Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 21, 2013

CLAIM NO. 201194456

JACOB JEANETTE PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

BIRKHEAD HEATING & AIR
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Jacob Jeanette ("Jeanette") appeals from the March 6, 2013, Order setting aside the February 8, 2013, Order granting Jeanette's Motion for Interlocutory Relief, the June 28, 2013, opinion and order dismissing his claim, and the August 1, 2013, order ruling on his

petition for reconsideration of Hon. Steven G. Bolton, Administrative Law Judge ("ALJ").

The Form 101 alleges on February 28, 2011, while in the employ of Birkhead Heating and Air ("Birkhead"), Jeanette sustained the following injuries:

> Claimant sustained work related injury to his Neck, Back and Right Knee when the company van in which he was a passenger was involved in a motor vehicle accident on February 28, 2011. Claimant suffered a permanent work related injury as defined by Kentucky's Workers' Compensation Act (KRS 342), resulting in a permanent impairment rating pursuant to the 5th Edition of the *AMA Guides*.

On November 8, 2012, Jeanette filed a "Motion For Interlocutory Relief to Compel Medical Treatment and Temporary Total Disability Benefits and to Hold Claim in Abeyance or, in the Alternative, to Bifurcate on the Issues of Entitlement to Recommend Medical Treatment and Temporary Total Disability Benefits." Jeanette requested the ALJ to compel Birkhead to authorize payment for a lumbar MRI, a lumbar myelogram/post-myelogram CT scan, and certain treatment recommended by Dr. Lisa Scott and Dr. Wayne Villanueva. He also sought to compel Birkhead to pay past-due and continuing temporary total disability ("TTD") benefits. Additionally, Jeanette requested the ALJ to hold

the claim in abeyance. In the alternative, Jeanette requested the ALJ to bifurcate the claim to decide the issues of entitlement to medical treatment and TTD benefits.

By order dated February 8, 2013, the ALJ granted Jeanette's November 8, 2012, motion to compel authorization of medical treatment and payment of past-due and continuing TTD benefits. The claim was placed in abeyance.

On February 20, 2013, Birkhead filed a "Motion to Set Aside February 8, 2013 Order or Alternatively, Motion to Schedule Telephonic Conference to Discuss February 8, 2013, Order." In the motion, Birkhead argued, in part, as follows:

> This Administrative Law Judge issued a one sentence Order on February 8, 2013 sustaining plaintiff's Motion for Interlocutory Relief. There is no indication in this Order that this Administrative Law Judge reviewed defendant's Response to plaintiff's Motion for Interlocutory Relief. Accordingly, counsel has attached a copy of its Response so that this Administrative Law Judge can review it. Further, defendant has attached a copy of a January 29, 2013 IME report from Dr. Thomas Loeb to this Response. This report was not available when this ALJ entered his Interlocutory Order.
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> ...
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> Dr. Loeb believed that it was significant that claimant's symptoms

were initially in his left lower extremity and 18 months later his symptoms were in his right lower extremity. He also believed that it was significant that there was a 17 month gap in treatment during which claimant worked for two subsequent employers. Dr. Loeb critiqued Dr. Barefoot's report as Dr. Barefoot failed to acknowledge that claimant's initial symptoms were to his left side. He also believed that Dr. Barefoot was remiss in failing to acknowledge that claimant's initial symptoms resolved within three weeks and that he returned to full duty work and then had recurrent symptoms on the opposite side. Dr. Loeb concluded that claimant's current condition 'is totally unrelated to the original work injury'. He noted that the only condition related to the motor vehicle accident would be a transient sprain.

As noted above, there are literally tens of thousands of dollars in indemnity and medical benefits at stake. The award of interlocutory benefits is inappropriate in this claim as there are multiple issues to address. The main issue in this claim is whether there is a causal relationship between claimant's current condition and the original motor vehicle accident. This is not an issue that should be decided on an interlocutory basis. This decision was made without this Administrative Law Judge even having the opportunity to review the IME report of Dr. Loeb. Defendant has no objection to the Interlocutory Order being set aside and the claim being bifurcated on compensability issues. However, an interlocutory award precludes a full litigation of the issues and precludes defendant from a defense. It is not

> clear from the Order whether this Administrative Law Judge even reviewed claimant's deposition testimony. Defendant respectfully submits that the Interlocutory Order should be set aside. The extraordinary remedy of interlocutory relief is not appropriate in a situation in which there are material issues of fact.

Attached to Birkhead's motion is the January 29, 2013, independent medical examination ("IME") of Dr. Thomas M. Loeb. In this report, Dr. Loeb opined as follows:

> **2. Whether any condition diagnosed is causally related to the motor vehicle collision on February 28, 2011?** The only condition related would be the transient sprain to the lumbar spine on February 28, 2011.

By order dated March 6, 2013, the ALJ ruled as follows:

> The above-captioned matters come on for consideration by the ALJ pursuant to Plaintiff's *Motion for Interlocutory Relief* filed herein on November 8, 2012 to which a response was filed by the Defendant Employer on December 5, 2012. A supplemental Motion for Order, etc. was filed on behalf of the Plaintiff on January 7, 2007 to which no response was filed. Consequently, the ALJ took the matter under consideration, noted the opinions of Dr. Villanueva and Dr. Barefoot, both of whom found that Plaintiff's medical problems arose out of the work-related automobile accident, and entered an interlocutory order on February 8, 2013 requiring the Defendant Employer to pay for Plaintiff's on-going medical expenses

(for which no Form 112 has as yet been filed by either party) and further compelling the payment of TTD. At the time, the ALJ was not aware that the Plaintiff had undergone lumbar spine surgery on December 27, 2012.

On February 20, 2013, the Defendant Employer filed a Motion to Set Aside the February 8 Order, to which a Response has been made by Defendant Employer on February 26, 2013.

The definition of "Temporary Total Disability" or "TTD" is set out at KRS 342.0011(11)(a). TTD "means the 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".

The record does reflect that the Plaintiff is unable to hold his employment as a service technician, and there is no medical evidence yet introduced that would support a finding pro or con that he has not reached a level of improvement that would permit a return to employment. Workers compensation is a statutory scheme, and the relief for injured workers is provided by statute. It appears from the face of the record in front of the ALJ that the appropriate remedy for Plaintiff's present situation is the award of temporary total disability benefits (TTD).

However, the work relatedness of the injury for which the Plaintiff is being treated is at issue, as well as the extent and duration of Plaintiff's work related injury.

For those reasons, the Defendant's Motion is partially GRANTED and

> partially DENIED, as well as the Plaintiff's Motion, which is also partially GRANTED and partially DENIED.
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> IT IS THEREFORE ORDERED as follows:
>
> 1. The ALJ's Order of February 8, 2013 is hereby set aside.
> 2. The Plaintiff's Motion of November 8, 2012 is partially GRANTED, to the extent that the issue of work relatedness/causation of Plaintiff's condition (including entitlement to recommended medical treatment and temporary total disability benefits) is hereby bifurcated. The parties shall submit briefs on this issue on or before the date of the benefit review conference scheduled herein.
> 3. This case is removed from abeyance, and proof time shall remain open for both parties until the BRC.
> 4. This matter is scheduled for a benefit review conference at Louisville, KY at 3:00 p.m., local time, April 10, 2013, so an informal telephonic conference is unnecessary under the circumstances.
> 5. All other matters are DENIED and passed to the merits of the case.

On March 27, 2013, Birkhead filed a Form 112 Medical Fee Dispute identifying the nature of the dispute as follows:

> Defendant has accepted this claim as compensable to the extent of a transient sprain/strain injury, the effects of which resolved no later than March 16, 2011. Defendant has denied compensability of all medical treatment after March 16, 2011.

The April 10, 2013, Benefit Review Conference ("BRC") order lists the following contested issues: work-relatedness/causation, unpaid or contested medical expenses/treatment, injury as defined by the ACT, and TTD. Additionally, under "other" is "case bifurcated." TTD was paid from March 1, 2011, through March 20, 2011, for a total of $793.40.

On May 14, 2013, Birkhead filed a "First Amended Medical Fee Dispute" in which the nature of the dispute was described exactly as it had been in the March 27, 2013, Form 112.

On June 28, 2013, the ALJ entered an opinion and order finding Jeanette:

> [F]ailed to prove within a reasonable degree of medical probability that his current disability is the result of the work related accident of February 28, 2011 and there is no other factual or legal basis in this record upon which to render an award on his behalf.

Consequently, the ALJ dismissed Jeanette’s claim.

Jeanette's first argument is that the ALJ erred in setting aside the February 8, 2013, order granting Jeanette's November 8, 2012, Motion for Interlocutory Relief arguing, in part, as follows:

> There was no procedural or legal justification for the ALJ to issue the subsequent Order setting aside the

> Interlocutory Opinion & Award in response to the Defendant [sic] Motion. As set forth above, the Defendant's February 19, 2013 Motion to Set Aside the Interlocutory Order was an attempt to file a Petition for Reconsideration which it was precluded from filing pursuant to 803 KAR 25:010 §19(1) which only permits the filing of a Petition for Reconsideration in response to an Administrative Law Judge filing a **'final order or award.'** The Court of Appeals has made clear a party cannot appeal from an award of Interlocutory benefits. Wings, Inc. v. Rodriguez, 2011-CA-001719-WC, Ky. App. Rendered 8/17/12 (Designated Not To Be Published). See also Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1989), and Ramada Inn v. Thomas, 892 S.W. 593 (Ky. 1995).

Jeanette's first argument may be dispensed with in short order. The ALJ's February 8, 2013, order sustaining Jeanette's November 8, 2012, motion is an interlocutory order and is not "final and appealable." *See* 803 KAR 25:010, § 21(2)(a). Jeannete's argument that Birkhead cannot appeal from this order misses the point, as Birkhead has not appealed from this order. Additionally, Jeannete's argument that Birkhead's Motion to Set Aside the February 8, 2013, order violates 803 KAR 25:010 §19(1) because it is an attempt to file a petition for reconsideration is also inaccurate. The record is clear. Birkhead's February 20, 2013, motion was styled a "Motion

to Set Aside February 8, 2013 Order or Alternatively, Motion to Schedule Telephonic Conference to Discuss February 8, 2013, Order." Birkhead's motion was filed twelve days after the February 8, 2013, order. While the interlocutory nature of the February 8, 2013, order precludes Birkhead from appealing the order, it is not in any way a bar to Birkhead filing a motion requesting the ALJ to set aside the order. Certainly nothing in the regulations prohibit a party from seeking relief from an order during the pendency of the claim. During the pendency of a controversy the ALJ, as fact-finder, retains jurisdiction and may change, reverse, modify, amend or vacate any order or ruling. Union Light, Heat & Power Co. v. Public Service Commissioner, 271 S.W.2d 361 (Ky. 1954); Western Kraft Paper Group v. Dept. for Natural Resources and Environmental Protection, 632 S.W.2d 554 (Ky. App. 1982).

Additionally, in his January 29, 2013, report Dr. Loeb opined as follows:

> **1. Diagnosis? This patient has degenerative disc disease, particularly at the L4/L4 and L5/S1 levels with a herniated disc to the right at L5/S1, totally unrelated to his work injury, which appears to be a transient strain to the lumbar spine on February 28, 2011.**

> **2. Whether any condition diagnosed is causally related to the motor vehicle collision on February 28, 2011?** The only condition related would be the transient sprain to the lumbar spine on February 28, 2011.

Regarding an impairment rating, Dr. Loeb opined as follows:

> He does have impairment based on his recent findings of a herniated disc to the right side and subsequent surgery. This would be calculated using the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* from page 384, Tabe 15-3 under DRE Lumbar Category III. With continued symptoms, he would be at 13% to the whole person. In this degree, I do agree with Dr. Barefoot's assessment as far as the permanent partial impairment rating, but this is totally unrelated to the motor vehicle accident on February 28, 2011.

Dr. Loeb's report was not filed in the record at the time the ALJ rendered the February 8, 2013, order sustaining Jeanette's November 8, 2012, motion; thus, the ALJ did not have the benefit of reviewing it before sustaining Jeanette's motion. Based on the above, we decline to disturb the March 6, 2013, order setting aside the February 8, 2013, order granting Jeanette's motion.

Jeanette's second argument is that the ALJ erred in failing to find the February 28, 2011, motor vehicle accident caused his alleged injuries. This argument

contains three sub-arguments, each of which will be addressed separately.

Jeanette's first sub-argument is that Birkhead filed no new evidence which would justify reversal of the ALJ's February 8, 2013, order and dismissal of his claim. Regarding Dr. Loeb's report attached to Birkhead's motion, Jeanette argues as follows:

> Instead, this is the exact same evidence/arguments relied on by the Defendant prior to ALJ Bolton's Interlocutory Order & Award, just 're-bundled' and stated through a different witness. **There is nothing new here.** The facts remain exactly the same as they were prior to the Interlocutory Opinion & Award; it is just Dr. Loeb providing the exact same opinions against causation as previously opined by Drs. Kirsch & Parker.

We will not revisit our ruling regarding the March 6, 2013, order setting aside the February 8, 2013, order granting Jeanette's Motion for Interlocutory Relief et al. Therefore, this argument has no merit.

Regarding the ALJ's dismissal of Jeanette's claim, the sole issue is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical

v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. The record reveals Dr. Loeb's January 29, 2013, report is the first such report filed by Birkhead. The only other medical evidence filed in the record by Birkhead are the reports of Drs. Peter Kirsch and Frank Parker pertaining to utilization review and utilization review appeal.

The September 27, 2012, Utilization Review Notice of Denial contains Dr. Kirsch's opinion which is set out below:

> I believe, based on the information in the chart, there is a 17-month hiatus between the present complaints and the last treatment. This patient had an injury consistent with soft tissue sprain/strain type complex, the active effects of that injury ceased long ago. The tissues have healed, and the patient has returned to pre-injury status. The current complaints are not related to the 2/28/11 work injury. The current request for MRI scan of the lumbar spine is not medically necessary and appropriate for the 2/28/11 work injury.

Jeanette appealed this decision to Dr. Parker who issued the following opinion on October 12, 2012: "MRI of the lumbar spine is not medically necessary or reasonable for evaluation of the work injury of 2/29/11."

In his January 29, 2013, report, Dr. Loeb opined Jeanette has degenerative disc disease at the "L4/5 and L5/S1 levels with a herniated disc to the right at L5/S1, **totally unrelated to his work injury**." (emphasis added). Additionally, regarding causation, Dr. Loeb stated as follows:

> **2. Whether any condition diagnosed is causally related to the motor vehicle collision on February 28, 2011?** The only condition related would be the transient sprain to the lumbar spine on February 28, 2011.

Dr. Loeb's opinions constitute substantial evidence in support of the ALJ's determination to dismiss Jeanette's claim for an injury to the right side of the lumbar spine at the L4-5 and L5-S1 level. That said, Dr. Loeb’s opinion does not constitute substantial evidence in support of a complete dismissal of Jeanette’s claim, as Dr. Loeb opined the February 28, 2011, motor vehicle accident caused a “transient sprain in the lumbar spine.”

Jeanette's second sub-argument is that in the June 28, 2013, order, the ALJ failed to make sufficient findings to provide the basis for his reliance upon Dr. Loeb's opinions over those of Dr. Villanueva.

The June 28, 2013, order, contains nearly two pages of summary regarding Dr. Loeb's opinions as set forth

in the January 29, 2013, IME report. In the "Analysis" section of the June 28, 2013, opinion and order, the ALJ stated as follows:

> The threshold issue in this case is work relatedness/causation. There is little doubt from the evidence in the record that the Plaintiff suffers from a permanent disability as the result of degenerative disc disease in his low back.
>
> Typically in low back cases one sees a previously existing condition such as degenerative joint disease aroused into disabling reality by a work related traumatic injury. Defendants typically raise the defense of a pre-existing condition being the source of the Plaintiff's disability. However, to be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the *AMA Guidelines* immediately prior to the occurrence of the work related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App., 2007). So, when work related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change. Hence, the harmful change comes within the definition of injury. *McNutt Construction v. Scott*, 40 S.W.3d 854 (Ky., 2001).
>
> Here however the situation is reversed. Based upon the medical records and evidence and the expert medical opinion of Dr. Thomas M Loeb, whose opinion I find to be the most compelling,

accurate and persuasive with regard to the Plaintiff's claimed injuries, the plaintiff may or may not have had pre-existing degenerative joint disease. However, when he suffered his work related trauma on February 28, 2011, the symptoms he related to his treating physicians clearly, by history as preserved in the medical records, related to his left side. He now states that he had back pain with radiculopathy on both sides, but we must rely on the record as being an accurate reflection of his complaints as expressed at that time. The only mention of his right knee in the original records was a slight contusion that rapidly resolved.

Again, although the Plaintiff now states that he purposely minimized his complaints to get back to work, the record shows that he was released to full duty with no restrictions after he reported to his treating physicians that he felt able to do so. He returned to full duty with the Defendant employer on March 21, 2011. He only stayed with the Defendant employer for about two months before moving to another HVAC contractor. However, he freely admitted that the primary reasons for that move had nothing to do with his medical condition. Subsequently, he moved to a third employer, once again because of job dissatisfaction rather than physical disability.

When he presented to Dr. Lisa Scott on August 17, 2012 he advised her that he had been suffering from a pinched nerve in his right back and leg for one month. She ordered a lumbar MRI completed on 9/21/ 2012. The MRI showed a <u>right</u> disc herniation from L4-S1 impinging on the S1 nerve root. As

> pointed out by Dr. Loeb, this is on the opposite side of Plaintiff’s injury of February 28, 2011.
>
> Sadly, although he has been incapacitated since Dr. Villanueva’s back surgery, the evidence taken from the record as a whole compels a conclusion that the back surgery was necessitated by a condition that cannot be connected within the bounds of reasonable medical probability to the work related trauma of February 28, 2011. That is the conclusion of Dr. Thomas M Loeb, whose opinion I find to be the most accurate, compelling and persuasive in the record.

While the ALJ did not set forth an analysis specifically addressing why he chose to rely upon Dr. Loeb's opinions over Dr. Villanueva's, his analysis fully apprises the parties and the Board of the rationale behind the ALJ's dismissal of Jeanette's claim for an injury to the right side of the lumbar spine. That is sufficient. The ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The ALJ is merely required to adequately lay out the basic facts drawn from the evidence upon which his ultimate conclusions were based so that all parties are reasonably apprised of the basis for the decision. Big Sandy Community Action Program vs. Chafins,

502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Jeanette's third sub-argument is that the overwhelming evidence compels a finding Jeanette's current symptoms are work-related. Dr. Loeb's report comprises substantial evidence in support of the ALJ's dismissal of Jeanette's claim for an injury to the right side of the lumbar spine. Clearly, Dr. Loeb did not believe the degenerative disc disease at L4/L5 and L5/S1 and herniated disc on the right at L5/S1 were work-related. Similarly, he did not believe the surgery performed by Dr. Villanueva was related to the work injury. The ALJ, as fact-finder, has full discretion to determine the physician or physicians upon which he relies. We acknowledge the differing medical opinions in the record; however, if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The fact that there is contrary evidence in the record does not compel a different result.

Jeanette's final, one-paragraph argument is as follows:

> ALJ Bolton found Mr. Jeanette suffered work related trauma on February 28, 2011 with Back [sic] pain and radiculopathy. Accordingly, ALJ Bolton's 'Dismissal of the Application for Adjustment of Injury' was unfounded simply because he did not believe Mr. Jeanette's current need for medical treatment/surgery was related to the original injury. Such a finding does not negate the fact an [sic] significant injury occurred for which Mr. Jeanette is entitled to benefits pursuant to the Act. Accordingly, Mr. Jeanette requests Judge Bolton [sic] Opinion Dismissing the claim be Reversed.

Although we are unsure of the nature of the relief Jeanette is seeking in this argument, we state again that the ALJ's determination to dismiss Jeanette's claim for an injury to the right side of her lumbar spine is supported by substantial evidence; thus, that determination will not be reversed.

That said, the ALJ's dismissal of Jeanette's entire claim is **VACATED**. On remand, the ALJ shall enter an amended opinion and award finding Jeanette sustained a work-related injury consisting of a transient sprain to the lumbar spine. The ALJ shall also determine Jeanette's entitlement to TTD benefits and future medical benefits for a sprain of the lumbar spine. *See* FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007). In the June 28, 2013,

order, the ALJ determined Jeanette suffered from "work related trauma on February 28, 2011." Additionally, Dr. Loeb, the physician upon whom the ALJ relied, opined that Jeanette sustained "a transient sprain to the lumbar spine" as a result of the February 28, 2011, accident. Further, Birkhead accepted the claim as compensable as it related to the transient lumbar sprain. The April 10, 2013, BRC order indicates TTD was paid from March 1, 2011, through March 20, 2011, for a total of $793.40. The ALJ must make a finding of fact as to whether an award of additional TTD benefits is warranted. Further, the ALJ must also award the appropriate medical benefits which may include an award of future medical benefits. While Jeanette did not specifically raise the issue of entitlement to past and future medical benefits and additional TTD benefits on appeal, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); *See* George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

Accordingly, concerning the dismissal of Jeanette's claims for an injury to his neck, right knee, and right side of the lumbar spine, the March 6, 2013, order, the June 28, 2013, opinion and order, and the August 1, 2013, order on reconsideration are **AFFIRMED**. The ALJ's

dismissal of Jeanette's claim for benefits for an injury to his lumbar spine is **VACATED**. This claim is **REMANDED** for additional findings of fact defining the work-related injury to Jeanette’s lumbar spine and for a determination concerning Jeanette's entitlement to medical benefits and any additional TTD benefits, and entry of an opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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