Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 8, 2013

CLAIM NO. 200987201

RENT-A-CENTER PARIS PETITIONER

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

DARRIN HOWARD
DR. MICHAEL HEILIG
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING
* * * * * *

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

STIVERS, Member. Rent-A-Center Paris ("RAC") seeks review of the February 7, 2013, opinion and order resolving a medical fee dispute in favor of Darrin Howard ("Howard") by finding bilateral knee replacement surgery to be causally related to his March 9, 2009, work injury. RAC also

appeals from the March 20, 2013, order denying its petition for reconsideration.

On appeal, RAC asserts the "ALJ applied the incorrect standard to the evidence," and "the award of total knee replacement surgeries must be reversed and remanded for correct findings and proper application of the law." Because the ALJ's February 7, 2013, opinion and order is interlocutory, we *sua sponte* dismiss RAC's appeal.

A Form 110 approved by Hon. R. Scott Borders, Administrative Law Judge ("ALJ Borders") on July 16, 2010, reflects Howard was injured on March 9, 2009, when he stepped off a concrete step while carrying the top of a recliner, and slipped and fell to the blacktop landing on both knees. He alleged "bilateral knee injuries." The Form 110 reflects surgery consisting of bilateral meniscus repairs was performed. Dr. Heilig's medical records reflect he performed those surgeries.[1] Howard was paid temporary total disability ("TTD") benefits of $15,968.90 and a lump sum of $15,049.15 representing permanent partial disability ("PPD") benefits based on an 8% impairment

[1] Dr. Heilig's records reveal that on April 28, 2009, he performed a right knee arthroscopic debridement of medial meniscus with condroplasty of the medial femoral condyle and lateral tibial plateau. On July 9, 2009, Dr. Heilig performed a left knee arthroscopic debridement of the medial meniscus with chondroplasty tricompartmental and plica excision.

rating provided by Dr. Heilig. Howard did not waive his right to reopen the claim.

On April 16, 2012, RAC filed a “Motion to Reopen for Medical Fee Dispute” and a Form 112 contesting its liability for continued treatment of Howard’s bilateral knee osteoarthritis. RAC also contested the bilateral knee replacement surgery proposed by Dr. Heilig as the surgery was not causally related to the March 9, 2009, work injury. RAC attached the March 30, 2012, report of Dr. Frank Bonnarens in support of its position.

On May 23, 2012, Hon. J. Landon Overfield, Chief Administrative Law Judge (“CALJ”) sustained the motion to reopen to the extent the matter would be referred to an ALJ for further adjudication. The CALJ also ordered Dr. Heilig joined as a party to the medical fee dispute. At that time, no other motions were filed.

Howard was deposed and testified at the hearing. Dr. Bonnarens’ report and deposition as well as numerous records of Dr. Heilig were introduced into the record.

In an opinion and order rendered February 7, 2013, the ALJ entered the following findings of facts and conclusions of law:

1. The bilateral knee replacement surgery proposed by Dr. Michael Heilig is causally related to the work incident

of March 9, 2009. In making this finding, I rely on the opinion of Dr. Michael Heilig as supported by the testimony of the Plaintiff, which I find to be the most persuasive evidence in the record with regard to this issue.

2. The Plaintiff is entitled to temporary total disability benefits if he undergoes surgery for the bilateral replacement of his knees and the attendant post-surgical care necessary to restore him to full function, if that can be accomplished.

3. While the osteoarthritic condition diagnosed by both Drs. Heilig and Bonnarens may have pre-existed the work incident of March 9, 2009, it was aroused into disabling reality by that incident. Thus, Plaintiff's ongoing medical treatment for his bilateral knees is clearly related to the work event of October 29, 2008, based upon the medical opinion of Dr. Michael Heilig, upon whose medical opinion the ALJ relies in making these findings.

The ALJ entered the following award and order:

> Based upon the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED AND ADJUDGED**:
>
> 1. The Medical Dispute initiated by the Defendant employer is hereby resolved in favor of the Plaintiff.
>
> 2. Plaintiff shall be scheduled for bilateral knee replacement by Dr. Michael Heilig, M.D.. [sic]
>
> 3. The Defendant Employer and/or its insurance carrier shall pay the costs

associated with that procedure and any other related medical expenses.

4. The Defendant Employer and/or its insurance carrier shall pay the Plaintiff TTD benefits from the date of his surgery until he is released to return to work or reaches MMI, whichever comes first.

On February 20 2013, RAC filed a petition for reconsideration making many of the same arguments it now makes on appeal.

Because he had not filed a timely petition for reconsideration, on March 7, 2013, Howard filed a motion for leave to file a response to the petition for reconsideration. Howard attached to the motion a response to the petition for reconsideration which he requested the ALJ consider.

On March 7, 2013, Howard also filed a motion to reopen the claim pursuant to KRS 342.125(1)(d), asserting that subsequent to the settlement, the ALJ determined he was entitled to bilateral knee replacement surgery. Howard requested the claim be reopened so a "determination can be made as to entitlement to additional benefits pursuant to KRS 342.125 and KRS 342.730 as is directly attributable to the March 9, 2009, injury." Among the documents attached was an updated Form 106 and Howard's affidavit in which he stated his condition has worsened since the settlement was

approved on July 16, 2010. Howard requested the ALJ determine the increase in his disability attributable to the injury and any other benefits to which he was entitled. RAC filed a response asserting if Howard was awarded bilateral total knee replacement surgeries then his motion to reopen for TTD benefits is "certainly appropriate." RAC asserted the motion to reopen should be passed until such time as the ALJ considered and ruled upon its petition for reconsideration.

As previously noted, on March 20, 2013, the ALJ entered an order denying RAC's petition for reconsideration. On that same date, the ALJ also entered an order overruling Howard's motion as premature, stating as follows:

> As the Plaintiff has not yet had the bilateral knee surgery previously approved, we do not yet know what the outcome of that surgery will be. We strongly hope that it will be totally successful, but until the results are verified by expert medical opinion, any assumption on our part would be based on speculation at best.

On May 16, 2013, Howard filed a "Motion to Reinstate Temporary Total Disability Benefits" requesting entry of an order awarding TTD benefits effective May 4, 2012, until he reached maximum medical improvement ("MMI"). In support of his motion, Howard cited to the ALJ's opinion

regarding his entitlement to bilateral knee replacement surgery. He noted the ALJ awarded TTD benefits from the date of the surgery until he was released to return to work or he reached MMI. Howard attached an "off work excuse" from Dr. Heilig and asserted Dr. Heilig's opinion is that he had been totally incapacitated from work since May 4, 2012. Accordingly, an award of TTD benefits of $694.30 per week beginning May 4, 2012, or until he reached MMI or is released to return to work was requested.

On February 18, 2013, RAC filed a notice of appeal. On May 16, 2013, the ALJ entered an order noting RAC had appealed his decision and that his decision is not yet final and the Board currently has jurisdiction. He also noted Howard had not undergone the bilateral knee surgery previously approved. After stating he had lost jurisdiction due to the notice of appeal being filed and Howard should address any request for relief to the Board, the ALJ overruled the motion.

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 February 7, 2013, opinion and order, the ALJ specifically ordered RAC to pay TTD benefits from the date of Howard's surgery until he was released to return to work or reached MMI whichever came first. More importantly, when Howard filed a motion to reopen seeking an adjudication of his entitlement to additional income

benefits, RAC conceded if Howard is awarded bilateral total knee replacement surgery, the motion to reopen for TTD benefits is "certainly appropriate" and suggested the motion be passed until the ALJ ruled on its petition for reconsideration. Based on its response to Howard's motion to reopen, it is clear RAC realized if the ALJ overruled its petition for reconsideration, an award of TTD benefits was necessary. Therefore, the open ended award of TTD benefits by the ALJ from the date of surgery until Howard is released to return to work or reaches MMI causes the February 7, 2013, opinion and order to be interlocutory in nature.

The beginning point and termination point of TTD benefits have yet to be decided. Consequently, the February 7, 2013, opinion and order does not terminate the action, does not act to decide all matters litigated by the parties, and does not operate to determine all rights of the parties so as to divest the ALJ of authority. *See* Tube Turns Division vs. Logsdon, supra. Additionally, the February 7, 2013, opinion and order does not contain the required recitation of "final and appealable." *See* CR 54.02(1).

We recognize at the time RAC filed its motion to reopen and Form 112, Howard did not file a motion to reopen

the claim seeking additional income benefits in the form of TTD and/or PPD benefits. Rather, Howard filed a motion to reopen seeking additional income benefits after the ALJ rendered his decision and RAC filed a petition for reconsideration. The ALJ's rationale for overruling Howard's motion to reopen is unclear in light of RAC's response and his denial of RAC's petition for reconsideration.

That said, the fact remains the ALJ awarded TTD benefits in the February 7, 2013, opinion and order. Significantly, in its petition for reconsideration, RAC did not contest the award of TTD benefits.

The very recent decision of the Court of Appeals in Maryhurst, Inc. v. Judy Gillespie, 2012-CA-001875-WC, rendered May 24, 2013, Designated Not To Be Published, is controlling. The Court of Appeals held 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). [footnote omitted] 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.

We acknowledge the facts in Maryhurst, Inc., supra, are different than in the case *sub judice*. In Maryhurst, Gillespie settled her claim in 2009 retaining the right to reopen. In 2011, she underwent an MRI and lumbar fusion surgery was recommended. Gillespie filed a motion to reopen her claim to receive TTD benefits while restricted from work. Maryhurst filed a motion to reopen and a medical fee dispute claiming the surgery was not related to a work-related condition. The ALJ entered an order requiring Maryhurst to pay for the surgery and to pay TTD benefits during the period of Gillespie's recovery after surgery until she reached MMI. The ALJ specifically stated the order was interlocutory. Maryhurst filed a petition for reconsideration which was denied. Maryhurst then appealed to the Board. The Board dismissed the appeal

concluding the order was interlocutory because there was one issue which remained to be unresolved, the TTD benefits due Gillespie.

Here, as in Maryhurst, supra, the February 7, 2013, opinion and order ordered Howard shall be scheduled for bilateral knee replacement surgery, RAC to pay for the procedures, and RAC to pay TTD benefits from the date of the surgery until Howard is released to return to work or reaches MMI, whichever occurs first. Regardless of the ALJ's orders that followed his opinion and order, there is still an open ended award of TTD benefits and the issue of TTD benefits has yet to be decided. Therefore, before the ALJ's February 7, 2013, opinion and order can be deemed final, the issue of Howard's entitlement to TTD benefits must be resolved.

As pointed out in Maryhurst, supra:

> KRS 342.285 describes the appellate procedure in front of the WCB. This statute has been consistently interpreted to apply only to final orders of the ALJ. *Hall*, *supra*; *Thomas*, *supra*; *Parker*, *supra*; *Saling*, *supra*. Interlocutory orders are not appealable.

Slip Op. 5.

We emphasize we have no reluctance to decide the appeal on its merits. However, given the ALJ's order and

RAC's response to Howard's motion to reopen, we conclude the opinion and order is not final at this juncture.

ACCORDINGLY, IT IS *SUA SPONTE* ORDERED RAC's appeal is **DISMISSED**. This matter is **REMANDED** to the ALJ for further proceedings on Howard's entitlement to TTD benefits and reconsideration of the order denying Howard's motion to reopen.

ALL CONCUR.

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FRANKLIN A. STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

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