DeLoach sustained an

acute trauma injury and provided timely notice of the injury. In his opinion, the ALJ shall cite to the specific evidence upon which he relied, in the form of findings of fact, so as to advise the parties and this Board of the basis for his decision. Further, should the ALJ determine DeLoach sustained a work-related injury and provided timely notice of the injury, he shall then revisit the issue of DeLoach's occupational disability in accordance with the views expressed herein.

The record reflects no additional evidence was introduced. However, the record reflects the parties again submitted briefs. On November 18, 2013, the ALJ entered the Interlocutory Amended Opinion and Order on Remand. A review of the Summary of Evidence contained within the subsequent opinion reflects it is identical to the Summary of Evidence contained in the March 1, 2013, opinion and order. In this opinion, the ALJ briefly summarized the testimony of DeLoach and the medical records of Dr. Wayne Naimoli, Pain Associates of North Tennessee, Jennie Stuart Medical Center, and Dr. Periyanyagam. The ALJ also discussed the report of Dr. O'Brien. Concerning the issue of work-relatedness and causation in the Findings of Fact and Conclusions of Law, the ALJ stated as follows:

I saw and heard the plaintiff Mr. DeLoach testify at the Final Hearing and found him to be a credible and convincing witness. Based on the

plaintiff's sworn testimony, as summarized above, and the medical records from Dr. Wayne Naimoli, as summarized above, as well as the medical records from Pain Associates of North Tennessee, as summarized above, and the medical records from Jennie Stuart Medical Center, as summarized in detail above, all of which evidence was persuasive and compelling, I make the factual determination that the plaintiff Mr. DeLoach sustained an acute trauma injury to his back and left lower extremity due to his work accident in March, 2011, as documented in the above evidence.

The ALJ determined DeLoach provided due and timely notice of the injury. However, the ALJ awarded only temporary total disability ("TTD") benefits reasoning as follows:

Based on the above-summarized sworn testimony of the plaintiff and the medical evidence from Dr. Wayne Naimoli, the plaintiff's treating physician, and the medical evidence from Pain Associates of North Tennessee, as well as the medical evidence from Jennie Stuart Medical Center, all of which is summarized above, and the medical evidence from Dr. Sirinibasan Periyanyagam, the plaintiff's treating physician, which is summarized above, I make the determination that the plaintiff has been temporarily totally disabled since May 24, 2011, the date he last worked for the defendant, and that the plaintiff Mr. DeLoach has not reached maximum medical improvement from his work injuries and has not reached a level of improvement that would permit a return to his employment.

In the order and award section of his opinion, the ALJ awarded TTD benefits beginning May 25, 2011, and continuing for the duration of DeLoach's temporary total disability. The November 18, 2013, order states this is an interlocutory opinion and award and is not final or appealable.

As a matter of law, the ALJ's November 18, 2013, opinion is interlocutory and does not represent a final and appealable order. 803 KAR 25:010, § 21(2)(a), provides as follows: "[w]ithin thirty (30) days of the date of 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, § 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) state 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 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. *Cf. KI USA Corp. v. Hall*, 3 S.W.3d 355 (Ky. 1999); *Ramada Inn v. Thomas*, 892 S.W.2d 593 (Ky. 1995); *Transit Authority of River City v. Saling*, 774 S.W.2d 468 (Ky. App. 1980).

The ALJ's November 18, 2013, decision and subsequent order of December 27, 2013, ruling on the petition for reconsideration meet none of these requirements. The ALJ's opinion does not operate to

terminate the action. Moreover, the ALJ's ruling does not act to finally decide all outstanding issues, nor does it operate to determine all rights of Cornette's and DeLoach so as to divest the ALJ once and for all of authority to decide the overall merits of the case. Instead, the ALJ has yet to decide DeLoach's entitlement to permanent income benefits and medical benefits. As a matter of law, the November 18, 2013, decision and subsequent order ruling on the petition for reconsideration must be deemed interlocutory. Consequently, the ALJ as fact-finder, not this Board, retains jurisdiction. See KRS 342.275.

That said, the ALJ's previous opinion of March 1, 2013, as to certain issues including the attainment of maximum medical improvement ("MMI") is the law of the case. The ALJ specifically found DeLoach sustained a permanent impairment to the body as whole as a result of a cumulative trauma injury. We vacated because there was no evidence supporting a finding of a cumulative trauma injury. However, the ALJ concluded in the original opinion and award DeLoach had attained MMI as he stated he was persuaded by "the medical report of Dr. O'Brien." Significantly, in summarizing Dr. O'Brien's report in the March 1, 2013, opinion and order, the ALJ specifically

noted Dr. O'Brien stated DeLoach had reached MMI. Therefore, the issue of MMI is no longer in dispute.

Further, this Board remanded with specific instructions to determine whether DeLoach sustained an acute trauma injury and provided timely notice of the injury. In the event the ALJ found DeLoach sustained a work-related injury and provided timely notice of the injury, the ALJ was to revisit the issue of DeLoach's occupational disability. As the ALJ previously relied upon the opinions of Dr. O'Brien who determined DeLoach had already reached MMI, the ALJ was not permitted to enter an open-ended award of TTD benefits in the November 18, 2013, decision. In addition, if the ALJ determined DeLoach sustained a work-related injury and provided timely notice, the ALJ was also to determine, based on the record as it currently existed, the extent, if any, of DeLoach's permanent occupational disability. Even though we are compelled to dismiss the appeal, we have serious reservations about the propriety of the award of open-ended TTD benefits and conclude the ALJ did not comply with this Board's directives contained in the August 15, 2013, opinion.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED the above-styled appeal is **DISMISSED**. This matter is

REMANDED to the ALJ for an immediate rendition of an opinion in conformity with the views expressed in the Board's August 15, 2013, opinion. It is strongly suggested to the ALJ that he vacate the open-ended award of TTD benefits as that award is not in conformity with the Board's previous instructions.

FRANKLIN STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS IN PART, DISSENTS IN PART, AND FURNISHES A SEPARATE OPINION.

CHAIRMAN, ALVEY. I respectfully concur in part, and dissent in part. This Board previously remanded this claim to the ALJ in a decision entered August 15, 2013, as outlined above by the majority. However, we did not grant the ALJ the opportunity to determine whether an award of interlocutory relief was appropriate. I agree with Cornette's LLC, the remand was for the ALJ to make limited and specific findings, and did not open the entire claim for review. Significantly, at no time did DeLoach file a motion to reopen to seek such award.

I agree the claim should be remanded, however in this limited instance, the interlocutory relief award should be set aside since the ALJ had no authority to make such award. The ALJ has clearly attempted to subvert and undermine the authority of this Board, which is not taken lightly. The majority has pointed to the fact the award is interlocutory and therefore not appealable. While this is ordinarily true, in this limited instance, it is not.

The previous decision of this Board was not appealed and is therefore the law of the case. In Inman v. Inman, 648 S.W. 2d 847 (Ky. 1982) the Supreme Court said:

The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact. "As the term 'law of the case' is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision

of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court." [citation omitted]

Id. at 849.

Therefore, our direction to the ALJ is the law of the case, and the ALJ was only permitted to address what was authorized by this Board.

When the ALJ rendered his decision on March 1, 2013, his discretion to award interlocutory relief was curtailed. This was not revived upon this Board's limited remand. Therefore, in this limited circumstance only, I would set aside the order granting interlocutory relief and remand to the ALJ for determination of the issues previously directed by this Board.

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