

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 18, 2019

CLAIM NO. 201268600

PERRY COUNTY SHERIFF'S DEPT.

PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE**

EVERETT JAMIE TURNER;
HON. MCKINNLEY MORGAN;
HON. WILLIAM RUDLOFF,
FORMER ADMINISTRATIVE LAW JUDGE; and
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING & REMANDING**

* * * * *

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

ALVEY, Chairman. Perry County Sheriff's Department ("Perry County") appeals from the Amended Opinion and Order on Remand rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ Rudloff") on June 16, 2015, and the July 9, 2015 Order denying its petition for reconsideration. Perry County also appeals

from the September 17, 2018 Opinion, Award and Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge (“ALJ”), and the September 28, 2018 Order denying its petition for reconsideration. On remand, ALJ Rudloff entered an Order granting Everett Jamie Turner (“Turner”) interlocutory relief in the form of temporary total disability (“TTD”) benefits and medical benefits. The ALJ subsequently found Turner permanently totally disabled due to a September 30, 2012 incident when he fell in the course of his duties as a deputy for Perry County, and awarded TTD benefits, permanent total disability (“PTD”) benefits and medical benefits.

On appeal, Perry County argues ALJ Rudloff and the ALJ rendered orders, decisions, and impermissibly allowed the introduction of additional evidence, which fell outside the scope of the direction from this Board on remand. Because we determine ALJ Rudloff and the ALJ acted outside of the scope of their authority on remand, we vacate and hold for naught all orders and decisions rendered by ALJ Rudloff and the ALJ since the March 30, 2015 decision from this Board. We direct the ALJ to issue a decision comporting with the previous direction provided by this Board on March 30, 2015.

This is the third time this claim has been appealed to this Board. The facts of the case were clearly outlined in the Board’s decision on March 30, 2015. In that decision, the Board affirmed in part the ALJ’s opinion rendered September 19, 2014, and the Order on reconsideration entered November 3, 2014 by finding the allegation of a neck injury was tried by consent. This Board vacated the remainder of the ALJ’s decision, and remanded for additional findings.

Dr. Arthur Hughes evaluated Turner on March 26, 2014, and assessed a 49% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), but stated he had not reached maximum medical improvement ("MMI") by the date of the examination. Also, ALJ Rudloff incorrectly stated in his decision that Dr. Henry Tutt, who had evaluated Turner at Perry County's request, found he had reached MMI. Relying upon the 49% impairment rating, ALJ Rudloff found Turner permanently totally disabled.

This Board determined the impairment rating assessed by Dr. Hughes was invalid because he found Turner had not reached MMI. Regarding this issue, the March 30, 2015 decision from this Board reflects as follows:

That said, for reasons not raised by Perry County, the ALJ's finding of permanent total disability and the award of TTD benefits and PTD benefits are vacated. It is clear from the language in the September 19, 2014, Opinion and Order that the ALJ relied upon Dr. Hughes' 49% whole person impairment rating. However, a finding of permanent total disability requires a *permanent impairment rating*. KRS 342.0011(1)(11)(c). While Dr. Hughes assessed a 49% whole person impairment rating in his March 26, 2014, IME report, he also opined Turner had not yet reached MMI. Pursuant to the AMA Guides, Chapter 1.2, "A medical impairment is considered permanent when it has reached **maximal medical improvement (MMI)**, meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment." (emphasis in original). Therefore, Dr. Hughes' whole person impairment rating was not permanent at the time of his IME report. Significantly, the record does not contain a supplemental report by Dr. Hughes.

In the September 19, 2014, Opinion and Order, the ALJ opined that "[b]ased upon the medical evidence from

Dr. Tutt, I make the factual determination that the plaintiff Mr. Turner has reached maximum medical improvement." In addition, the ALJ awarded TTD benefits from October 1, 2012, through June 25, 2014, "when Dr. Tutt stated that Mr. Turner reached maximum medical improvement." In order for the ALJ to rely upon Dr. Hughes' 49% impairment rating, he must simultaneously rely upon a physician who determined MMI had been attained on or before the date Dr. Hughes assessed his 49% impairment rating, March 26, 2014.

The ALJ believed Dr. Tutt's testimony supports an MMI date of June 25, 2014, the date of his IME report. However, we are unable to locate a clear articulation of MMI by Dr. Tutt in his June 25, 2014, IME report, his August 1, 2014, supplemental report, or his August 27, 2014, deposition. Notably, in its petition for reconsideration, Perry County argued the record does not contain an opinion from Dr. Tutt regarding MMI. We note the following testimony in Dr. Tutt's August 27, 2014, deposition:

Q: And Doctor, in your opinion, did Mr. Turner sustain, in your opinion, any type of permanent injury as a result of the September 30, 2012 incident?

A: No, sir.

Q: And based upon what he did describe, which basically I think was light-headedness and-

A: Syncope.

Q: Yes. How soon would that have- should that have resolved?

A: Within hours.

On remand, the ALJ must provide additional findings regarding his determination of June 25, 2014, as the date of MMI in reliance upon Dr. Tutt's testimony. If the ALJ again finds June 25, 2014, is the date of MMI, Dr. Hughes' impairment rating must be rejected, as it was assessed prior to Turner reaching MMI. Our holding is

fully supported by Robert Corbett v. Makers Mark Distillery, No. 2013-CA-001102-WC, Designated Not To Be Published (March 13, 2015), in which the Court of Appeals held as follows:

Because Dr. Morris opined Corbett had not reached MMI, the AMA *Guides* prohibited him from assigning *any* impairment rating for *any* of Corbett's conditions.

...

A permanent impairment rating resulting from an injury must be determined by utilization of the AMA *Guides*. KRS 342.730(1). The proper interpretation of the AMA *Guides* and the proper assessment of impairment are medical questions solely within the province of medical experts for the purposes of assessing a claimant's disability. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003); *Lanter v. Ky. State Police*, 171 S.W.3d 45, 52 (Ky. 2005). To be useful for the fact-finder as competent, substantial evidence, a physician's opinion must be grounded in the AMA *Guides*, and an ALJ may not give credence to an opinion of a physician assigning a permanent impairment rating that is not based upon the AMA *Guides*. *Jones* at 154. In order to utilize an impairment rating in the assessment of a claimant's disability rating and monetary award, an ALJ is required to determine whether the impairment rating was based upon the AMA *Guides*, and is authorized—though not compelled—to consult the AMA *Guides* when determining the weight and credibility to be assigned to the evidence. *Caldwell Tanks v. Roark*, 104 S.W.3d 753, 756-757 (Ky. 2003).

Slip Op. at 18, 22-23.

Consequently, should the ALJ find Turner reached MMI on June 25, 2014, as this Board is unable to locate another impairment rating in the record, there can be no award of PTD benefits or permanent partial disability ("PPD") benefits. At that point, the ALJ must determine if Turner, based upon the medical evidence in the

record, sustained a temporary injury, and if appropriate, the extent to which he is entitled to TTD benefits and medical benefits for any and all injuries. Should the ALJ determine Turner did not sustain a temporary injury, Turner's claim must be dismissed.

However, should the ALJ not find evidentiary support for an MMI date of June 25, 2014, the ALJ must examine the record to determine a different MMI date and also determine whether it predates March 26, 2014, the date Dr. Hughes assessed his impairment rating.

Rather than comply with the Board's direction to provide a decision based upon the evidence of record when the claim was submitted, ALJ Rudloff ordered the parties to submit additional briefs. On June 16, 2015, ALJ Rudloff determined Turner had not reached MMI, and found he was entitled to an award of interlocutory relief, for which he awarded TTD benefits beginning on October 1, 2012, with 12% interest on unpaid amounts, and medical benefits. On July 6, 2015, Perry County filed a petition for reconsideration, arguing ALJ Rudloff's determination did not comply with the direction of this Board. The petition was denied by Order dated July 9, 2015.

Perry County appealed from those orders, and the appeal was dismissed in a decision issued by this Board on August 24, 2015, as an appeal from a decision that was not yet final. This Board specifically noted the ALJ had not complied with the direction provided in the previous decision. Perry County appealed to the Kentucky Court of Appeals, which affirmed the decision from this Board.

Several motions were subsequently filed before ALJ Rudloff and the ALJ, to whom the claim was eventually reassigned. Additional evidence was

submitted and a hearing was held on July 13, 2018. The ALJ, relying upon the report of Dr. Stephen Autry who evaluated Turner at his own request on April 12, 2017 (more than two years after the claim was remanded), found Turner had reached MMI. Relying upon the 60% impairment rating assessed by Dr. Autry, the ALJ awarded TTD benefits, PTD benefits, and medical benefits.

Perry County filed a petition for reconsideration on September 28, 2018, again arguing the ALJ exceeded the scope of the direction provided by this Board in its decision remanding for additional determination. The ALJ denied the petition in an Order issued on October 18, 2018.

As noted above, on remand, ALJ Rudloff was directed to make a determination of whether Turner had reached MMI on the evidence of record as it existed on March 30, 2015, the date of the Board's opinion. ALJ Rudloff was not directed, or permitted, to allow for further proceedings, or to allow the introduction of additional evidence. This is consistent with the decisions of the Kentucky Supreme Court in T. J. Maxx v. Blagg, 274 S.W.3d 436 (Ky. 2008); Nesco v. Haddix, 339 S.W.3d 465 (Ky. 2011); and UEF v. Pellant, 396 S.W.3d 292 (Ky. 2012) which prohibit "a second bite of the apple", or the introduction of additional evidence on remand.

In the March 30, 2015 decision, we specifically noted that Dr. Hughes' assessment of an impairment rating was invalid, and did not comport with the direction of the AMA Guides because he determined Turner had not reached MMI. ALJ Rudloff was directed to determine, from the record, whether there was any medical opinion establishing that Turner had reached MMI, and what he was

permitted to do if there was no such opinion. We noted Dr. Hughes' opinion, standing alone, did not support an award of PTD benefits. The Board's decision was not appealed and therefore became the law of the case.

In Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982) the Supreme Court instructed as follows:

The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact. "As the term 'law of the case' is most commonly used, and as used in the present discussion unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the case to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court." 5 Am. Jur. 2d, Appeal and Error, Sec. 744.

In McGuire v. Coal Ventures Holding Company, Inc., 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published, the Kentucky Supreme Court described the law of the case doctrine as follows:

The law of the case doctrine concerns the preclusive effect of judicial determinations in the course of a single litigation before a final judgment. [footnote omitted] As applied to workers' compensation cases, a final decision of law by an appellate court [footnote omitted] or the

Board [footnote omitted] establishes the law of the case and must be followed in all later proceedings in the same case.

Slip Op. at 6.

On remand, ALJ Rudloff was granted the limited authority to determine whether a valid impairment rating existed at the time the case was submitted, supported by the appropriate determination of when Turner reached MMI. ALJ Rudloff was not granted authority to conduct additional proceedings, allow the introduction of additional evidence, or grant interlocutory relief.

Rather than follow the directives of this Board, ALJ Rudloff, and later the ALJ, allowed the introduction of additional evidence, allowed the parties to file additional briefs, awarded interlocutory relief, and impermissibly conducted a second hearing. Additionally, ALJ Rudloff and the ALJ made multiple awards of attorney fees to counsel for Turner, which could be construed to exceed the limits set forth in KRS 342.320.

Here, ALJ Rudloff and the ALJ have ignored the Board's explicit and clear directives. Because ALJ Rudloff and the ALJ exceeded their authority, all orders issued (including awards of attorney fees), evidence submitted, subsequent proceedings, and opinions issued (including those awarding interlocutory relief listed above), and any actions by ALJ Rudloff or the ALJ, conducted subsequent to the March 30, 2015 opinion entered by this Board, are hereby vacated and held for naught.

The June 16, 2015 Amended Opinion and Order on Remand by Hon. William J. Rudloff, Administrative Law Judge, awarding interlocutory relief in the

form of TTD benefits and medical benefits, and the Order issued July 9, 2015 denying Perry County's petition for reconsideration are **VACATED**. We likewise **VACATE** any attorney fees awarded. We additionally **VACATE** the September 17, 2018 Opinion, Award, and Order, and the October 18, 2018 Order denying Perry County's petition for reconsideration issued by Hon. Stephanie L. Kinney, Administrative Law Judge. This claim is **REMANDED** to the ALJ for entry of a decision in conformity with the opinion of this Board rendered March 30, 2015, based upon the evidence of record on that date, consistent with the views expressed herein.

ALL CONCUR.

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