

OPINION ENTERED: June 12, 2013

CLAIM NO. 200899189

MEINERS ELECTRIC

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

JERRY GARRETT
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER
DISMISSING

* * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Jerry Garrett ("Garrett") has filed a "Motion to Dismiss Appeal" asserting the March 29, 2013, order of Hon. Jonathan R. Weatherby, ALJ ("ALJ") is not final and appealable.

803 KAR 25:010 Section 21(2)(b) expressly provides that, "[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).” CR 54.02 (1) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims of 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.

Applicable case law, mirroring the requirements of CR 54.02, holds an order is final and appealable if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. Tube Turns Division vs. Logsdon, 677 S.W.2d 897 (Ky. App. 1984).

In the March 29, 2013, opinion and award the ALJ

found as follows:

**Additional TTD/Credit for Unemployment
and Wages/Synvisc Injections**

7. Temporary total disability 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...KRS 342.0011(11)(a)

8. Dr. Nawab, the Plaintiff's treating physician has treated the Plaintiff conservatively and after reviewing diagnostic imaging, has determined that he is not a candidate for additional surgery. Dr. Nawab however noted the presence of post-meniscectomy changes and diagnosed post-meniscectomy chondrosis. Dr. Nawab recommended synvisc injections on July 6, 2011.

9. The ALJ finds that the opinion of the treating physician is the most credible and accordingly concludes that the Plaintiff is entitled to additional temporary total disability benefits and to receive the contested synvisc injections.

10. The Defendant shall be entitled to a credit against the temporary total disability benefits in the amount of the wages and unemployment benefits received during the relevant times.

The ALJ entered the following award:

1. The Plaintiff, Jerry Garrett, shall recover from the Defendant,

Meiners Electric, and/or its insurance carrier temporary total disability benefits in the amount of \$646.47 per week from January 4, 2012 through the date the claimant either: (1) returns to work or, (2) achieves MMI, which ever first occurs together with interest at the rate of 12% per annum on all past due and unpaid installments of such compensation. The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made as well as for the wages received by the Plaintiff during the relevant TTD period. All benefits shall terminate pursuant to KRS 342.730(4) as of the date on which Plaintiff qualifies for normal old-age Social Security retirement benefits.

2. Plaintiff shall recover of Defendant-employer and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances as may be reasonably required for the cure and relief from the effects of the work-related injury specifically to include the contested synvisc injections. Defendant's obligation shall commensurate with the limits set by the Kentucky Medical Fee Schedule.

. . .

While temporary total disability ("TTD") benefits were awarded, Respondent has not yet reached maximum medical improvement ("MMI") or returned to employment; thus, the termination point of TTD benefits has yet to be

decided. KRS 342.0011(11)(a). The March 29, 2013, opinion and award is interlocutory in nature, as the March 29, 2013, opinion and award does not terminate the action, does not act to decide all matters litigated by the parties, and does not operate to determine all the rights of the parties so as to divest the ALJ of authority. See Tube Turns Division vs. Logsdon, supra. Additionally, the March 29, 2013, opinion and award does not contain the required recitation of "final and appealable." See CR 54.02 (1).

We are further buttressed in our holding by the recent case of Maryhurst, Inc. v. Judy Gillespie, 2012-CA-001875-WC, rendered May 24, 2013, Designated Not To Be Published, in which the Court of Appeals stated as follows:

Maryhurst first argues that the orders at issue were not interlocutory. Maryhurst claims that Ms. Gillespie never specifically requested interlocutory relief, that the order divests it of the right to deny the recommended surgery, and that if the surgery is later found to be nonwork-related, it might not be able to recoup the money it expended. The orders being appealed are interlocutory and cannot be appealed. The issue of TTD benefits has yet to be finally resolved. The fact that Ms. Gillespie did not formally request interlocutory relief is not fatal. See *McKinney Painting v. Wallace*, 2005 WL 32941 (Ky. App. 2005).¹ Ms. Gillespie reopened her workers' compensation claim in order to assert her right to TTD benefits while she recovers from surgery. As stated

previously, TTD benefits are interlocutory in nature when the injured employee has not reached MMI. Even if Maryhurst has been ordered to approve the recommended surgery, the issue of TTD has yet to be decided; therefore, the action is still active.

Slip Op. 4-5.

Accordingly, it is ORDERED and ADJUDGED that Respondent's "Motion to Dismiss Appeal" is hereby **GRANTED** and the above-styled appeal is **DISMISSED**.

ALVEY, CHAIRMAN, CONCURS.

FRANKLIN STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

COPIES MAILED TO:

HON RODNEY J MAYER
600 EAST MAIN STREET SUITE 100
LOUISVILLE KY 40202

HON WAYNE C DAUB
600 W MAIN ST STE 300
LOUISVILLE KY 40202

HON JONATHAN R WEATHERBY
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DR
LEXINGTON KY 40511