Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 24, 2015

CLAIM NO. 201268600

PERRY COUNTY SHERIFF'S DEPARTMENT PETITIONER

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

EVERETT JAMIE TURNER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION & ORDER
DISMISSING
* * * * * *

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

STIVERS, Member. Everett Jamie Turner ("Turner") has filed a motion to dismiss the appeal of Perry County Sheriff's Department ("Perry County") asserting the Amended Opinion and Order on Remand entered on June 16, 2015, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") is interlocutory and not appealable. It notes the ALJ made this finding in the July 9, 2015, Interlocutory Order

overruling Perry County's petition for reconsideration. Therefore, Perry County has appealed from a June 16, 2015, Interlocutory Order which is not a final and appealable order.

In response, Perry County asserts the June 15, 2015, Amended Opinion and Order and the July 9, 2015, Interlocutory Order overruling its petition for reconsideration represent orders which do not conform or comply with the Board's opinion vacating the September 19, 2014, Opinion and Award and remanding. It contends the ALJ was directed by the Board to take a specific course of action, make specific findings, and reach a specific conclusion. It maintains the ALJ's June 16, 2015, Amended Opinion and Order on Remand does not comply with the Board's direction. Perry County requests the motion to dismiss be overruled and it be given the opportunity to submit its brief in this matter.

In an opinion entered November 3, 2014, relying upon an impairment rating assessed by Dr. Arthur Hughes and the date of maximum medical improvement ("MMI") set by Dr. Henry Tutt, the ALJ found Turner had a 49% impairment rating as a result of his injuries and was permanently totally disabled. Perry County appealed. In vacating and remanding, we stated, in relevant part, as follows:

That said, for reasons not raised by Perry County, the ALJ's finding of permanent total disability and the award of TTD benefits and PTD benefits are vacated. It is clear from the language in the September 19, 2014, Opinion and Order that the ALJ relied upon Dr. Hughes' 49% whole person impairment rating. However, a finding of permanent total disability requires a *permanent impairment rating*. KRS 342.0011(1)(11)(c). While Dr. Hughes assessed a 49% whole person impairment rating in his March 26, 2014, IME report, he also opined Turner had not yet reached MMI. Pursuant to the AMA Guides, Chapter 1.2, "A medical impairment is considered permanent when it has reached **maximal medical improvement (MMI)**, meaning it is well stabilized and unlikely to change substantially in the next year with our without medical treatment." (emphasis in original). Therefore, Dr. Hughes' whole person impairment rating was not permanent at the time of his IME report. Significantly, the record does not contain a supplemental report by Dr. Hughes.

In the September 19, 2014, Opinion and Order, the ALJ opined that "[b]ased upon the medical evidence from Dr. Tutt, I make the factual determination that the plaintiff Mr. Turner has reached maximum medical improvement." In addition, the ALJ awarded TTD benefits from October 1, 2012, through June 25, 2014, "when Dr. Tutt stated that Mr. Turner reached maximum medical improvement." In order for the ALJ to rely upon Dr. Hughes' 49% impairment rating, he must simultaneously rely upon a physician who determined MMI had been attained on or before the date Dr. Hughes assessed his 49% impairment rating, March 26, 2014.

> The ALJ believed Dr. Tutt's testimony supports an MMI date of June 25, 2014, the date of his IME report. However, we are unable to locate a clear articulation of MMI by Dr. Tutt in his June 25, 2014, IME report, his August 1, 2014, supplemental report, or his August 27, 2014, deposition.[1] Notably, in its petition for reconsideration, Perry County argued the record does not contain an opinion from Dr. Tutt regarding MMI. . . .
>
> On remand, the ALJ must provide additional findings regarding his determination of June 25, 2014, as the date of MMI in reliance upon Dr. Tutt's testimony. If the ALJ again finds June 25, 2014, is the date of MMI, Dr. Hughes' impairment rating must be rejected, as it was assessed prior to Turner reaching MMI. Our holding is fully supported by Robert Corbett v. Makers Mark Distillery, No. 2013-CA-0011o2-WC, Designated Not To Be Published (March 13, 2015), in which the Court of Appeals held as follows:
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>> Because Dr. Morris opined Corbett had not reached MMI, the AMA *Guides* prohibited him from assigning *any* impairment rating for *any* of Corbett's conditions.
>>
>> . . .
>>
>> A permanent impairment rating resulting from an injury must be determined by utilization of the AMA *Guides*. KRS 342.730(1). The proper interpretation of the AMA *Guides* and the proper

[1] While this Board is not ruling out a statement of MMI in Dr. Tutt's 15-page IME report, 6-page supplemental report, or his deposition, this Board, in its review, has been unable to locate one.

> assessment of impairment are medical questions solely within the province of medical experts for the purposes of assessing a claimant's disability. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003); *Lanter v. Ky. State Police, 171 S.W.3d 45, 52 (Ky. 2005)*. To be useful for the fact-finder as competent, substantial evidence, a physician's opinion must be grounded in the AMA *Guides*, and an ALJ may not give credence to an opinion of a physician assigning a permanent impairment rating that is not based upon the AMA *Guides*. *Jones* at 154. In order to utilize an impairment rating in the assessment of a claimant's disability rating and monetary award, an ALJ is required to determine whether the impairment rating was based upon the AMA *Guides*, and is authorized—though not compelled—to consult the AMA *Guides* when determining the weight and credibility to be assigned to the evidence. *Caldwell Tanks v. Roark*, 104 S.W.3d 753, 756-757 (Ky. 2003).
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> Slip Op. at 18, 22-23.

Consequently, should the ALJ find Turner reached MMI on June 25, 2014, as this Board is unable to locate another impairment rating in the record, there can be no award of PTD benefits or permanent partial disability ("PPD") benefits. At that point, the ALJ must

> determine if Turner, based upon the medical evidence in the record, sustained a temporary injury, and if appropriate, the extent to which he is entitled to TTD benefits and medical benefits for any and all injuries. Should the ALJ determine Turner did not sustain a temporary injury, Turner's claim must be dismissed.
>
> However, should the ALJ not find evidentiary support for an MMI date of June 25, 2014, the ALJ must examine the record to determine a different MMI date and also determine whether it predates March 26, 2014, the date Dr. Hughes assessed his impairment rating.
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> Even though Perry County did not raise this issue, we are permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

We directed as follows:

> Those portions of the September 19, 2014, Opinion and Order and the November 3, 2014, Opinion and Order on Reconsideration finding Turner sustained a work-related fall and a neck injury are **AFFIRMED**. However, the finding Turner has a 49% impairment rating and is totally disabled and the award of TTD benefits, PTD benefits, and medical benefits are **VACATED**. Also, the ALJ's finding that Turner reached MMI on June 25, 2014, is **VACATED**. The claim is **REMANDED** for additional findings and entry of a decision in conformity with the views expressed herein.

Following the submission of contemporaneous briefs, in a June 16, 2015, Amended Opinion and Order on

Remand, the ALJ again determined Turner had suffered severe physical injuries to his right upper extremity and neck as a result of a work-related fall. He also made the determination Perry County had not met the burden of proving a pre-existing active impairment or occupational disability before the September 30, 2012, work injury. After summarizing Dr. Hughes' testimony, the ALJ stated as follows:

> Pursuant to the direction of the Board, I make the determination that under the evidence from Dr. Hughes, the plaintiff has not reached maximum medical improvement and requires the implantation of a spinal cord stimulating device for treatment of his RSD. Pursuant to the direction of the Board, I make the determination that based upon the medical evidence from Dr. Tutt that the plaintiff has not reached maximum medical improvement.
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> . . .
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> Based upon the credible and convincing lay testimony of Mr. Turner, which is covered above, and the persuasive, compelling and reliable medical evidence from Dr. Patel, his treating physician, which is covered in detail above, as well as the persuasive, compelling and reliable medical evidence from Dr. Hughes, which is covered in detail above, I make the factual determination that the plaintiff is entitled to recover from the defendant and its workers' compensation insurer weekly temporary total disability benefits beginning October 1, 2012 and continuing until

> the plaintiff reaches maximum medical improvement and for so long as he remains disabled from his customary work or the work he was performing at the time of his work-related injuries on September 30, 2012.

With regard to medical benefits, the ALJ awarded medical benefits as follows:

> Based upon the credible and convincing lay testimony of the plaintiff, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Patel, his treating physician, as covered in detail above, and also the persuasive, compelling and reliable medical evidence from Dr. Hughes, as covered in detail above, I make the determination that the plaintiff is entitled to recover from the defendant and its workers' compensation insurer for his work-related medical bills and expenses for treatment of his work-related injuries on September 30, 2012, both past and future, including, but not limited to, the treatment recommendations by Dr. Patel, including, but not limited to, a bone scan, an electromyogram, a nerve conduction study, an MRI of the cervical spine, prescription of anti-depressants for neurogenic pain, as well as any and all other prescription medications ordered by Dr. Patel, and also a stellate ganglion block for the plaintiff's upper limb RSD and physical therapy.

Section VI of the June 16, 2015, Amended Opinion and Order on Remand reads as follows:

> SECTION VI – INTERLOCUTORY ORDER AND AWARD

> In light of the above findings of fact and conclusions of law, IT IS HEREBY ORDERED AND ADJUDGED as follows:
>
> A. Plaintiff shall recover from the defendant and/or its workers' compensation insurer temporary total disability benefits in the amount of $564.25 per week beginning on October 1, 2012 and continuing until the plaintiff reaches maximum medical improvement and for so long as he remains disabled from his customary work or the work he was performing at the time of his injuries.
>
> B. Plaintiff shall recover from the defendant and/or its workers' compensation insurance company for the cure and relief of any effects of his work injuries, medical, surgical, hospital treatment, including nursing, medical or surgical supplies and appliances as may reasonably be required at the time of his injury and thereafter during disability.
>
> C. Plaintiff shall be entitled to recover 12% interest on any past due and unpaid benefits.
>
> D. Defendant shall be entitled to a credit for workers' compensation benefits heretofore paid.
>
> E. All motions for approval of attorney fees shall be filed within thirty days from the final disposition of this award.
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> F. This is an Interlocutory Opinion and Order and is not final or appealable.

On June 29, 2015, Perry County filed a petition for reconsideration. Among the grounds raised in the

petition for reconsideration is the interlocutory order does not comply with the Board's directions.

Perry County filed a Protective Notice of Appeal on July 10, 2015.

On July 9, 2015, the ALJ entered an Interlocutory Order stating as follows:[2]

> As the parties are well aware, Section 19 of the Workers' Compensation Regulations provides that a party shall file a Petition for Reconsideration within 14 days of the filing of a final Order or Award. As specified in the Amended Opinion and Order on Remand, it was an Interlocutory Opinion and Order and is not a final Order or Award. Defendant's Petition for Reconsideration is, therefore, a legal nullity.

Perry County filed another notice of appeal appealing from both the June 16, 2015, Order and the July 9, 2015, Order overruling its petition for reconsideration.

Because we agree with Turner, the appeal must be dismissed at this time. The ALJ has yet to resolve the issues as directed by the Board's opinion of March 30, 2015. Further, by the express language used in the opinion, it is not final. For purposes of Chapter 342, a final award, order or decision is determined according to

[2] Apparently, the ALJ July 9, 2015, Order was filed in the record after Perry County's Protective Notice of Appeal.

CR 54.02 (1) and (2). 803 KAR 25:010. Pursuant to CR 54.02, an order is appealable only if it terminates the action itself, acts to decide all matters litigated by the parties, and operates to determine all the rights of the parties so as to divest the ALJ of authority. Tube Turns Division v. Logsdon, 677 S.W.2d 897 (Ky. App. 1984). Accordingly, this Board is without authority to review the June 16, 2015, Amended Opinion and Order on Remand and subsequent orders denying reconsideration.

That said, we are compelled to state the ALJ's Amended Opinion and Order on Remand of June 16, 2015, is not in accordance with the directions provided in the March 30, 2015, Opinion affirming in part, vacating in part, and remanding. On remand, the ALJ was to provide additional findings based on the record as it existed regarding the date of MMI. If the ALJ again found June 25, 2014, is the date of MMI then he must reject Dr. Hughes' impairment rating since it was assessed prior to Turner's reaching MMI. In that case, there could be no award of permanent income benefits. The ALJ would then determine, based on the medical evidence currently in the record, whether Turner sustained a temporary injury and, if appropriate, the extent to which he is entitled to temporary total disability benefits and medical benefits for any and all

injuries. However, if the ALJ determined Turner did not sustain a temporary injury then Turner's claim must be dismissed.

Alternatively, if the ALJ had determined the record does not support an MMI date of June 25, 2014, he was to examine the record to determine another date of MMI and whether it pre-dates Dr. Hughes' impairment rating assessed on March 26, 2014. The ALJ was to then enter the appropriate decision.

Accordingly, the claim was remanded for the ALJ to make specific determinations based on the current record. We have reviewed the Benefit Review Conference Order of July 7, 2014, and no issue was raised that Turner was not at MMI at that time. Thus, an open ended award of TTD benefits is clearly not in accordance with the Board's direction set out in the March 30, 2015, opinion. On remand, the ALJ was to enter a final and appealable decision based on the contents of the record as of the time he originally took the claim under submission. The ALJ clearly exceeded his authority in ordering an open ended award of TTD benefits from October 1, 2012, and continuing until Turner reached MMI and for so long as he remained disabled from his customary work or the work he was performing at the time of the injuries.

Thus, we strongly recommend the ALJ vacate his June 16, 2015, Amended Opinion and Order on Remand as well as the subsequent order of July 9, 2015, overruling the petition for reconsideration and immediately enter a final and appealable decision on the merits of the claim.

Accordingly, Perry County's appeal of the June 16, 2015, Amended Opinion and Order on Remand and the July 9, 2015, Order overruling and denying its petition for reconsideration is **DISMISSED**.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

_____
FRANKLIN A. STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

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