OPINION ENTERED: August 9, 2012

CLAIM NO. 200773762

THOMAS BUSH PETITIONER

VS. **APPEAL FROM HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE**

JACK COOPER TRANSPORT
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Thomas Bush ("Bush") seeks review of the February 21, 2012, opinion, award, and order of Hon. Joseph W. Justice, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits only for a work-related injury to the left foot sustained on October 15, 2007. The ALJ dismissed Bush's claim for

income and medical benefits for an alleged low back injury occurring November 6, 2009. Bush also appeals from the March 26, 2012, order overruling his petition for reconsideration.

As the sole issue on appeal relates to Bush's entitlement to medical benefits for the alleged low back injury of November 6, 2009, we will only discuss the evidence and the ALJ's determination regarding that issue.

Bush's Form 101 alleges injuries to his left leg, hamstring, and low back occurring on July 12, 2007, an injury to his left foot/heel on October 15, 2007, and an injury to his right foot on October 11, 2008. Subsequently, Bush amended his Form 101 to assert a low back injury occurring on November 6, 2009. All injuries are alleged to have occurred in the course of Bush's employment with Jack Cooper Transport ("Jack Cooper").

Bush testified by deposition on December 21, 2009, and at the December 15, 2011, hearing. At his deposition, Bush described the November 6, 2009, incident as follows:

> Q: Okay. And can you tell me what happened with the incident on November 6th, 2009?
>
> A: I was at Bradford, Pennsylvania, and I was unloading the units on my trailer, pulled the skids out, no

problems, unloaded the units off the -– the trailer, put the skids back in, put the -– the passenger side, right side skid in, went for the left side skid.

Maybe -– maybe there was a rock that hung up or something in the ramp, I don’t know, but it just -– I got about halfway up and it just kind of stopped. It stopped, I didn’t stop.

Q: Okay.

A: And it kind of like pinched my back. I didn’t think too much about it.

Q: Did any part of your body impact with that –- that ramp?

A: No.

Q: -- that you were putting in? Did your left leg hit that ramp?

A: No.

Q: Okay. When you said it stopped, but you didn’t –-

A: You put it in with a -– we refer to it as a “dogging” [phonetic] bar. And it’s a three foot long bar that you undo your straps with and stuff. But in the end of the ramp, it has a little hole like this and you stick the curved end in here and you push that on in.

Q: Okay.

A: It’s to reduce back injuries and stuff like that. And for the most part, it does work.

Q: Okay. How much does that -– that ramp weigh?

A: I don’t have a clue.

> Q: Okay. When you say “units,” you’re talking about cars here; right? You’re --
>
> A: Yes.
>
> Q: Basically, you were -– had -– had the truck -– or the trailer loaded and --
>
> A: Yes.
>
> Q: -- you were putting the ramps back in?
>
> A: Correct.

Bush testified that after being injured he did not seek medical attention but instead drove a hundred miles to his next stop in Franklin, Pennsylvania, where three cars were unloaded. He then drove to Carrollton, Kentucky where he spent the night. Bush testified he went to sleep at about 8:30 p.m., and when he awoke early Saturday morning he could not move. After crawling to the shower and taking a very hot shower, Bush drove to Louisville. On Monday he told his terminal supervisor about the injury.

Bush has been primarily treated by Dr. Carroll L. Witten, Jr. Bush underwent an MRI and physical therapy. Dr. Witten prescribed Meloxicam and Hydrocodone for his back injury. Bush explained he has back pain just below the belt line, and his left upper thigh is numb.

Occasionally, he has pain down the back of his legs. Bush's back hurts when he rides in a car for any length of time. Bush testified his back pain is unlike anything he experienced prior to November 6, 2009, and he has not worked since the injury.

At the hearing, Bush testified his low back pain keeps him from sleeping through the night. He also experiences low back pain when he sits or stands too long. His back problems restrict his activities inside and outside his home. Bush believes his back is getting worse.

The reports and medical records of Dr. Witten, Dr. Ronald Fadel, and Dr. Warren Bilkey were introduced regarding the low back injury.

In the February 21, 2012, opinion, award, and order, the ALJ determined the incident of July 12, 2007, caused an injury to Bush's left foot and leg resulting in a 3% impairment. The ALJ concluded that on October 11, 2008, Bush sustained a minor right foot injury which did not result in a permanent impairment or the need for future medical treatment. Concerning Bush's low back injury, the ALJ concluded as follows:

> **3. Low back injury**. Dr. Witten's final diagnosis for Plaintiff's low back injury was mechanical low back pain. Dr. Witten released Plaintiff for work, although Dr. Witten thought it would be

> difficult for Plaintiff to return to his former truck driving job. He said he thought Plaintiff could perform most jobs that did not require heavy lifting. Plaintiff told Dr. Witten that he was going to retire. Dr. Witten said Plaintiff did not have any radicular pain, nerve root impingement or muscle spasm. Dr. Bilkey assigned 5% WPI, but the ALJ cannot find on what objective medical basis. Plaintiff has been able to split firewood and work on his vehicles. The ALJ was persuaded by the report of Dr. Fadel in assigning 0% WPI for the low back, and finds that Plaintiff has 0% WPI of the low back. Again, Dr. Witten said Plaintiff would only need occasional medication for arousal of mechanical back pain.

After awarding TTD and PPD benefits for the left foot injury, the ALJ ordered as follows:

> 3. Plaintiff, Thomas Bush's claim for permanent partial disability benefits and future medical for a right foot injury is DISMISSED.
>
> 4. Plaintiff, Thomas Bush's claim for permanent partial disability benefits for his low back injury is DISMISSED.

Significantly, the ALJ did not address Bush's entitlement to medical benefits for the back injury. The ALJ awarded medical expenses for the work-related hamstring and left foot injury. Bush filed a petition for reconsideration/clarification arguing, in part, as follows:

> Plaintiff was awarded "'medical expenses including but not limited to provider's fees, hospital treatment,

> surgical care, nursing, supplies, and appliances as may be reasonably required for the care and relief from the effects of the work-related injury of Plaintiff's hamstring and left foot injury.'" (2/21/12 Opinion pp. 24-25)
>
> . . .
>
> Further, Plaintiff petitions this Administrative Law Judge to specifically include an award of medical treatment for his Low [sic] Back [sic] injury.

By order dated March 27, 2012, the ALJ denied Bush's petition for reconsideration/clarification stating as follows:

> IT IS HEREBY ORDERED that the Plaintiff's Petition for Reconsideration is denied. To clarify, the undersigned Administrative Law Judge found on pages 22 and 23 of his Opinion and Award that the Plaintiff had a 0% whole person impairment to the low back and found further that there was no permanent injury to the lumbar spine or the low back, and therefore, there is no award of future medical treatment or future medical benefits under KRS 342 for the Plaintiff for the low back or the lumbar spine. All claims for income benefits and medical benefits are dismissed against the Employer for the low-back injury of November 6, 2009.

On appeal, Bush argues every physician diagnosed lumbar sprain or mechanical low back pain and assessed permanent restrictions as a result of the November 6, 2009, work injury. Bush asserts Dr. Fadel did not state he did

not sustain a work-related low back injury, nor did he state Bush sustained a temporary work-related low back injury. Bush argues the evidence compels a finding he sustained a work-related low back injury on November 6, 2009.

Citing FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), Bush asserts medical coverage for a work-related injury is not "dependent upon a finding of an impairment rating." Bush argues even though the ALJ relied upon Dr. Fadel's opinion the low back injury did not warrant an impairment rating, the ALJ was not precluded from awarding future medical treatment for the work-related low back injury. Bush contends Dr. Fadel assessed permanent restrictions as a result of the November 6, 2009, work-related injury. Bush insists no physician stated his work-related low back injury had resolved and he needed no further medical treatment. Therefore, the ALJ's determination Bush is not entitled to future medical benefits for his low back injury must be reversed.

Dr. Witten was deposed on September 15, 2010. Dr. Witten testified due to the low back injury, Bush should not lift more than twenty pounds repetitively and "maybe fifty pounds off and on." Dr. Witten stated Bush should perform "a more sedentary job." Dr. Witten believed

Bush's back pain is mechanical in nature and not associated with radiculopathy. Bush attained maximum medical improvement ("MMI") on March 31, 2010. Dr. Witten testified Bush's back had improved as much as it was going to for the foreseeable future. Dr. Witten offered to send Bush "for cortisone epidurals in his back," but Bush declined. Regarding the need for future treatment, Dr. Witten testified as follows:

> Q: Doctor, in terms of his lumbar spine only, what, if any, future treatment do you think he will need?
>
> A: You know, if he contin [sic] -– if he hurts, he may need some occasional pain medication. He could still – might still benefit from cortisone epidurals in his back. I think it's unlikely he would ever need any surgery. And I think you can just treatment it symptomatically.

Dr. Witten testified the opinions he expressed in a July 29, 2010, letter have not changed.

The July 29, 2010, letter, attached as exhibit two to his deposition, reflects Dr. Witten diagnosed "mechanical low back pain with sciatica" due to the injury. Dr. Witten stated Bush "does not need anything more than symptomatic treatment for his low back in the future." Dr. Witten believed Bush could be gainfully employed; however, he would have difficulty doing his job as a truck driver

and a car carrier. Bush could perform most jobs that do not require heavy lifting.

Dr. Witten's February 23, 2011, note reflects a diagnosis of "persistent pain in the low back secondary to sciatica." At that time Dr. Witten believed Bush was "status quo with his back."

Dr. Witten's June 8, 2011, letter reflects Bush never complained of low back pain until his injury on November 6, 2009. Dr. Witten felt this particular incident was entirely different "from the others." Dr. Witten again stated Bush could return to gainful employment with restrictions of lifting no more than fifty pounds off and on and twenty pounds repetitively as set forth in his deposition.

In his August 30, 2010, independent medical examination ("IME") report, Dr. Warren Bilkey diagnosed a lumbar strain due to the November 6, 2009, injury. He believed Bush was at MMI and no additional diagnostic or treatment procedures would likely help him. Dr. Bilkey assessed a 5% impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides").

Jack Cooper submitted the July 1, 2010, letter of Dr. Fadel generated after conducting an IME on June 29,

2010. Concerning the November 6, 2009, injury, Dr. Fadel diagnosed "Lumbosacral sprain superimposed upon pre-existing axial degenerative disease." Dr. Fadel stated as follows: "Mr. Bush's prognosis for a degree of recovery sufficient to perform his expected work duties is guarded in my view." Dr. Fadel was asked what treatment is reasonable and necessary for Bush's November 6, 2009, work-related condition, and stated as follows:

> At this juncture it is my view that the expected conservative management appropriate for the November 6, 2009 injury has been maximized and beyond a diligent HEP I would not anticipate any further formal treatment.

Dr. Fadel stated Bush had no permanent impairment as a result of the November 6, 2009, injury. Concerning the restrictions he would place upon Bush, Dr. Fadel stated as follows:

> This patient has not undergone work hardening and or functional assessment thus reliable restrictions, either temporary or permanent, as relate to the November 6th injury are difficult to reliably establish. Based on the interview and his alleged diminished tolerance for strenuous work I would consider restrictions of no more than 50 lbs. occasional lifting and avoidance of repetitive bending, twisting or stooping. These restrictions involve considerable overlap in my view since so much of his subjective assertions are related to previous injuries.

In the February 21, 2012, opinion, award, and order, the ALJ dismissed Bush's claim for income and medical benefits for the right foot injury, but only dismissed Bush's claim for income benefits for the low back injury. He did not rule on Bush's entitlement to medical benefits as a result of the low back injury. Appropriately, Bush raised this issue in his petition for reconsideration. Contrary to the ALJ's statement in the March 27, 2012, order ruling on the petition for reconsideration, the opinion, award, and order does not contain a finding "there was no permanent injury to the lumbar spine or the low back." Rather, in the opinion, award, and order, the ALJ stated he was persuaded by Dr. Fadel's report Bush had no impairment of the low back. The ALJ then noted Dr. Witten stated Bush only needed "occasional medication for arousal of mechanical back pain." The ALJ did not discuss Dr. Fadel's diagnosis and work restrictions pertaining to the low back injury. The ALJ made no findings regarding the nature of Bush's low back injury.

We agree the ALJ erred in dismissing Bush's low back claim in its entirety based on a finding Bush had "0% WPI of the low back." The ALJ did not adequately address Bush's claim for medical benefits.

"Injury" is defined at KRS 342.0011(1) as:

> [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.

The above definition does not require the claimant to have permanent injury and/or disability to be eligible for medical benefits. "Permanent disability" is defined at KRS 342.0011(11)(c). For permanent disability, the claimant must have a permanent impairment rating. Temporary disabling conditions are compensable under KRS 342.0011(a), which provides that an employee who has not reached MMI from an injury and has not reached the level of improvement that would permit the return to employment may be entitled to benefits of a temporary nature. See Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000). Furthermore, workers suffering temporary injuries may be entitled to medical benefits pursuant to KRS 342.020. An injured worker is entitled to an award of medical benefits "at the time of injury and thereafter during disability" in the absence of a permanent injury or disability. KRS 342.020(1); Combs v. Kentucky River District Health Dept., 194 S.W.3d 823 (Ky. App. 2006).

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 paid, but yet fail in the burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized. In contrast, we acknowledge the Kentucky Court of Appeals, in Combs v. Kentucky River District Health Dept., supra, has also recognized there may be instances when a workers' compensation claimant is entitled to an award of future medical benefits after reaching MMI, even in the absence of a finding of a permanent disability and resulting permanent functional impairment rating. In FEI Installation, Inc. v. Williams, supra, the Supreme Court instructed that KRS

342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award.

In the case *sub judice*, the medical evidence unquestionably establishes Bush sustained a low back injury as a result of his work at Jack Cooper, which produced at least a temporary condition. Although Dr. Bilkey alone assessed a permanent impairment rating as a result of Bush's work at Jack Cooper, the medical evidence introduced on behalf of Jack Cooper does not contradict a finding of a work injury. Dr. Fadel's letter establishes a diagnosis of lumbosacral sprain superimposed upon pre-existing actual degenerative disc disease as a result of the November 6, 2009, injury. In addition, Dr. Fadel noted Bush's prognosis was guarded and set forth specific work restrictions. Although Dr. Fadel stated the restrictions involved considerable overlap since much of Bush's subjective assertions are related to previous injuries, he assessed these restrictions in response to a specific inquiry as to the restrictions to be imposed as a result of the November 6, 2009, injury. Dr. Witten's testimony and records support the need for future medical care.

As the medical evidence establishes Bush sustained an injury as defined by the Act, possibly entitling him to medical benefits, the ALJ erred in completely dismissing the low back injury claim. In the opinion, award, and order the ALJ did not discuss Bush's entitlement to future medical benefits due to his low back injury, and his March 27, 2012, order contains an erroneous statement of law regarding a claimant's entitlement to medical benefits in the absence of a functional impairment rating. Therefore, this matter must be remanded to the ALJ for additional findings of fact regarding Bush's entitlement to future medical benefits due to his low back injury.

Accordingly, those portions of the February 21, 2012, opinion, award, and order and the March 27, 2012, order ruling on Bush's petition for reconsideration which relate to Bush's entitlement to future medical benefits for his work-related low back injury are **VACATED**. This matter is **REMANDED** to the ALJ, as designated by the CALJ, for entry of an amended opinion, order, and award determining whether, based on the medical evidence, Bush is entitled to future medical benefits as a result of the work-related back injury he sustained on November 6, 2009.

ALL CONCUR.

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