

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 28, 2020

CLAIM NO. 201983993 & 201889685

CHARLES JONES TRUCKING INC.

PETITIONER

VS.

APPEAL FROM HON. JEFF LAYSON,
ADMINISTRATIVE LAW JUDGE

CHARLES JONES
and HON. JEFF LAYSON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING AND REMANDING

* * * * *

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

STIVERS, Member. Charles Jones Trucking, Inc. ("Charles Jones") appeals from the April 14, 2020, Opinion, Award, Order and the May 17, 2020, Order on Reconsideration of Hon. Jeff Layson, Administrative Law Judge ("ALJ") resolving Charles Jones' ("Jones") consolidated claims. In Claim No. 2018-89685, the ALJ awarded temporary total disability ("TTD") benefits of \$723.63 per week from March 12, 2018, to September 23, 2018, with Charles Jones taking credit for any TTD benefits

paid, permanent partial disability (“PPD”) benefits, and medical benefits. In Claim No. 2019-83993, the ALJ awarded TTD benefits of \$507.93 per week from April 16, 2019, to July 8, 2019, with Charles Jones taking credit for any TTD benefits previously paid and medical benefits, including future medical benefits. The ALJ dismissed Jones’ claim for PPD benefits.

On appeal, Charles Jones first argues an award of future medical benefits is inappropriate for Jones’ temporary work-related cervical and lumbar spine injuries stemming from an April 16, 2019, motor vehicle accident (“MVA”), which have fully resolved. Next, Charles Jones asserts it is entitled to a credit for the TTD benefits overpaid in Claim No. 2019-83993 against the PPD benefits awarded in Claim No. 2018-89685. Finally, Charles Jones preserves the issue that, pursuant to the case of Partin Bros. Contracting, Inc. v. Rodney Lawson, 2018-CA-00804-WC, rendered November 15, 2019, Designated Not To Be Published, the interest rate on all past due income benefits is 6%.

The Form 101 in Claim No. 2018-89685, indicates Jones sustained work-related injuries to his “shoulder(s)” on May 17, 2017, in the following manner: “Plaintiff ran into the back of another vehicle while traveling 20-25 mph exiting I-64 to I-264 East. He had his upper extremities tensed with hands clutching the steering wheel.”¹

The Form 101 in Claim No. 2019-83993, indicates Jones sustained work-related injuries to “multiple body parts” on April 16, 2019, in the following

¹ At the February 19, 2020, hearing, Jones clarified that the body part injured on May 17, 2017, was his left shoulder.

manner: “Plaintiff ran into the back of a trailer being hauled by a pick-up truck traveling at a slow speed on the interstate.”² By order dated August 29, 2019, the claims were consolidated.

Jones was deposed on June 18, 2019. At the time of the May 17, 2017, MVA, Jones felt something tear in his left shoulder. Jones eventually underwent left shoulder surgery performed by Dr. James Smith on April 24, 2018. Jones returned to work after Dr. Smith released him to work without restrictions in or near August 2018. Jones was able to continue working without additional left shoulder treatment until the April 16, 2019, MVA.

Jones testified that after the April 16, 2019, MVA, “everything” bothered him. He explained: “Pain, my body was aching, my knees, my back, my neck. And my arms was hurting, both of them, and I was nauseated.” Jones was ultimately referred to a chiropractor by his family doctor, Dr. Robert Hemmer.

Jones addressed the symptoms he was experiencing at the time of his deposition:

A: I feel sore.

Q: And, specifically, where do you feel like the soreness is located?

A: My neck, upper shoulders, lower back, shoulder blades, my right knee.

Q: Any other specific complaints right now since that 2019 incident?

A: Just the current complaints that I just said.

² At the hearing, Jones defined the body parts injured on April 16, 2019, as his head, teeth, both shoulders, lower back, and neck.

Q: So neck, upper shoulders, lower back, and right knee?

A: And this shoulder here (indicating).

Q: The shoulder blades?

A: The shoulder blades.

Q: Is one shoulder worse than the other, or anything like that?

A: Well, the left one is a little bit more. The right one, I can just feel it popping. That's it.

Jones also testified at the February 19, 2020, hearing and clarified that, as a result of the May 17, 2017, work-related MVA, he injured his left shoulder and as a result of the April 16, 2019, work-related MVA, he sustained injuries to his teeth, head, both shoulders, right knee, neck, and low back.

Jones tore his rotator cuff as a result of the May 17, 2017, MVA and ultimately underwent repair surgery performed by Dr. Smith. Jones testified that he recovered from the surgery and had no left shoulder symptoms immediately before the April 16, 2019, MVA.

After the April 16, 2019, work-related MVA, Jones was paid TTD benefits through August 11, 2019.

Concerning his current symptoms, the following testimony ensued:

Q: Okay. Let's talk about your left shoulder, okay? What type of symptoms are you having with your left shoulder?

A: Pain, throbbing.

Q: Where is it?

A: In my shoulder down my arm.

Q: Okay. And how far into – does it go into your hand?

A: Into my ring finger.

Q: Okay. So you also experience numbness?

A: Yes, sir.

Q: Is there a relationship between the more you do physically, the more symptoms you experience?

A: Yes, sir.

Q: Is the pain – how would you describe it? What's it like?

A: Probably about a two or a three.

Q: All right. And when it gets bad does it get?

A: Probably about a five.

Q: Okay. Let's now move to your teeth and your head. We've talked about your teeth?

A: Yes, sir.

Q: Do you experience – I think there's some reference to migraines?

A: Yes, sir.

Q: Did you ever have migraines before the work injury?

A: No, sir.

...

Q: Okay. Now, let me come back to – what type of the [sic] symptoms are you having in your right shoulder?

A: Right shoulder is numbness, tingling in the fingers.

Q: Okay. What about your right knee?

A: My right knee, getting in and out of the truck, it gives out on me sometimes.

Q: Okay. And what about your neck?

A: My neck, sometimes pain, some pain.

Q: And how about your low back?

A: Low back, every now and then, it hurts, bending, stuff like that.

Q: All right. These don't hurt you all the time?

A: No, sir.

Q: Okay. Same thing, the knee, the neck, the low back, or your shoulder?

A: Yes, sir.

Jones is still working as a truck driver, but his symptoms worsen the longer he drives. Further, his symptoms affect his ability to engage in household chores. He takes Excedrin because he has difficulty sleeping at night.

The February 19, 2020, Benefit Review Conference (“BRC”) Order and Memorandum lists the following contested issues: permanent income benefits per KRS 342.730, average weekly wage, TTD benefits, wages upon return to work, current wages, ability to return to work, and unpaid or contested medical expenses. The parties stipulated work-related injuries occurred on April 16, 2019, and May 17, 2017. The parties further stipulated Charles Jones paid TTD benefits for the May 17, 2017, left shoulder injury from March 12, 2018, through September 23, 2018, and, for the April 16, 2019, injury, from April 16, 2019, to August 11, 2019.

Charles Jones first asserts the award of future medical benefits is inappropriate for Jones' work-related cervical and lumbar spine conditions, as no physician opined he will require future medical treatment for those conditions. On this issue, we affirm.

In FEI Installation, Inc. v. Williams, 214 S.W.3d 284 (Ky. 2001), the Court held that a permanent impairment rating is not necessary for an award of future medical benefits, only proof of disability. The Court held:

Unlike KRS 342.0011(11) and KRS 342.730(1), KRS 342.020(1) does not state that eligibility for medical benefits requires proof of a permanent impairment rating, of a permanent disability rating, or of eligibility for permanent income benefits. Moreover, it states clearly that liability for medical benefits exists “for so long as the employee is disabled regardless of the duration of the employee's income benefits.” Mindful of the relationship between impairment and disability under the 1996 Act, we conclude that disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits.

Id. at 318-319.

The ALJ is entitled to exercise his discretion in making a determination regarding entitlement to future medical benefits. *See* FEI Installation, Inc. v. Williams, *supra*; *see also* Mullins v. Mike Catron Construction/Catron Interior Systems, Inc., 237 S.W.3d 561 (Ky. App. 2007). The ALJ may make any determination he or she deems appropriate as long as it is supported by substantial evidence.

The ALJ ultimately determined Jones sustained work-related temporary injuries to his cervical and lumbar spine as a result of the April 16, 2019, MVA. In awarding future medical benefits for these injuries, the ALJ relied upon Jones’ deposition and hearing testimony pertaining to the amount of pain he still experiences in those areas. Further, at the hearing, Jones described how his symptoms affect every aspect of his life, from his ability to work, to perform household chores, and to sleep. Even though there is no medical opinion in the record directly supporting an award of

future medical benefits for Jones' work-related lumbar and cervical spine condition, the ALJ has the discretion to award future medical benefits based solely upon Jones' testimony. The ALJ is able to rely upon a claimant's testimony regarding the extent of his disability, and Jones' testimony comprises substantial evidence in support of the award of future medical benefits. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

That said, the ALJ's award of future medical benefits does not mean every future medical expense for the work-related cervical and lumbar spine injuries would be compensable. As articulated by the Williams Court, "[u]nder 803 KAR 25:012; *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky. 1993); and *National Pizza Co. v. Curry*, 802 S.W.2d 949 (Ky. App. 1991), an employer is free to move to reopen an award to contest the reasonableness or necessity of any medical treatment and also whether the need for treatment is due to the effects of the injury." Id. at 319. We affirm the ALJ's award of future medical benefits for Jones' work-related cervical and lumbar spine conditions.

We note that Charles Jones, in his petition for reconsideration, argued that the ALJ failed to define the precise injuries, stemming from the April 16, 2019, MVA, which are covered by the award of future medical benefits. In the May 17, 2020, Order on Reconsideration, the ALJ clarified that his award of future medical benefits covers Jones' lumbar back and neck conditions. The ALJ also specifically discussed and excluded Jones' alleged injury to his teeth from the award of future medical benefits, concluding Jones "failed to provide any medical evidence which would establish that he injured his teeth at that time." However, the ALJ did not formally

dismiss the claim for this injury, nor did he resolve the alleged injuries to Jones' knee or shoulders stemming from the April 16, 2019, MVA. Therefore, remand is necessary.

On remand, the ALJ must formally dismiss Jones' claim for injury to his teeth and also fully resolve Jones' claim for injuries to his knee and shoulders stemming from the April 16, 2019, MVA, including entitlement to future medicals.

Charles Jones next asserts it is entitled to a credit for the TTD benefits overpaid for the April 16, 2019, injuries against the PPD benefits the ALJ awarded for the May 17, 2017, left shoulder injury. We affirm on this issue.

The parties stipulated at the BRC that TTD benefits were voluntarily paid for the injuries Jones sustained as a result of the April 16, 2019, MVA from April 16, 2019, to August 11, 2019. However, the ALJ relied upon Dr. Jules Barefoot's opinion Jones reached maximum medical improvement ("MMI") on July 8, 2019, for the cervical and lumbar spine injuries Jones sustained on April 16, 2019, resulting in an overpayment of TTD benefits of five weeks.³ However, the ALJ only awarded PPD benefits for Jones' May 17, 2017, left shoulder injury, and, as held by the ALJ in the May 17, 2020, Order, while the two claims were consolidated for purposes of adjudication, they are nonetheless separate claims.

Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990), is the seminal case concerning the issue of credit for overpayment of TTD benefits. In Triangle Insulation, supra, the credit for overpaid TTD benefits was taken against past due income benefits awarded

³ Dr. Barefoot's opinion regarding MMI is set forth in his October 8, 2019, Independent Medical Examination report filed in the record by Jones.

in the same claim, not a separate claim. In fact, as noted by the ALJ in the May 17, 2020, Order, Charles Jones failed to cite to any “statutory authority or case law which supports the proposition that an overpayment of TTD benefits in one claim can be taken against an award of PPD benefits in a completely separate claim.” As there is no precedent for receiving a credit for overpayment of TTD benefits in one claim against an award of income benefits in a different claim regardless of the consolidation of the claims, we affirm the ALJ’s resolution of this issue.

Finally, Charles Jones preserves the issue regarding the correct interest rate to be paid on past due benefits relying on Partin Bros. Contracting, Inc. v. Rodney Lawson, *supra*. As this is not an argument but rather an issue preserved for further review, there is nothing for this Board to resolve. However, we note that are five decisions from the Court of Appeals directly on point - three of which hold the amendment to KRS 342.040(1) (contained in House Bill 223) does not have retroactive application and two of which hold the amendment has retroactive application when an award is rendered on or after June 29, 2017. In Excel Mining, LLC v. Maynard, 2018-CA-000511-WC, rendered September 14, 2018, Designated Not To Be Published, and Slater Fore Consulting, Inc. v. Rife, 2018-CA-000647-WC, rendered June 21, 2019, Designated Not To Be Published, the Court of Appeals held the 6% rate of interest was not applicable to unpaid income benefits due prior to June 29, 2017. In Parton Bros. Contracting, Inc. v. Lawson, *supra*, and Warrior Coal, LLC v. Martin, 2018-CA-001430-WC, rendered January 10, 2020, Designated Not To Be Published, the Court of Appeals held all income benefits awarded on or after June 29, 2017, bear 6% interest. Consequently, the Board was reversed in upholding the awards

of 12% interest on income benefits due on or before June 28, 2017. Most recently, in Excel Mining, LLC v. Sowards, 2018-CA-001316-WC, rendered March 20, 2020, Designated Not To Be Published, the Court of Appeals reaffirmed its holding in Excel Mining, LLC v. Maynard, *supra*, declaring 12% interest is payable on all unpaid installments of income benefits due on or before June 28, 2017, and 6% interest is payable on all unpaid installments of income benefits due on or after June 29, 2017. We choose to rely upon the first, second, and fifth decisions of the Court of Appeals, holding the 6% interest rate only applies to unpaid installments of income benefits due on or after June 29, 2017, and not prior to that date. As noted, Charles Jones has not set forth an argument for us to resolve at this time.

Accordingly, on all issues raised on appeal, the April 14, 2020, Opinion, Award, Order and the May 17, 2020, Order on Reconsideration are **AFFIRMED**. This claim is **REMANDED** for an amended opinion and order formally dismissing Jones' alleged injury to his teeth and resolving Jones' claim for injuries to his knee and shoulders stemming from the April 16, 2019, MVA, including entitlement to future medicals.

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