Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 2, 2016

CLAIM NO. 201500071

JEFFREY CRUMP PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, CHIEF ADMINISTRATIVE LAW JUDGE**

UNITED MEDICAL INC. and
HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Jeffery Crump ("Crump") appeals from the Opinion, Award, and Order on Remand rendered March 30, 2016 by Hon. Robert L. Swisher, Chief Administrative Law Judge ("CALJ"), finding him entitled to medical benefits for two work-related neck injuries, but dismissing his claim for

permanent income benefits. Crump also appeals from the May 9, 2016 order denying his petition for reconsideration.

On appeal, Crump argues dismissing his claim which warrants an impairment rating simply because he has not attained maximum medical improvement ("MMI") is patently unfair and is contrary to the purpose of the Act. Because the CALJ followed the directives of this Board on remand, substantial evidence supports his determination, and no contrary result is compelled, we affirm.

Crump filed a form 101 alleging he sustained two injuries to his neck while employed by United Mechanical, Inc. ("United Mechanical") as a journeyman and service technician. On October 2, 2013, Crump injured his neck while carrying a compressor. He underwent a C5-6 anterior cervical discectomy and arthrodesis performed by Dr. Joseph Finizio on November 27, 2013 and returned to work without restrictions on March 17, 2014. Crump again injured his neck on August 27, 2014 while catching an extension ladder. The records indicate Dr. Finizio performed fusion surgery to the adjacent disc level on February 24, 2015, although the operative report and post-operative treatment notes were not introduced as evidence. Dr. Finizio restricted Crump from work from January 22, 2015 through March 30, 2015.

United Mechanical filed Dr. Michael Doyle's April 29, 2015 report. He diagnosed Crump with chronic mechanical neck pain from developmental cervical degenerative disease and mild to moderate degree of cervical stenosis. Dr. Doyle found Crump was significantly symptomatic prior to the first injury, and therefore could not conclude his symptoms either resulted from or were brought into disability reality by his work-related injuries. Likewise, Dr. Doyle opined neither of the two cervical fusions were related to the work-related injuries. Dr. Doyle did not specifically address if and when Crump attained MMI.

Crump filed Dr. Warren Bilkey's May 27, 2015 report. He diagnosed: 1) a 10/2/13 work-related cervical strain, aggravation of cervical spinal stenosis, cervical radiculopathy, ACDF surgery at C5-6; and 2) a 8/27/14 work-related cervical strain, cervical radiculopathy, ACDF surgery at C6-7 on 2/24/15. Dr. Bilkey stated both of Crump's injuries were acute, work-related, and required surgeries.

Dr. Bilkey stated Crump "is not at MMI and could not be considered as having reached MMI status until 2/25/16." Nonetheless, Dr. Bilkey assessed a 28% impairment rating utilizing the DRE Method and a 29%

impairment rating utilizing the Range of Motion method, both pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He opined as follows regarding the tenuous nature of the 28% impairment rating calculated pursuant to the Range of Motion methodology:

> After one year subsequent to the second surgery, Mr. Crump may prove to have a higher level of impairment according to the Range of Motion method and this impairment rating would have to be calculated at that time to apply. The Range of Motion method however may also show a lower impairment rating than 28% whole person impairment. In that event, according to the rules of the Guides, when there are pertinent but competing methods to calculate impairment, the highest is utilized. Therefore if at the one year anniversary the Range of Motion method yields a lower impairment rating than the DRE method, the DRE method impairment would apply.

The June 11, 2015 Benefit Review Conference ("BRC") order lists the following contested issues: work-relatedness/causation; notice; benefits per KRS 342.730; credit for unemployment; "injury" as defined by the Act; TTD; (overpayment/underpayment); pre-existing active; medical benefits; and compensability of the surgeries.

In an opinion dated July 24, 2015, Hon. William Rudloff, Administrative Law Judge ("ALJ Rudloff") determined Crump sustained work-related injuries to his

neck on October 2, 2013 and again on August 27, 2014. The ALJ determined Crump is entitled to temporary total disability ("TTD") benefits from November 27, 2013 through March 17, 2014 and again from September 11, 2014 through May 18, 2015. ALJ Rudloff relied upon the 28% impairment rating assessed by Dr. Bilkey. After performing an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ determined Crump is entitled to have his benefits enhanced by the three multiplier. The ALJ awarded TTD benefits, permanent partial disability ("PPD") benefits based upon a 28% impairment rating increased by the three multiplier, and medical benefits. The ALJ overruled United Mechanical's motion to recuse and petition for reconsideration in an order dated September 2, 2015.

This Board rendered an opinion on January 25, 2016 affirming in part, vacating in part, and remanding. The Board affirmed ALJ Rudloff's finding Crump sustained two work-related injuries. Regarding the award of PPD benefits based upon the 28% impairment rating, the Board stated as follows:

> That said, and in response to United Mechanical's second argument on appeal that substantial evidence does not support a permanent impairment rating, we vacate the ALJ's findings of permanent partial disability, the award of PPD benefits, and the award of

medical benefits and remand for additional findings.

It is clear from the language of both the July 24, 2015, Opinion and Order and the September 2, 2015, Order on Reconsideration that the ALJ relied upon a 28% impairment rating assessed by Dr. Bilkey. However, what is also clear is Dr. Bilkey opined Crump had not reached MMI at the time he assessed the two impairment ratings. In fact, in the May 27, 2015, IME report, Dr. Bilkey opined Crump could not be considered at MMI until February 25, 2016, and at that time, pursuant to the Range of Motion methodology, his impairment rating may be higher or lower than 28%.

On remand, the ALJ must review the medical evidence and determine if there is evidence regarding an MMI date that *pre-dates* May 27, 2015, the date Dr. Bilkey assigned his impairment ratings. *It is important to note that there are no other impairment ratings in the record.* Thus, an award of PPD benefits based upon Dr. Bilkey's impairment rating can only be rehabilitated through other medical evidence relating to MMI that pre-dates the date upon which Dr. Bilkey assigned his impairment ratings - May 27, 2015. If the ALJ is unable to discern that medical evidence supports an MMI date which satisfies this requirement, permanent income benefits cannot be awarded.

In the event an award of permanent income benefits is not supported by the evidence in the record, on remand, the ALJ may find that the medical evidence supports Crump having sustained temporary injuries on October 2, 2013, and August 27, 2014. In the event the

ALJ determines Crump sustained temporary injuries, the ALJ must evaluate Crump's entitlement to reasonable and necessary medical benefits, both past and future, according to the applicable law. *See* FEI Installation, Inc. v. Williams, 214 S.W.3d 313, (Ky. 2007).

Significantly, the language utilized by Dr. Bilkey in his May 27, 2015, report demonstrates Crump sustained "2 straightforward injuries." Thus, the ALJ must enter separate awards for Crump's two injuries. If the ALJ determines MMI was attained prior to Dr. Bilkey's examination, entering separate awards may be difficult, as the only impairment rating in the record was assessed by Dr. Bilkey who failed to make a distinction between the first and second injury in assessing a single impairment rating. Nonetheless, on remand, if the ALJ is able to rehabilitate the impairment rating assessed by Dr. Bilkey, he may not combine the award of PPD benefits.

We also note the parties do not contest the propriety of the award of TTD benefits. In its brief to this Board, United Mechanical appears to be satisfied with the award of TTD benefits by asserting as follows in its argument:

> ALJ Rudloff terminated claimant's award of temporary total disability benefits when he returned to work for Alpha Mechanical in May 2015. However, a return to work does not mean that a claimant has reached maximum medical improvement. There is a big difference between reaching maximum medical improvement

> and no longer being temporarily totally disabled. The fact that claimant is no longer temporarily totally disabled does not mean that he has reached maximum medical improvement.

> Finally, in a one-sentence assertion embedded in United Mechanical's argument against the award of PPD benefits, it asserts as follows: "On remand the Administrative Law Judge must determine whether claimant sustained a temporary injury and if so whether he is entitled to medical benefits through the May 18, 2015 temporary total disability benefits award." We have already addressed this argument.

The Board vacated the determination Crump is permanently partially disabled, as well as the award of PPD and medical benefits, and remanded the claim for additional findings.

Subsequently, the claim was reassigned to the CALJ. In the March 30, 2016 Opinion, Award and Order on Remand, the CALJ stated as follows:

> The initial task, on remand, is to determine whether there is any evidence in the record that plaintiff reached maximum medical improvement prior to the date of Dr. Bilkey's report, May 27, 2015. Having carefully and thoroughly reviewed every page of every medical record submitted by the parties in this matter, the undersigned Chief Administrative Law Judge finds that there is no such evidence. Both parties have submitted treatment notes

> from plaintiff's treating neurosurgeon, Dr. Finizio, practicing through the Neurological Institute of Kentucky. It is important to note that plaintiff sustained two distinct traumatic injuries, one on October 2, 2013 and one on August 27, 2014. Although Dr. Finizio's treatment records have been submitted with respect to each of those injury dates, Dr. Finizio does not specifically address the issue of maximum medical improvement following either injury. Likewise, Dr. Bilkey does not specifically address maximum medical improvement following the first distinct injury after which plaintiff underwent what appears to have been a successful cervical fusion at C5-6 but felt, instead, that plaintiff could not be considered as having reached MMI status until "2/25/16." Therefore, there is no evidence in the record as to when, if ever, plaintiff reached maximum medical improvement following the first injury, and no evidence in the record that plaintiff reached maximum medical improvement following the second injury at any point prior to the date of Dr. Bilkey's report, May 27, 2015. As instructed by the Workers' Compensation Board, therefore, the absence of a finding of maximum medical improvement following either injury is fatal to an award of permanent partial disability benefits. Accordingly, plaintiff's claim for permanent partial disability benefits is dismissed.

The CALJ then found Crump had not proven entitlement to an award of permanent income benefits. He additionally determined such a finding does not necessarily preclude an award of future medical benefits. The CALJ

ultimately found Crump continues to experience “disability” for the purposes of KRS 342.020, and is entitled to an award of ongoing medical benefits subject to the requirements they be work-related, and medically reasonable and necessary. The CALJ stated there is no evidence in the record which persuades him Crump sustained only temporary injuries which have completely resolved and which would preclude an award of permanent medical benefits. Therefore, the CALJ awarded TTD benefits and medical benefits, although he dismissed Crump’s claim for permanent income benefits.

Crump filed a petition for reconsideration arguing the same issues raised on appeal. He also took issue with the CALJ’s use of the word “dismissed.” In the May 9, 2016 Order overruling Crump’s petition, the CALJ stated as follows:

> This matter is before the undersigned Chief Administrative Law Judge on plaintiff’s Petition for Reconsideration. Therein, plaintiff contends that the CALJ erred in dismissing his claim for permanent partial disability benefits and should, instead, have issued an interlocutory order placing the claim in abeyance until plaintiff reaches maximum medical improvement and a permanent impairment rating can be assessed. Plaintiff further takes issue with the CALJ’s use of the word “dismiss” with respect to

plaintiff's claim for permanent partial disability benefits. . . .

On petition for reconsideration an administrative law judge is limited in the review to the correction of errors patently appearing upon the face of the award, order or decision. KRS 342.281. Although plaintiff clearly disagrees with the undersigned's ultimate findings and conclusions, the petition does not demonstrate any error clearly appearing on the face of the Opinion, Award and Order on Remand. While the CALJ agrees that the result in this matter is harsh, it is the result which the law of the case and the evidence compelled. In its Opinion remanding this matter to the Administrative Law Judge, the Workers' Compensation Board specifically ruled that,

> On remand, the ALJ must review the medical evidence and determine if there is evidence regarding an MMI date that *pre-dates* May 27, 2015, the date Dr. Bilkey assigned his impairment rating. *It is important to note that there are no other impairment ratings in the record.* Thus, an award of PPD benefits based upon Dr. Bilkey's impairment rating can only be rehabilitated through other medical evidence relating to MMI that pre-dates the date upon which Dr. Bilkey assigned his impairment rating – May 27, 2015. **If the ALJ is unable to discern that medical evidence supports an MMI date which satisfies this requirement, permanent income**

> **benefits cannot be awarded. (emphasis added).**

The CALJ notes that the decision of the Workers' Compensation Board was not appealed by plaintiff and has become the law of the case. On remand, the Board specifically ruled that if there was no evidence supporting an MMI date prior to May 27, 2015, "permanent income benefits cannot be awarded." The evidence in this claim simply did not support a finding that plaintiff reached maximum medical improvement from either of his specific and distinct injuries prior to May 27, 2015. The undersigned, therefore, had no choice and could not award permanent disability benefits. In reviewing the Benefit Review Conference Order from proceedings before Judge Rudloff, it is noted that neither party preserved whether plaintiff had reached maximum medical improvement as a contested issue. Moreover, plaintiff did not request in his brief a finding that he had not reached maximum medical improvement nor request that this matter be held in abeyance until such time as he did, in fact, reach maximum medical improvement.

Next, plaintiff takes issue with the CALJ's use of the word "dismiss" in the Opinion, Award and Order on Remand. To be clear, the undersigned confirmed Judge Rudloff's award of temporary total disability benefits and the undersigned made an award of ongoing medical benefits with respect to plaintiff's cervical spine injuries of October 2, 2013 and August 27, 2014, and those aspects of the claim were not dismissed. The only "dismissal" is with respect to plaintiff's claim for permanent partial disability benefits. Contrary to plaintiff's assertion, it

> would not be appropriate to make a finding of "a zero percent impairment rating" since no physician assigned a zero percent impairment rating. Simply stated, plaintiff failed to meet his burden of proving that he qualified for a permanent partial disability award, and a dismissal of that aspect of this claim follows as a matter of law.

On appeal, Crump argues the CALJ erred by dismissing his claim for PPD benefits. Crump points out the Board affirmed ALJ Rudloff's finding of two work-related injuries, and points to Dr. Bilkey's report. Crump asserts dismissing his claim which has an impairment rating simply because he has not attained MMI is patently unfair and is contrary to the purpose of the Act. Crump now argues, "The claim was not ripe for a decision on permanent partial income benefits, but the claim was ripe on the issues of notice, work-relatedness/causation, injury as defined by the Act, and pre-existing active." Crump argues ALJ Rudloff's opinion should have been deemed interlocutory, and requests the claim be remanded with directions to place the claim in abeyance pending attainment of MMI.

We first emphasize Crump had the burden of proving each of the essential elements of his cause of action, including entitlement to permanent income benefits

and the attainment of MMI. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

We find no merit in Crump's arguments on appeal since the CALJ followed the Board's directives on remand, cited to substantial evidence in the record supporting his decision, and no contrary result is compelled. Permanent partial disability is defined as, "the condition of an employee who, due to an injury, has a permanent disability rating . . . ." KRS 342.11(11)(b). Pursuant to Chapter 1.2 of the AMA Guides, "an impairment is considered permanent when it has reached **maximum medical improvement (MMI)**, meaning it is well stabilized and unlikely to change substantially in the next year with our without medical treatment." (original emphasis). Likewise in Chapter 2.4, The AMA Guides states, "An impairment should not be considered permanent until the clinical findings indicate the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI).**" (original emphasis).

As stated by this Board in its January 25, 2016 opinion, Dr. Bilkey opined Crump had not reached MMI at the time he assessed the two impairment ratings on May 27, 2015. Dr. Bilkey opined Crump could not be considered at MMI until February 25, 2016, and at that time, pursuant to

the Range of Motion methodology, his impairment rating may be higher or lower than 28%. The Board then directed ALJ Rudloff to review the medical evidence to determine if there is evidence supporting an MMI date which pre-dates the May 27, 2015 report. "If the ALJ is unable to discern that medical evidence supports an MMI date which satisfies this requirement, permanent income benefits cannot be awarded." Since neither party appealed the Board's opinion, it is the law of the case.

On remand, the CALJ followed the directive of the Board and found there is no evidence in the record supporting Crump reaching MMI prior to Dr. Bilkey's May 27, 2015 report. The CALJ noted Dr. Finizio's treatment records do not specifically address the issue of MMI following either injury. In addition, the records of Dr. Finizio subsequent to the second surgery were not submitted as evidence by either party. As the CALJ noted, Dr. Bilkey did not specifically provide whether Crump attained MMI from his first injury. Rather, Dr. Bilkey stated Crump, "is not at MMI and could not be considered as having reached MMI status until 2/25/16."

Substantial evidence supports the CALJ's determination there was no evidence in the record as to when, if ever, Crump reached MMI following the first

injury. Likewise, there is no evidence in the record supporting his achieving MMI following the second injury at any point prior to the date of Dr. Bilkey's report. As instructed by the Board, the CALJ dismissed Crump's claim for PPD benefits.

In the order on reconsideration, the CALJ also noted neither party preserved as a contested issue at the BRC whether Crump had reached MMI. Neither party requested at any time prior to the rendition of the July 24, 2015 opinion the claim be bifurcated on the issues of notice, work/relatedness, injury as defined by the Act, and pre-existing active condition. Likewise, Crump did not request at any time prior to the rendition of the July 24, 2015 opinion that the claim placed in abeyance pending his attainment of MMI. At no point did Crump request an award of interlocutory relief.

Finally, we disagree the July 24, 2015 opinion by ALJ Rudloff "should have been deemed interlocutory." 803 KAR 25:010, § 21(2)(a), provides as follows:

> Within 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.

Regarding the finality of the ALJ's determination, 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). We find the March 30, 2016 opinion clearly met all three requirements. Therefore, the CALJ's determination was final and appealable. Because the CALJ's determination is supported by substantial evidence, follows the direction of this Board, and does not constitute an abuse of discretion, we affirm.

Accordingly, the March 30, 2016 Opinion, Award, and Order on Remand and the May 9, 2016 Order on Petition for Reconsideration by Hon. Robert L. Swisher, Chief Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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