OPINION ENTERED: May 21, 2012

CLAIM NO. 200767708

PEP BOYS MANNY, MOE AND JACK PETITIONER

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

CHRISTY FRAZIER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING
* * * * * *

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

STIVERS, Member. Pep Boys Manny, Moe and Jack ("Pep Boys") has filed a "Notice of Interlocutory Appeal" from the April 18, 2012, "Interlocutory Opinion and Order on Reconsideration" of Hon. William J. Rudloff, Administrative Law Judge ("ALJ Rudloff"). Even though a motion to dismiss this appeal has not been filed, because we conclude the March 22, 2012, "Second Interlocutory Opinion and Order"

and the April 18, 2012, “Interlocutory Opinion and Order on Reconsideration” are not final and appealable orders we *sua sponte* order the appeal dismissed and remand this matter to the ALJ. We will only discuss the facts of this claim necessary to explain our grounds for dismissing and remanding.

On June 26, 2009, Christy Frazier (“Frazier”) filed a Form 101 alleging on November 2, 2007, during the course of delivering parts to Pep Boys’ customer she was involved a motor vehicle accident causing injury her back, neck, head, and face. She also alleged radiculopathy down her left leg. As a result, she underwent various medical treatment and tests.

On October 30, 2009, Frazier filed a “Motion to Bifurcate and for Determination of Plaintiff’s Right to Medical and TTD Benefits.” After setting forth the basis for her motion, Frazier requested Hon. Howard E. Frasier, Administrative Law Judge (“ALJ Frasier”) to bifurcate the claim, order Pep Boys to pay for diagnostic studies recommended by Dr. Casnellie, order Pep Boys to resume payment of temporary total disability (“TTD”) benefits, and award past due TTD benefits retroactive to February 18, 2007.

On December 4, 2009, ALJ Frasier found that in light of a previous order extending proof on all disputed issues and in the absence of grounds sufficient to support a motion for interlocutory relief no summary resolution of any disputed issues was appropriate at the time. However, since there was no objection to the motion to bifurcate, ALJ Frasier found it was appropriate to bifurcate the claim "on issues other than final extent and duration." ALJ Frasier ordered the claim bifurcated and issues other than final extent and duration will be resolved including "MMI, medical expenses, and TTD."

On January 14, 2010, ALJ Frasier entered an order stating that upon joint motion of the parties the claim was placed in abeyance until Frazier reached maximum medical improvement ("MMI"). The ALJ Frasier ordered the parties to file status reports every sixty days. He also ordered the claim would only be removed from abeyance when one or both parties move to take it out of abeyance "when [Frazier] is no longer eligible for TTD."

On March 1, 2010, Pep Boys filed a "Motion to Bifurcate and Motion for Determination of Reasonable and Necessary Medical Treatment." It requested the ALJ bifurcate the proceedings regarding the issue of the reasonableness and necessity of medical treatment

specifically “the sole issue of performing objective medical testing to include either an MRI or Myelogram/post-Myelogram CT Scan.” In support of the motion Pep Boys stated Dr. Timothy Kriss recommended a Myelogram/post-Myelogram CT Scan to determine whether there was a pinched SI nerve root causing irritation in the lower extremity. Pep Boys noted Dr. Casnellie recommended an MRI be performed as opposed to the procedure recommended by Dr. Kriss. Pep Boys stated it was willing to pay for Myelogram/Post-Myelogram CT Scan but Dr. Casnellie will not order it.

On March 3, 2010, ALJ Frasier entered an order granting Pep Boys’ motion to bifurcate and finding the Myelogram/post-Myelogram CT Scan was a reasonable and necessary diagnostic procedure and directed it to be ordered and performed within fifteen days of the order. ALJ Frasier further ordered that the claim was to remain in abeyance.

On May 11, 2010, ALJ Frasier directed the parties to agree “on the terms of an agreed referral to a specialist for the purpose of resolving a surgical issue.” He also ordered the claim remain in abeyance.

Based on the agreement of the parties, on June 1, 2010, ALJ Frasier ordered Frazier be evaluated by Dr.

Guarnaschelli on May 27, 2010. ALJ Frasier ordered the claim remain in abeyance pending the evaluation and until either party moves to return it to the active docket. The order directed Dr. Guarnaschelli to conduct an examination and advise the ALJ which surgical procedure or procedures he believes to be reasonably necessary to treat Frazier's lumbar injury.

On January 12, 2011, ALJ Frasier entered a Benefit Review Conference ("BRC") order reflecting Pep Boys' motion to take the claim out of abeyance was granted. Further, pursuant to the parties' agreement to waive a hearing on the issue of reasonableness and necessity of the proposed surgical procedures, the parties were directed to "be prepared to give oral arguments at the conference set for January 31, 2010 [sic] at 1:00p(ET) at the Louisville hearing site." The parties had until January 26, 2011, to file simultaneous briefs of no more than five pages in length.

On January 31, 2011, ALJ Frasier entered an "Interlocutory Opinion and Award" finding the opinions of Drs. Kriss and Guarnaschelli more credible than the opinion of Dr. Casnellie regarding the issue of whether Frazier was entitled to both decompression surgery and fusion surgery as recommended by Dr. Casnellie. As previously noted, the

parties had agreed that Frazier would be seen by Dr. Guarnaschelli regarding this issue. Accordingly, ALJ Frasier found only the proposed decompression surgery recommended by Drs. Kriss and Guarnaschelli was reasonable and necessary for treatment of the work-related injury. ALJ Frasier found the proposed fusion surgery was not reasonable and necessary treatment of the work-related injury. He went on to state as follows:

> if the Plaintiff should now agree to complete a myelogram, followed by a CT scan, for the purpose of verifying [sic] need for decompression surgery, as recommended by Dr. Kriss, she may have such testing prior to surgery.

ALJ Frasier further stated "at this time no opinion has been presented from any physician that the Plaintiff is not at MMI if she elects not to have the proposed decompression surgery." ALJ Frasier stated since he found the proposed fusion surgery was not reasonable, Frazier could no longer argue she is not at MMI. He further found if Frazier elected not to have the proposed decompression surgery and to have such surgery scheduled within forty-five days of January 31, 2011, then Frazier is at MMI and no longer entitled to any TTD benefits. ALJ Frasier then stated:

> if [Frazier] should choose to go forward with the recommendation for a myelogram and CT scan, the finding of MMI shall be delayed for the additional

> period of time to complete such testing that must be scheduled within the next 30 days.

ALJ Frasier stated that with a resolution of the disputed issue, the claim should either be placed in abeyance pending MMI after surgery, or a final hearing should be set "to resolve final extent and duration and any other disputed issues." ALJ Frasier pointed out that "absent compelling circumstances, the only permitted grounds for cancelling the hearing will be if the Plaintiff goes forward with proposed decompression surgery." Accordingly, ALJ Frasier ordered the challenged fusion surgery is not compensable, the proposed decompression surgery is compensable, and it must be scheduled within forty-five days of the order. He further ordered if the proposed decompression surgery is performed, he would grant a motion to place the claim in abeyance pending MMI and "proof for all parties was extended to March 19, 2011 and Defendant's proof is extended to April 19, 2011." A final hearing was set for April 20, 2011.

On April 7, 2011, ALJ Frasier entered an order stating "in light of the decompression surgery on March 30, 2011, the hearing on April 20, 2011 is CANCELLED." He ordered the claim placed in abeyance until Frazier reached MMI, and ordered Pep Boys to pay TTD benefits until Frazier

reaches MMI or is able to perform her customary employment whichever occurs first. The parties were directed to file status reports every ninety days and to file a motion to take the claim out of abeyance and set a final BRC and proof schedule after Frazier reaches MMI.

On July 7, 2011, Pep Boys filed a status report stating "this matter is not ripe to be removed from abeyance as Plaintiff is undergoing continued physical therapy."

On December 16, 2011, this claim was reassigned to ALJ Rudloff.

On February 13, 2011, Pep Boys filed a medical fee dispute regarding Dr. Casnellie's request for pre-certification of "MAST/TLIF" surgery. It asserted Dr. Guarnaschelli performed an independent medical examination ("IME") on October 18, 2011, indicating the MAST/TLIF surgery was not reasonable and necessary and not related to the effects of the work-related injury. Pep Boys also filed a motion to join Dr. Casnellie as a party which ALJ Rudloff sustained and ordered Dr. Casnellie joined as a party.

After Frazier filed a "Response to Medical Dispute," on March 16, 2012, Pep Boys filed a "Motion to Bifurcate and Set Proof Schedule" stating a medical fee

dispute had been filed contesting the MAST/TLIF surgery recommended by Dr. Casnellie. Pep Boys cited to ALJ Frasier's order determining the MAST/TLIF surgery was not reasonable and necessary treatment. It asserted in spite of the ALJ's decision, Dr. Casnellie continues to request MAST/TLIF surgery be performed, necessitating the filing of the medical fee dispute. Pep Boys suggested it would be beneficial for the ALJ to "bifurcate the issue on the medical fee dispute" and determine the reasonableness and necessity of the MAST/TLIF procedure. Pep Boys posited once this issue was determined the parties could then proceed to litigate the remaining issues including extent and duration.

On March 22, 2012, ALJ Rudloff entered a "Second Interlocutory Opinion and Order" finding the additional medical records and opinions of Dr. Casnellie constituted new evidence. ALJ Rudloff stated after the decompression surgery, Frazier's pain continued and Dr. Casnellie again recommended a fusion procedure. ALJ Rudloff noted Dr. Guarnaschelli's most recent opinion is that surgery is not reasonable and necessary because Frazier does not have spinal instability sufficient to warrant the procedure and would not get the relief she desires. ALJ Rudloff found Dr. Casnellie opined the first procedure did not adequately

relieve Frazier's pain and time had proven him correct. Accordingly, ALJ Rudloff was more persuaded by the opinion of the treating physician, Dr. Casnellie, and found the recommended fusion surgery is reasonable and necessary for the cure and relief of the effects of Frazier's 2007 work injury and ordered Pep Boys to pay for the surgery.

On April 9, 2012, Pep Boys filed a "Motion to Vacate/Petition for Reconsideration." Pep Boys pointed out it had filed a motion to bifurcate the medical fee dispute and had filed a notice to take Dr. Guarnaschelli's deposition. Likewise, it had filed a notice to take Frazier's deposition. After setting out its grounds for the motion, Pep Boys requested the ALJ vacate his order of March 22, 2012, and enter an order consistent with the initial interlocutory findings of ALJ Frasier regarding the fusion surgery. However, if the ALJ did not vacate the March 22, 2012, Second Interlocutory Opinion and Order, Pep Boys requested specific findings of fact relative to the new evidence upon which the ALJ based his opinion. Alternatively, Pep Boys requested the ALJ to rule on its Motion to Bifurcate and Set Proof Schedule filed on March 12, 2012.

On April 18, 2012, ALJ Rudloff overruled Pep Boys' Motion to Vacate/Petition for Reconsideration. On

April 23, 2012, Pep Boys filed a medical fee dispute and a supplemental medical fee dispute. On May 4, 2012, it filed a second supplemental medical fee dispute. On May 8, 2012, Pep Boys filed a "Notice of Interlocutory Appeal" stating it was appealing the Interlocutory Opinion and Order on Reconsideration of ALJ Rudloff dated April 18, 2012.

We conclude, as a matter of law, the ALJ's ruling of March 22, 2012, 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 March 22, 2012, Second Interlocutory Opinion and Order and subsequent order ruling on the petition for reconsideration meet none of these

requirements. The ALJ's opinion does not operate to terminate the action itself. Moreover, the ALJ's ruling does not act to finally decide all outstanding issues, nor does it operate to determine all rights of Frazier and Pep Boys so as to divest the ALJ once and for all of authority to decide the overall merits of the case. Clearly, this claim was placed in abeyance until Frazier reached MMI. The ALJ has never removed the claim from abeyance; therefore, the March 22, 2012, Second Interlocutory Opinion and Order and the April 18, 2012, Interlocutory Opinion and Order on Reconsideration could not possibly be deemed final and appealable. Pep Boys recognizes this fact in its Notice of Appeal which is styled "Notice of Interlocutory Appeal."

The ALJ has yet to decide several potential issues involving Frazier's claim, including but not limited to future medical care, TTD benefits, and the extent and duration of her occupational disability. As a matter of law, therefore, the March 22, 2012, decision and subsequent order ruling on the Motion to Vacate/Petition for Reconsideration must be deemed interlocutory. Therefore, the ALJ as fact-finder, not this Board, retains jurisdiction. *See* KRS 342.275.

Accordingly, the appeal of Pep Boys is hereby **DISMISSED.**

ALL CONCUR.

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FRANKLIN A. STIVERS, MEMBER,
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON MARK R BUSH
250 GRANDVIEW DR STE 550
FT MITCHELL KY 41017

COUNSEL FOR RESPONDENT:

HON UDELL B LEVY
462 S FOURTH ST STE 1730
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM J RUDLOFF
400 E MAIN ST STE 300
BOWLING GREEN KY 42101