Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 11, 2014

CLAIM NO. 201300080

HAZARD ARH PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

MELISSA LEACH
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Hazard ARH seeks review of the March 11, 2014, Opinion, Award, and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") rendered on remand in which the ALJ determined Melissa Leach ("Leach") has a 16% permanent impairment due to bilateral carpal tunnel syndrome. Permanent partial disability benefits, temporary total disability ("TTD") benefits, and medical benefits

were awarded. Hazard ARH also appeals from the March 31, 2014, Order overruling its combined petition for reconsideration, motion to vacate the opinion, award, and order, and motion to place the claim in abeyance. In that same order, the ALJ sustained Leach's motion to strike the medical records of Dr. Steven Carawan filed by Hazard ARH.

In our January 8, 2014, Opinion Vacating and Remanding, we summarized the relevant facts as follows:

> Leach filed a Form 101 on January 18, 2013 alleging bilateral carpal tunnel resulting from repetitive use of her hands as a medical transcriptionist for Hazard ARH beginning in 2005, which manifested on July 14, 2012. She had previously worked in a similar position beginning in 1997. In support of her claim, Leach filed the August 8, 2012 record from Hazard ARH noting she had experienced tingling and numbness in her right hand for several years, which was getting worse. Nerve conduction studies from that visit demonstrated severe right carpal tunnel syndrome, for which surgery was performed.
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> Leach testified by deposition on April 15, 2013, and at the hearing held June 24, 2013. Leach was born on January 23, 1978, and is right hand dominant. She is a high school graduate, and completed vocational training as an administrative assistant. She continues to work for Hazard ARH, which she stated requires typing eight hours per day, six days per week. She began experiencing symptoms of mild pain six months before it became severe. She has had surgery on the right wrist, but not on the left. She has continued to experience pain in

both wrists, and her symptoms are worse at the end of the day, with numbness and tingling every night. She wears splints on both wrists when the symptoms get bad, and she wears them to sleep at night. She expressed concern over her ability to perform her job into the indefinite future.

Leach submitted as evidence Dr. Owen's report from his March 1, 2013 evaluation. He noted she was initially evaluated for her complaints in July 2012 for complaints of cramping and pain in her fingers. He noted left hand complaints, although not as severe as the right. He assessed her problems were due to the cumulative trauma of her job. Although he opined Leach had not yet reached MMI, Dr. Owen assessed a 16% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), and recommended additional testing and treatment. Regarding the impairment rating, Dr. Owen stated as follows:

> Maximum medical improvement has not been reached. The 5th Edition Guides shows criteria for both postop EMG as well as one year from time of injury for evaluation of motor deficit. It should be noted in this situation that was only 2% upper extremity impairment that would potentially have been changed. The sensory abnormality would most certainly have been back to as good as it is going to get by six months and, therefore, I think the sensory aspect of it should be considered at maximum medical improvement. The range of

> motion of the wrists has not been afforded appropriate physical therapy techniques and, therefore, that may very well change as well given appropriate treatment. **If that treatment is not forthcoming, then the impairment rating as stated would be the appropriate rating.**
> (Emphasis added).

Dr. Owen recommended restrictions of avoiding activity which provokes pain or numbness in the involved fingers.

Hazard ARH filed the report of Dr. Ronald Burgess who evaluated Leach on May 1, 2013. Dr. Burgess stated Leach had reached MMI, and assessed a 1% impairment rating based upon the AMA Guides. He stated Leach has idiopathic carpal tunnel syndrome caused by her gender and morbid obesity. He stated the use of a keyboard is not a risk factor for developing carpal tunnel syndrome and Leach can continue to work in her current job.

A benefit review conference ("BRC") was held on June 11, 2013. The BRC order and memorandum reflects the contested issues were benefits per KRS 342.730(2); work-relatedness/causation; notice; unpaid or contested medical expenses; injury as defined the Kentucky Worker's Compensation Act; and entitlement to temporary total disability benefits ("TTD").

In the August 12, 2013 opinion, award and order, the ALJ found Leach had sustained a work-related injury and awarded TTD benefits from August 8, 2012 to September 19, 2012. The ALJ also awarded PPD benefits based upon the 16%

impairment rating despite referencing Dr. Owen's statement Leach had not reached MMI.

Hazard ARH filed a petition for reconsideration arguing the ALJ erred in relying upon the 16% impairment rating because Dr. Owen admitted she had not reached MMI, and therefore the rating was invalid. Hazard ARH cited to the unreported case of the Kentucky Supreme Court, Stevens v. Coal Transport, 2003 WL 1478073 (Ky. Mar. 20, 2003)(No. 2002-SC-0259-WC), as modified (Mar. 25, 2003), which states, "AMA impairments are not assigned until after the injured worker has reached maximum medical improvement following an injury."

In the order on reconsideration issued September 23, 2013, the ALJ amended his decision by finding as follows:

> 1. Page 5, Section 6 ARH Regional Medical Center of the ALJ's SUMMARY OF THE EVIDENCE is HEREBY stricken from the OPINION, AWARD AND ORDER rendered on August 12, 2013.
>
> 2. Page 7 of the ALJ's FINDINGS OF FACT AND CONCLUSIONS OF LAW shall be amended as follows: Pursuant to the opinion of Dr. Burgess she warrants a 1% impairment rating. Dr. Owen's 16% impairment rating is inappropriate as the plaintiff had not reached maximum medical improvement when he offered his opinion regarding same.

> 3. Page 8 of the ALJ's FINDINGS OF FACT AND CONCLUSIONS OF LAW shall be amended as follows: the plaintiff's permanent partial disability award shall be $612.00 (AWW) x 2/3 (workers' compensation rate) x .01 (impairment rating) x .65 (grid factor) = $2.65 per week, for 425 weeks from July 14, 2012, and excluding all periods of temporary total disability benefits actually owed.
>
> 4. Page 8, Section 1 of the ALJ's ORDER shall be amended as follows: The plaintiff, Melissa Leach, shall recover of the Defendant-employer, Hazard ARH, and/or its insurance carrier, the sum of $2.65 per week, as permanent partial disability benefits, from July 14, 2012, for 425 weeks, and excluding any periods of temporary total disability benefits, with 12% interest on any past due portions and with the Defendant taking a credit for any benefits paid.

In vacating and remanding, we stated as follows:

> Here, the ALJ initially awarded benefits based upon the impairment rating assessed by Dr. Owen, despite noting Leach had not reached MMI. In his order on reconsideration he stated he erred in relying upon Dr. Owen's impairment rating, and amended his award to rely upon the rating assessed by Dr. Burgess.

> Dr. Owen opined Leach had not reached MMI because she needed additional physical therapy and an EMG. He further stated if this treatment was not forthcoming, the 16% impairment rating he assessed was appropriate. In her brief, Leach asserted the recommended treatment and testing were not provided. Because the additional treatment was not forthcoming, it would be reasonable to infer Leach had indeed reached MMI, and the impairment rating assessed by Dr. Owen can be relied upon.
>
> On remand, the ALJ is directed to determine whether the additional treatment recommended by Dr. Owen was provided. If not, he may determine Leach has reached MMI, and therefore he may award PPD benefits based upon either the impairment rating assessed by Dr. Owen, or the one assessed by Dr. Burgess. This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

On remand, the ALJ entered the following findings:

> This matter is on Remand from the Kentucky Workers' Compensation Board. To simplify this Remand Opinion a brief history of the claim would be helpful. Essentially, the undersigned initially found the 16% impairment rating assigned by Dr. Owen to be the most accurate rating. On Reconsideration I determined that, as a matter of law, the rating assigned by Dr. Owen could not be used because he did not believe the Plaintiff was at MMI. The Board has determined that I can make a finding that the Plaintiff is at MMI and, if

> so, the rating assigned by Dr. Owen can be used.
>
> In fact because the Plaintiff never had the additional recommended treatment she is at MMI. Accordingly, and in keeping with my initial inclinations regarding the facts, which I erroneously believed I could not rely upon as a matter of law, the Plaintiff has a 16% impairment rating.
>
> Leach's permanent partial disability award shall be 612.00 (AWW) x 2/3 (workers' compensation rate) x .16 (impairment rating) x 1.00 (grid factor) = $65.28 a week, for 425 weeks, from July 14, 2012, and excluding all periods of temporary total disability benefits actually owed. She is also entitled to all reasonable and necessary, work-related medical expenses for the bilateral carpal tunnel syndrome.

Hazard ARH filed a petition for reconsideration, motion to vacate the opinion, award, and order, and a motion to place the claim in abeyance. It asserted the ALJ erroneously found Leach did not undergo the additional recommended treatment for her bilateral carpal tunnel syndrome and she was at maximum medical improvement ("MMI"). It observed that pursuant to the direction of Dr. Carawan, Leach was to undergo electrodiagnostic nerve studies the day after the final hearing. It attached the medical records of Dr. Carawan representing that the records reflect Leach underwent those studies as scheduled

and additional electrodiagnostic studies on her left arm in January 2014. Hazard ARH asserted Leach was scheduled to undergo left carpal tunnel release surgery on March 17, 2014. Consequently, the ALJ's finding Leach had not received the additional treatment recommended by Dr. Owen was patent error.

In addition, contending the surgery could affect the permanency of Leach's condition, Hazard ARH argued any finding as to permanent impairment is premature. Hazard ARH represented it contacted Dr. Carawan's office and authorized the left carpal tunnel release surgery which took place two days prior to the filing of its petition for reconsideration and motions. It also represented it is now paying TTD benefits pending recovery from surgery. Consequently, Hazard ARH requested the ALJ's ruling regarding the permanency of Leach's condition be vacated, the claim placed in abeyance pending attainment of MMI, and a subsequent proof schedule be set to address the extent and duration of Leach's disability after she has recovered from the March 17, 2014, surgery.

Leach filed a response asserting there is no provision in the Workers' Compensation Act for the relief sought by Hazard ARH. She also asserted the diagnostic tests and medical treatment Hazard ARH had finally approved

after the claim was under submission was irrelevant. Since there is no provision permitting Hazard ARH to file additional evidence, it requested the attached medical records of Dr. Carawan be stricken from the record.

On March 31, 2014, the ALJ overruled Hazard ARH's petition for reconsideration, motion to vacate, and motion to place the claim in abeyance. The ALJ sustained Leach's motion to strike Dr. Carawan's medical records and ordered them removed from the record and returned to Hazard ARH.

On appeal, Hazard ARH asserts the ALJ erred in relying upon the 16% impairment assessed by Dr. Owen. It maintains the primary issue on appeal is whether the ALJ's decision amending the award is supported by substantial evidence. It argues the ALJ's finding on remand that Leach never received the treatment recommended by Dr. Owen is erroneous and is not based on reliable, probative, and material evidence. Hazard ARH asserts the Board directed the ALJ to determine whether the additional treatment recommended by Dr. Owen was provided. If the ALJ determined treatment had not been provided, he could find Leach reached MMI and award PPD benefits based upon the impairment rating of Dr. Owen or Dr. Ronald Burgess. However, it notes the Board did not advise the ALJ how to

proceed if he found Leach received the recommended treatment.

Hazard ARH cites to Leach's June 24, 2013, hearing testimony that pursuant to Dr. Carawan's direction she was scheduled to undergo additional electrodiagnostic nerve studies the day after the hearing. It asserts in spite of this testimony, on remand the ALJ found Leach was at MMI and relied upon the 16% impairment rating of Dr. Owen. Hazard ARH contends the ALJ's award was based on the mistaken belief Leach had not undergone the additional treatment recommended by Dr. Owen and his finding to that effect is erroneous. It notes Dr. Carawan's medical records indicate she underwent additional diagnostic testing on both arms and ultimately left carpal tunnel release surgery. Hazard ARH maintains Dr. Carawan's records were received on March 19, 2014, and immediately filed in evidence. It argues these records could not have been filed prior to submission of the claim as the records did not exist at that time. Since Leach received the additional treatment as contemplated by Dr. Owen, Hazard ARH argues the ALJ could not rely upon Dr. Owen's impairment rating as Leach was not at MMI when the impairment was assessed. Therefore, the Board should vacate the ALJ's decision and remand the claim to the ALJ

with instructions to reinstate the award of PPD benefits based on the 1% impairment assessed by Dr. Burgess. Alternatively, Hazard ARH requests the Board vacate the decision and remand with instructions to the ALJ to find Leach has not reached MMI, place the claim in abeyance pending attainment of MMI, and thereafter enter a decision on the issue of extent and duration of disability.

Next, Hazard ARH argues the evidence of record indicates the issue of extent and duration of Leach's work-related disability have not been sufficiently developed and should be remanded for additional proof. It again contends Leach's testimony at the final hearing reveals she received the additional treatment contemplated by Dr. Owen and therefore she was not at MMI when seen by him. Consequently, on remand the ALJ should be instructed to find Leach has not reached MMI and to permit the parties to introduce additional evidence concerning the issues of MMI and the extent and duration of Leach's disability.

Finally, Hazard ARH argues striking the medical records of Dr. Carawan was an abuse of discretion as the medical records constitute newly discovered evidence. It posits newly discovered evidence is evidence which could not have been discovered by due diligence and presented for consideration prior to the ultimate decision. Hazard ARH

maintains that two days after it received Dr. Carawan's medical records, the records were filed into evidence. It asserts these records could not have been discovered or presented prior to the ALJ's initial decision since they were not in existence. It again argues the ALJ's finding Leach did not receive the recommended treatment by Dr. Owen is erroneous as Leach's hearing testimony and Dr. Carawan's records establish otherwise. Hazard ARH maintains the medical records are vital to a proper decision. Because striking Dr. Carawan's records constitutes an abuse of discretion, it advocates we vacate the decision, and remand the claim to the ALJ with instructions to consider these records in rendering his decision.

We begin by observing our January 8, 2014, decision vacating and remanding was not appealed and is the law of the case. Consequently, on remand the ALJ was bound by our instructions. The Supreme Court in McGuire v. Coal Ventures Holding Company, Inc., 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published, described the law of the case doctrine as follows:

> The law of the case doctrine concerns the preclusive effect of judicial determinations in the course of a single litigation before a final judgment. [footnote omitted] As applied to workers' compensation cases, a final decision of law by an appellate court

> [footnote omitted] or the Board [footnote omitted] establishes the law of the case and must be followed in all later proceedings in the same case.

Slip Op. at 6.

In the case *sub judice*, on remand the ALJ did as directed. He resolved whether Leach received the additional recommended treatment, was at MMI, and Dr. Owen's impairment rating could be utilized. Hazard ARH asserts based on Leach's testimony she was scheduled to undergo electrodiagnostic nerve studies the day after her hearing, she received the treatment recommended by Dr. Owen and thus was not at MMI when examined by Dr. Owen. Regarding MMI, Dr. Owen stated as follows:

> Maximum medical improvement has not been reached. The 5th Edition Guides shows criteria for both postop EMG as well as one year from time of injury for evaluation of motor deficit. It should be noted in this situation that was only 2% upper extremity impairment that would potentially have been changed. The sensory abnormality would most certainly have been back to as good as it is going to get by six months and, therefore, I think the sensory aspect of it should be considered at maximum medical improvement. The range of motion of the wrists has not been afforded appropriate physical therapy techniques and, therefore, that may very well change as well given appropriate treatment. If that treatment is not forthcoming, then the impairment

> rating, as stated, would be the appropriate rating.

In our previous opinion we stated that Dr. Owen opined Leach had not reached MMI because she needed additional physical therapy and an EMG, but if this treatment was not forthcoming the 16% impairment rating was appropriate. However, a review of the above quote from Dr. Owen's report leads us to conclude physical therapy was the only additional treatment Dr. Owen felt was appropriate. He specifically noted the sensory aspect of her abnormality should be considered at MMI. Thus, we believe undergoing an EMG did not prevent Leach from attaining MMI.

The above aside, the ALJ was to enter an opinion and order based on the record. The ALJ determined Leach had not received the additional recommended treatment. There is nothing in the record indicating that at the time of the ALJ's March 11, 2014, decision Leach had actually undergone the recommended treatment. The record reveals that after Dr. Owen's report was filed in the record on March 21, 2013, Leach did not undergo any further treatment. Leach's April 15, 2013, deposition testimony reveals she received no additional treatment. At the June 24, 2013, hearing, Leach testified she was to "undergo a nerve study" the next day. On cross-examination, Hazard

ARH did not question Leach in any manner regarding the nerve study scheduled for the next day. It only inquired as to the name of her new physician. A review of its brief to the ALJ reveals Hazard ARH did not seek to hold the claim in abeyance pending the outcome of the study. Therefore, the reliance upon Dr. Owen's impairment rating was appropriate.

The record also reveals our decision became final on February 10, 2014.[1] The ALJ rendered an opinion on March 11, 2014. Between February 10, 2014, and March 11, 2014, Hazard ARH made no attempt to advise the ALJ of any additional treatment received by Leach. Rather, it filed the medical records after it received an adverse decision. Significantly, Hazard ARH was well aware at the June 4, 2013, hearing that Leach was to undergo an additional nerve study the next day and made no attempt to introduce into evidence the results of the study prior to entry of the August 12, 2013, opinion. Similarly, it did not request the ALJ to set aside his directive regarding the filing of briefs and to refrain from taking the claim under submission. We find Hazard ARH's concern for Leach's wellbeing to be rather disingenuous at this juncture, since

[1] As February 7, 2014, fell on Saturday, Monday February 9, 2014, was the last day to file a notice of appeal.

it showed no such concern after learning at the June 24, 2013, hearing that Leach was to undergo an additional nerve study the next day. The record establishes that as of the time of the June 2013 hearing, Leach had not undergone any of the treatment recommended by Dr. Owen. Therefore, the ALJ's determination Leach was at MMI when seen by Dr. Owen is supported by substantial evidence and his determination Leach has a 16% impairment due to the work injury will not be disturbed.

We find no merit in Hazard ARH's second argument that the record indicates the extent and duration of Leach's work-related injury has not been sufficiently developed. The parties had every opportunity to introduce medical proof. Even after learning at the June 24, 2013, hearing that Leach was to undergo an additional diagnostic study the next day, Hazard ARH did not request to have the opportunity to obtain the results of the study and/or seek to prevent the claim from standing submitted for a decision. Hazard ARH cannot now seek to further explore this issue when it had the opportunity at the hearing to delay submission of the claim based on Leach's testimony or to file the appropriate motion seeking this relief shortly after the hearing. The transcript of the July 24, 2013, hearing reveals the ALJ stated briefs were to be filed no

later than July 24, 2013, and the matter would stand submitted as of July 25, 2013. Hazard ARH had over a month after the hearing to seek to submit additional evidence and to request the ALJ not take the claim under submission. It did not. As such, it cannot now seek to do what it had the opportunity to do at the June 24, 2013, hearing or shortly thereafter. Thus, we decline to remand the claim with instructions to find Leach had not reached MMI and permit the parties to develop further proof on the issues of MMI and the extent of Leach's occupational disability.

Finally, we find no error in striking Dr. Carawan's medical records. Hazard ARH's argument that the medical records constitute newly discovered evidence misses the point. KRS 342.125 reads, in relevant part, as follows:

> (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:
>
> . . .
>
> (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence.

The above-language does not apply in the case *sub judice* as the proceeding on remand was not a reopening or review of a previous award. Rather, the claim was

remanded for a specific finding by the ALJ and a determination of Leach's occupational disability based upon that finding. Hazard ARH's attempt to introduce Dr. Carawan's records was improper, and the ALJ, within his discretion, ordered the records stricken from the record as they had no bearing on the task he was to undertake on remand.

Consistent with our decision, Hazard ARH is not prevented from filing a subsequent motion pursuant to KRS 342.125 (d) should it believe this evidence causes a change in Leach's disability due to an improvement of impairment. As previously noted, we find the assertion this was newly discovered evidence to be disingenuous as Hazard ARH was aware on the date of the June 24, 2013, hearing that a diagnostic study would be performed the next day. We find nothing in the record indicating Hazard ARH took any steps after the hearing to secure the records pertaining to the test.

That said, we have reviewed the records attached to Hazard ARH's combination petition for reconsideration, motion to vacate, and motion to place the claim in abeyance. Those documents include in chronological order, the EMG-NCV findings pertaining to the test performed on June 25, 2013; the December 2, 2013, progress note with

the reference “patient is referred here by Dr. Carawan for left upper extremity NCV EMG;” the January 9, 2014, progress note revealing “patient is here for upper extremity NCV EMG;” the EMG-NCV findings pertaining to the test performed on January 9, 2014; the February 18, 2014, progress note; the “orthopedics pre-op orders” dated March 5, 2014; and the provider approval letter concerning left carpal tunnel release surgery dated March 12, 2014. The findings concerning the EMG-NCV tests conducted on June 26, 2013, and January 9, 2014, were generated well before the March 11, 2014, Opinion, Award, and Order. Further, the tests were performed at Hazard ARH’s facility. Hazard ARH could have sought the records regarding the NCV/EMG test results well before the ALJ entered his decision on remand. The same is true for Leach’s December 12, 2013, January 9, 2014, and February 18, 2014, progress notes. Consequently, Hazard ARH’s argument these documents constitute newly discovered evidence rings hollow. Finding no error in the ALJ’s order striking those records, the decision of the ALJ on this issue will is affirmed.

Accordingly, the March 11, 2014, Opinion, Award, and Order and the March 31, 2014, Order overruling Hazard ARH’s petition for reconsideration, motion to vacate, and

motion to place the claim in abeyance and sustaining Leach's motion to strike from the record the medical records of Dr. Carawan are **AFFIRMED**.

ALL CONCUR.

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