OPINION ENTERED: MARCH 15, 2013

CLAIM NO. 200988270

RODNEY SMEATHERS PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

DEIG BROTHERS CONSTRUCTION
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

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

ALVEY, Chairman. Rodney Smeathers ("Smeathers") appeals from the September 17, 2012 opinion and order and the October 19, 2012 order denying his petition for reconsideration rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ").

The CALJ determined Smeathers waived his claim for a pre-surgery period of temporary total disability ("TTD") benefits. On appeal, Smeathers argues the CALJ misapplied

the Board's previous opinion when he limited the period of TTD benefits and erred in finding a waiver of entitlement to TTD benefits for the pre-surgery period in question. We affirm in part, vacate in part, and remand.

Smeathers filed a Form 101, Application for Resolution of Injury Claim, on May 27, 2010, alleging he injured his left shoulder and bicep on April 24, 2009 while working for Deig Brothers Lumber & Construction Co. ("Deig").

A Benefit Review Conference ("BRC") was held on October 5, 2010. The BRC order and memorandum reflects TTD benefits were paid from May 21, 2009 through October 21, 2009. The contested issues listed were injury as defined by the Act and entitlement to past and future medicals, including shoulder surgery. Smeathers' brief to the ALJ requested he authorize a left shoulder arthroscopy recommended by Dr. Martin and to place the claim in abeyance "until such time as appropriate treatment can be obtained and Mr. Smeathers reaches maximum medical improvement ("MMI")."

In the opinion, award and order rendered on December 16, 2010, Hon. Joseph W. Justice, Administrative Law Judge, ("ALJ Justice") found Smeathers sustained an injury on April 24, 2009 and was entitled to medical benefits pursuant to KRS 342.020, including the recommended surgery. ALJ Justice also ordered Deig to institute TTD benefits commencing on

the date of surgery, continuing until Smeathers reached MMI. The ALJ dismissed Smeathers' claim for permanent partial disability ("PPD") benefits since Smeathers did not submit an impairment rating.

Smeathers' petition for reconsideration, filed December 27, 2010, was denied. He appealed to the Board, arguing the ALJ erred in dismissing his claim for PPD benefits and the matter should be placed in abeyance until the claim is ready for final determination. The Board issued its opinion vacating and remanding on May 12, 2011. Relevant portions of the Board's prior decision are as follows:

> Clearly the issue of entitlement to income benefits is not ripe for decision in the case *sub judice*, and the ALJ's dismissal of Smeathers' "claim" for permanent partial disability benefits is erroneous. A review of the October 5, 2010, benefit review conference order lists a limited number of issues, specifically injury as defined by the Act and entitlement to past and future medicals, including shoulder surgery. The administrative regulation pertaining to benefit review conferences, 803 KAR 25:010 § 13(14), is unambiguous. The regulation plainly states as follows: "*Only contested issues shall be the subject of further proceedings*." As extent and duration are not listed on the benefit review conference order, these issues were not to be addressed by the ALJ.
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> Further, Smeathers' brief to the ALJ, as recounted in relevant part herein, clearly stated the relief he

sought. Smeathers was requesting the authorization of arthroscopic surgery and the claim be placed in abeyance until Smeathers reaches MMI. Even Smeathers' testimony at the final hearing was clear:

> Q: Okay. And so that is the issue at this point, whether you get surgery or not?
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> A: Yes.

We take issue with certain language contained in the ALJ's December 16, 2010, opinion, award, and order. Specifically, the ALJ states as follows: "Plaintiff is not making a claim for income benefits, as he is aware that an impairment rating of 0% WPI precludes that." This statement is only partially true. First, Smeathers was not seeking income benefits *at that time*. This was not due, however, to a lack of impairment ratings in the record. As expressed by Dr. Martin, it was due to the fact Smeathers' left shoulder condition was unstable and likely to change and required arthroscopic surgery. At the time of the hearing, Smeathers only sought certain medical treatment. Clearly the medical evidence filed by Smeathers supports this proposition. After determining Smeathers continues to require treatment for his work-related left shoulder condition, including arthroscopic surgery, the ALJ, *sua sponte*, should have placed the claim in abeyance until such time Smeathers reached MMI.

. . .

While Smeathers could have filed a pre-claim medical fee dispute to have the issue of the compensability of the proposed arthroscopic left shoulder

surgery resolved, Smeathers instead filed a Form 101. This is well within his rights under the law and, as Smeathers states in his appeal brief, "[t]he ALJ appeared to have a clear understanding of the situation" based on the contested issues listed in the benefit review conference order.

We now turn to the award of TTD benefits. We acknowledge the fact Smeathers has not directly contested the ALJ's award of TTD benefits. However, we are not limited to the arguments of counsel when an analysis is erroneous as a matter of law. KRS 342.285(2)(c) provides the Board may determine on appeal whether an order, decision, or award is in conformity to the provisions of KRS Chapter 342, and KRS 342.285(3) provides, in relevant part, the Board may "in its discretion" remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." These provisions permit the Board to *sua sponte* reach issues even if unpreserved in order to properly apply the law. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). The ALJ's award of TTD benefits is erroneous as a matter of law and, for that reason, must be vacated. The ALJ's award of TTD benefits spans from the day of surgery "until he reaches MMI from the surgery." However, this award is erroneous under applicable statutory and case law, as entitlement to a period of TTD benefits is controlled by a two-prong standard.

KRS 342.0011(11)(a) defines TTD as follows:

> '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.
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> . . . On remand, the ALJ's award of TTD shall span from the date of the arthroscopic surgery to the earlier of the following two dates: the date Smeathers reaches MMI or the date Smeathers returns to his customary work or the work he was performing at the time of the injury.
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> Accordingly, those portions of the ALJ's December 16, 2010, opinion, award, and order dismissing Smeathers' claim for permanent partial disability benefits and awarding TTD benefits until Smeathers obtains MMI are hereby **VACATED** and **REMANDED** to the ALJ for entry of an amended order consistent with the views expressed in this opinion. On remand, the ALJ shall place the claim in abeyance until such time following surgery as Smeathers' reaches MMI or returns to his customary work or work he was performing at the time of the injury. The ALJ shall then set a proof schedule and resolve all remaining issues including but not limited to Smeathers' entitlement to income benefits.

ALJ Justice entered an order on remand on July 15, 2011 deleting the paragraph regarding dismissal of the PPD claim, placing the claim in abeyance, and directing Deig to institute TTD benefit payments until Smeathers reaches MMI or he returns to his customary work or the work he was performing at the time of his injury, whichever shall first occur.

On October 13, 2011, Deig filed a motion to remove the claim from abeyance, noting Smeathers' treating physician released him to return to work without restrictions. By order dated November 2, 2011, ALJ Justice removed the claim from abeyance and set a proof schedule.

By order dated May 12, 2012, the matter was reassigned to the CALJ. A telephonic BRC was held June 4, 2012, at which time the CALJ issued a BRC order and memorandum. The CALJ noted an additional period of TTD benefits had been paid from May 9, 2011 through October 5, 2011 and Smeathers had a permanent injury for which he was entitled to medical benefits pursuant to KRS 342.020. The CALJ noted "The only contested issue reserved for determination is the amount of TTD benefits owed to Plaintiff."

A formal hearing was held July 18, 2012. The CALJ confirmed the only contested issue was the amount of TTD benefits owed to Smeathers. On two occasions during questioning, Smeathers' counsel made it clear the issue involved entitlement to TTD benefits from the date Deig terminated TTD payments until the date of surgery. Counsel stated: "Really, the issue in this case is your temporary total disability benefits before your surgery" and "So, the pertinent time period you have not received benefits – let me see if this sounds correct to you – May – no, October

21, 2009, until surgery was ordered and done May 9, 2011?" Deig voiced no objection to the statements at the hearing. Smeathers testified he was unable to work during the pre-surgery period in question.

In his September 17, 2012 opinion and order, the CALJ provided the following discussion and findings:

> Plaintiff has argued in his brief to the CALJ that immediately prior to the May 9, 2011 surgery he was in the same condition as he was when Defendant Employer terminated his TTD benefits on October 21, 2009. This is accurate. The medical evidence from that same time span is also unchanged. All that has changed is that Plaintiff is now claiming entitlement to TTD benefits for the period between October 22, 2009 and May 8, 2011.
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> In his November 30, 2010 brief to the ALJ which was filed with evidence concerning Plaintiff's condition between October 21, 2009 and November 30, 2010 being almost identical to the evidence which is currently in the record, Plaintiff conceded the following:
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> Nowhere in Dr. Martin's records is it indicated Smeathers claims he can't use his arm at all. Dr. Martin explains, as well as can be expected of a treating physician, what he finds, what he suspects, what he intends to do surgically in the practice of his profession to help Smeathers return [to] work. We ask the ALJ to carefully weigh Dr. Martin's records and reports. Mr. Smeathers deserves to have his shoulder injury treated. There's no indication the claimant has been

anything but completely straightforward and honest. ***He doesn't claim to be totally disabled. He's not asked for TTD for the time he's been off work.*** He didn't ask for disability or unemployment. He asked for the treatment he should be afforded pursuant to Kentucky workers compensation law. (Emphasis added).

All that has changed is what Plaintiff asks for after being awarded all that he asked for before the ALJ on November 30, 2010. Until the hearing before the CALJ on July 18, 2012 no mention was made by Plaintiff of entitlement to TTD benefits "before [his] surgery". (T/E, p.7).

The CALJ is of the opinion that as a matter of law, Plaintiff never made a claim in the litigation specifically for TTD benefits between October 21, 2009 and May 8, 2011. The claim was litigated and submitted to the ALJ. Plaintiff, in his brief to the ALJ, waved [sic] entitlement to TTD benefits during the time he now claims entitlement. That ALJ's opinion, although vacated and remanded, addressed the only issues presented by Plaintiff: that he had suffered an injury as defined by the Act and was entitled to the surgery recommended by Dr. Martin.

The issue of pre-surgery TTD was not addressed in Plaintiff's appeal from that opinion and the claim was remanded by the Board with instructions to render an award requiring Defendant Employer to pay what Plaintiff asked for – the medical expenses related to the surgery and TTD benefits beginning the day of that surgery until Plaintiff had reached maximum medical improvement or had been returned to his usual

> employment. That opinion was not appealed. Plaintiff has waived his entitlement to the TTD benefits which he now seeks.
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> Defendant Employer argues that the Board's order on remand is the law of the case concerning Plaintiff's entitlement to benefits prior to Dr. Martin's surgery. The CALJ agrees.
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> **FINDINGS AND CONCLUSIONS**
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> 1. The facts as stipulated and as discussed above.
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> 2. Plaintiff, having previously waived any entitlement to TTD benefits for the period between October 21, 2009 and May 8, 2011, has no entitlement to such benefits.
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> 3. The law of the case, The Board's order on remand, further mandates that Plaintiff's current claim for TTD benefits be denied.
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> **ORDER**
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> Plaintiff, Rodney Smeathers, having waived entitlement to TTD benefits for the period between October 21, 2009 and May 8, 2011 and the Board's order on remand having mandated that Plaintiff's current claim for TTD be denied, Plaintiff's claim for TTD benefits for the period between October 21, 2009 and May 8, 2011 must be and it is hereby **DENIED** and **DISMISSED**.

On appeal, Smeathers argues the Board's opinion is the law of the case. He argues the CALJ misapplied the Board's opinion when he limited the period of TTD benefits. Smeathers contends the CALJ misconstrued the Board's

instructions, noting the claim was remanded to be placed in abeyance with all other issues to be decided once he reached MMI or a level of improvement permitting a return to his usual or customary employment. He asserts the Board did not find he waived his entitlement to or was ineligible to receive TTD benefits for the period between the termination of benefits and the date of surgery. Smeathers contends he met both prongs of the test for entitlement to TTD benefits prior to the surgery. Smeathers further argues the CALJ erred by limiting the scope of entitlement to TTD benefits to a period of time that was not agreed upon as a limitation in the 2012 BRC order or at the formal hearing. The BRC order defined the issue as determination of the amount of TTD benefits owed to Smeathers and did not further narrow the issue. Additionally, Smeathers notes evidence was developed on the question of entitlement to TTD benefits for the pre-surgery period which was tried by consent. Finally, Smeathers argues the CALJ erred in basing his finding regarding waiver on the quote from his brief to ALJ Justice which was taken out of context. Smeathers asserts the quote that he was not asking for TTD benefits during the time he was off work was directed to the interlocutory nature of his request at that time. Smeathers asserts he needed surgery so badly he had to request for a piecemeal decision.

Smeathers notes the CALJ's finding of a waiver in the decision to bifurcate would abrogate the point of having bifurcated hearings.

Since we agree the CALJ improperly applied the Board's prior decision and erred in finding Smeathers waived entitlement to the contested period of TTD benefits, we vacate in part and remand for additional findings and entry of an amended opinion.

In our prior decision, we recognized Smeathers was only initially seeking medical benefits in the form of arthroscopic surgery and was not seeking income benefits at that time. Since Deig denied Smeathers' condition constituted an injury as defined by the Act, a determination of that issue was required. While Smeathers could have filed a pre-claim medical dispute or a motion for interlocutory relief, his intent was readily apparent. In essence, the claim was bifurcated for a decision on the issues of injury as defined by the Act and compensability of the recommended surgery.

The Board's prior decision vacated ALJ Justice's opinion for two reasons. First, it was premature to dismiss the partial disability claim since Smeathers had not reached MMI. Second, ALJ Justice had not properly stated the standard to be used in terminating TTD benefits following

the surgery. The Board did not, and could not, address entitlement to the pre-surgery period of TTD benefits since the issue was neither before ALJ Justice or this Board. To the contrary, the Board's prior decision directed the ALJ to place the claim in abeyance, institute payment of TTD benefits, and reserve any ruling on "all remaining issues including but not limited to Smeathers' entitlement to income benefits." "Income benefits" includes TTD benefits. Thus, nothing in the Board's prior decision can be taken to mandate dismissal of Smeathers' claim for the pre-surgery period of TTD benefits.

Prior to the initial decision by ALJ Justice, nothing in the record affirmatively indicated Smeathers intended to waive other issues or entitlement to any other benefits. Smeathers correctly notes the June 4, 2012 BRC order only listed the amount of TTD benefits owed to him as a contested issue without any other qualification or reservation. Thus, the issue was properly preserved. By making this determination, we are not directing any particular result. The CALJ may well determine Smeathers is not entitled to any additional period of TTD benefits.

Accordingly, the September 17, 2012 Opinion and Order and the October 19, 2012 order denying Smeathers' petition for reconsideration rendered by Hon. J. Landon Overfield,

Chief Administrative Law Judge, is **VACATED IN PART** and **REMANDED** for a decision on the merits of the claim for pre-surgery TTD benefits and entry of an amended opinion in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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