

OPINION ENTERED: February 22, 2013

CLAIM NO. 201100651

SIGMA PLASTICS

PETITIONER

VS.

APPEAL FROM HON. EDWARD D HAYS,  
ADMINISTRATIVE LAW JUDGE

MIGUEL RODRIGUES  
A.K.A. MYNOR OSORIO HERNANADEZ  
and HON. EDWARD D. HAYS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Sigma Plastics ("Sigma") appeals from the August 23, 2012, opinion, order, and award and the October 19, 2012, order overruling Sigma's petition for reconsideration rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"). In the August 23, 2012, opinion, order, and award, the ALJ awarded Miguel Rodrigues

a.k.a. Mynor Osorio Hernandez ("Rodrigues") temporary total disability ("TTD") benefits at the rate of \$246.67 per week from January 28, 2011, through May 20, 2011, and past and future medical benefits.

The Form 101 indicates Rodrigues injured his back on February 7, 2011, in the following manner: "lifting some plastic rolls when I felt a pain in my back."

The June 14, 2012, benefit review conference ("BRC") order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, exclusion for pre-existing disability/impairment, TTD (duration).

On appeal, Sigma argues the ALJ erred by awarding TTD benefits. Sigma asserts since Rodrigues failed to prove the February 7, 2011, incident resulted in an injury as defined by the Act, he is not entitled to TTD benefits. Sigma also asserts the ALJ erred by awarding past and future medicals as Rodrigues failed to prove a compensable injury as defined by the Act.

In the August 23, 2012, opinion, order, and award, the ALJ determined as follows regarding "injury" as defined by the Act and entitlement to TTD and medical benefits:

The next question or issue to be determined is whether or not the claimant sustained an "injury" as defined by the Act at the time in question. KRS 342.0011(1) defines "injury" as meaning:

"...any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings..."

There is limited medical evidence pertaining to the question of whether or not the plaintiff sustained an "injury" as defined by the Act. Dr. Kevin Pavelonis, the chiropractor, rendered an opinion of a permanent impairment of 1% to the body as a whole, but he erroneously based his decision on the Sixth Edition of the AMA Guidelines. Kentucky has not yet adopted the Sixth Edition, but still utilizes the Fifth Edition of the Guides. Dr. Robert Jacob, orthopedist, assessed a 0% impairment to the body as a whole based on the AMA Guides, Fifth Edition. Dr. Jacob is an orthopedist and he utilized the correct edition of the guidelines. The ALJ has little, if any, choice in subscribing to the opinion of Dr. Jacob, who is not only a qualified orthopedist, but is also the only person who testified who used the correct Edition of the AMA Guides. Accordingly, the ALJ finds that Mr. Rodrigues did not sustain an "injury" as defined by the Act. He did not sustain a permanent change in his human organism or a permanent impairment. Thus, plaintiff is entitled to no

indemnity benefits as a result of the incident.

However, it is equally clear that a work-related event occurred, which resulted in temporary or transient symptoms which did require medical attention. Mr. Rodrigues sought attention from Dr. Pavelonis, a chiropractor, and based on the testimony of Mr. Rodrigues, the chiropractic treatment was beneficial to him and permitted him to return to work and to regain productivity pursuant to KRS 342.020, and Square D Co. v. Tipton, 862 S.W.2d 308 (1993). The claimant is afforded a considerable amount of latitude in selecting his or her medical care and attention and the ALJ finds the treatment rendered herein by Dr. Pavelonis to have been reasonable and necessary. The Defendant-Employer and/or its insurance carrier is responsible for payment of those services rendered by Dr. Pavelonis.

KRS 342.0011(11)(a) defines "temporary total disability" as "...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." The Plaintiff continued working with the defendant-employer through January 28, 2011 at light duty activities. He then was off from work due to the painful symptoms until he commenced employment with Wendy's. Although Mr. Rodrigues was off work until mid-July, 2011, he was released by Dr. Pavelonis on May 20, 2011. Dr. Jacob stated in his report he was unable to determine a date for maximum medical improvement, but that it was attained no later than May 20, 2011, which corresponds with the date

of release by Dr. Pavelonis. The Plaintiff acknowledges that he would be entitled only to temporary total disability benefits extending through May 20, 2011. Thus, based upon these facts, the ALJ does hereby determine that plaintiff is entitled to recover for temporary total disability benefits from January 28, 2011 through May 20, 2011 in the amount of \$246.67 per week (2/3 of \$370.00 AWW).

...

The last question to be determined is whether or not the plaintiff is entitled to future medical benefits pursuant to KRS 342.020. The Defendant argues that based on Dr. Jacob's opinion, there is no need for additional medical treatment, medications, diagnostic testing, and/or surgery, and thus the claimant is not entitled to the benefits afforded under KRS 342.020. The ALJ has discretion to deny future medical benefits to a claimant under certain circumstances. Robertson v. United Parcel Service, 64 S.W.3d 284 (2001) and Mullins v. Mike Catron Construction/Catron Interior System, Inc., Ky. App. 237 S.W.3d 561 (2007). However, the ALJ is not required to deny future medical benefits simply because the claimant does not have a permanent impairment or the impairment does not rise to the level that it warrants a permanent impairment or permanent disability rating. FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007). Although Mr. Rodrigues did not sustain a condition serious enough to constitute an "injury" as defined by the Act, he did sustain a traumatic temporary condition which required chiropractic treatment and which did incapacitate him for a considerable

period of time. Recognizing that any future medical treatment may be challenged by the defendant-employer, the ALJ finds, nevertheless, that under the facts of this claim, the medical evidence is not convincing to this ALJ that future medical treatment is necessarily unreasonable. The ALJ finds that claimant is entitled to reasonable and necessary future medical treatment as provided for in KRS 342.020.

In Sigma's petition for reconsideration, among numerous assertions, it argued since Rodrigues did not sustain "a compensable injury as defined by the Act, [Rodrigues] is not entitled to any income or medical benefits." In the October 19, 2012, order overruling Sigma's petition for reconsideration, the ALJ made the following findings:

This claim is before the Administrative Law Judge on the defendant-employer's Petition for Reconsideration of the Opinion, Award and Order rendered by the undersigned ALJ on August 23, 2012. The Defendant is requesting that the Opinion and Award be amended so as to deny plaintiff any and all future medical expenses beyond the date of May 20, 2011, the time at which he reached maximum medical improvement.

The ALJ has already considered and discussed this issue in the original Opinion and Award (see page 9). The ALJ relies on the authority set forth in FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), but has also considered Robertson v. United Parcel

Service, 64 S.W.3d 284 (2001). In the case at hand, Mr. Rodrigues sustained a traumatic condition which required extensive chiropractic treatment, even though it did not result in any permanent functional impairment. However, he was off from work a considerable period of time. He definitely sustained a work-related event, even though it did not rise to the level of an "injury" as defined by the Act. Considering all of the factors, as discussed herein and in the original Opinion and Award, the ALJ finds that claimant is entitled to reasonable and necessary future medical treatment as provided for in KRS 342.020.

Accordingly, the defendant-employer's Petition for Reconsideration is hereby DENIED and OVERRULED.

The ALJ's award of TTD benefits and medical benefits, including future medical benefits, is inconsistent with the language used in the August 23, 2012, opinion, order, and award and the October 19, 2012, order overruling Sigma's petition for reconsideration in which he determined Rodrigues did not sustain an "injury" as defined by the Act. The ALJ *cannot* award TTD and medical benefits without finding Rodrigues sustained either a temporary or permanent injury as defined by the Act. Based on the language in both orders, it appears the ALJ determined Rodrigues did not sustain an "injury" as defined by the Act

because his injury was not permanent in nature. The ALJ stated as follows:

Accordingly, the ALJ finds that Mr. Rodrigues did not sustain an "injury" as defined by the Act. He did not sustain a permanent change in his human organism or a permanent impairment. Thus, plaintiff is entitled to no indemnity benefits as a result of the incident.

However, based on the clear language in KRS 342.0011(1), an "injury" does not require a *permanent* "harmful change in the human organism." "Injury" is defined as follows:

[A]ny work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.  
KRS 342.0011(1)

Again, the above definition does not require a *permanent* injury. Temporary disabling conditions, as defined in KRS 342.0011(11)(a), are still injuries pursuant to KRS 342.0011(1). In Robertson v. United Parcel Service, 64 S.W.3d 284, 286 (Ky. 2001), the Kentucky Supreme Court stated:

In other words, the ALJ concluded that the claimant suffered a work-related injury but that its effect was only transient. It resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. Thus,

the claimant was not entitled to income benefits for permanent, partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.

Since the rendition of Robertson, this Board has consistently held that it is possible for an injured worker to establish a temporary injury for which only TTD benefits and temporary medical benefits may be awarded, but not meet his or her burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized. Further, pursuant to FEI Installation Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the ALJ may award future medical benefits despite the lack of a permanent impairment rating after providing sufficient reasons for the award.

Instead of stating Rodrigues sustained a temporary work-related injury, the ALJ used the following language in the August 23, 2012, opinion, order, and award and the October 19, 2012, order overruling Sigma's petition for reconsideration:

- "However, it is equally clear that a work-related event occurred, which resulted in temporary or transient symptoms which did require medical attention." (emphasis added).

- "In the case at hand, Mr. Rodrigues sustained a traumatic *condition* which required extensive chiropractic treatment, even though it did not result in any permanent functional impairment." (emphasis added).
- "He definitely sustained a work-related event, even though it did not rise to the level of an 'injury' as defined by the Act." (emphasis added).

A "work-related event" or "traumatic *condition*" is not sufficient for an award of TTD benefits and past and future medical benefits. (emphasis added). Since we are not a fact-finding tribunal, we will not attempt to resolve the inconsistencies in the August 23, 2012, opinion, order, and award and the October 19, 2012, order overruling Sigma's petition for reconsideration. Thus, we vacate the ALJ's award of TTD benefits and past and future medical benefits and remand to the ALJ for further findings on whether Rodrigues sustained a temporary injury as defined by the Act. The medical evidence firmly establishes Rodrigues did not sustain a permanent injury justifying the award of permanent income benefits. Therefore, if the ALJ finds Rodrigues sustained a temporary work-related injury as defined by the Act, an award of TTD and medical benefits may be appropriate.

Accordingly, the award of TTD benefits and past and future medical benefits as set forth in the August 23, 2012, opinion, order, and award and the October 19, 2012, order overruling Sigma's petition for reconsideration award are **VACATED**. The claim is **REMANDED** to the ALJ for further findings on whether Rodrigues sustained a temporary injury as defined by the Act and, if appropriate, the award of TTD and medical benefits consistent with the views expressed herein.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON JOEL W AUBREY  
303 N HURSTBORNE PKWY STE 110  
LOUISVILLE KY 40222

**COUNSEL FOR RESPONDENT:**

HON LIDDELL VAUGHN  
517 WEST ORMSBY AVENUE  
LOUISVILLE KY 40203

**ADMINISTRATIVE LAW JUDGE:**

HON EDWARD D HAYS  
657 CHAMBERLIN AVE  
FRANKFORT KY 40601