

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

COMMERCE AND INDUSTRY)
INSURANCE COMPANY, and)
TRU-CHECK, INC.,)

Petitioners,)

VS.)

SUE ANN HEAD, Administrator,)
TENNESSEE DEPARTMENT OF)
LABOR AND WORKFORCE)
DEVELOPMENT AND WORKERS')
COMPENSATION DIVISION, et al.,)

Respondents.)

NO. 10-1578-III

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MEMORANDUM AND ORDER

This matter was filed by an employer, Tru-Check, Inc., and an insurer, Commerce and Industry Insurance Company, ("Petitioners") for immediate review of a preliminary order of a Worker's Compensation Specialist as modified by the Administrator's Designee at the Department of Labor (when the Specialist and Designee are referred to collectively, it shall be "DOL"). The order required the Petitioners to pay temporary disability and medical benefits pursuant to Tennessee Code Annotated section 50-6-238. The orders for temporary

disability benefits and payment for medical procedures were issued in response to the Employee's attorney filing a May 12, 2010 Request For Assistance ("RFA").¹

The legal claim that brings this matter before the Court is not that DOL merely made an incorrect decision. If that were the case, there would be no authority for this Court to intervene while the agency/DOL proceedings are ongoing, as section 50-6-238(b) of the Worker's Compensation Act provides a remedy for mere errors. Under section 50-6-238(b) an erroneous ruling of DOL can be corrected upon a final order of the trial court after it tries the case by a reimbursement to an employer and/or insurer from the Second Injury Fund.

The circumstances the Petitioners claim that warrant immediate judicial intervention are alleged irremedial rulings of the DOL. The Petitioners claim that the DOL is violating fundamental rights with rulings that are outside of the DOL's authority and clearly violate Tennessee law. Specifically, the Petitioners claim the following abuses of authority by the DOL:

- The Specialist *sua sponte* reinstated temporary total disability benefits, even though the attorneys did not seek that relief (paragraph 9 of the Amended Petition);
- The Specialist ordered that the Employee had not attained maximum medical improvement despite a physician's opinion to the contrary (paragraphs 9-10 of the Amended Petition); and

¹Under Tennessee law, when there is a dispute in a workers' compensation case, "[a]ny party or their attorney may request the assistance of a workers' compensation specialist in the determination of whether temporary disability or medical benefits are appropriate." TENN. CODE ANN. 50-6-238(a)(1) (West 2011). This "request for assistance" process is designed "to provide an informal, expeditious resolution to disputes between injured workers and employers." Tenn. Comp. R. & Regs. 0800-02-05-.06(1).

- The Designee mandated that the Petitioners pay for unrelated oral surgery for which the Employee had not sought payment (paragraph 12 of the Amended Petition).

After studying the record and considering the law and argument of counsel, the Court concludes it must dismiss the petition for immediate judicial review for three reasons. First and foremost is that the Court concludes that review by a court upon a trial of the case after the agency proceedings are final provides the Petitioners an adequate remedy. The Court finds from its review of the record that any incorrect rulings by the DOL are simply erroneous; such rulings do not violate fundamental rights or constitute an abuse of authority. Related to that is, secondly, that this Court finds that DOL did not act outside its statutory authority. The rulings DOL made were sought by the parties and/or related to issues counsel sought to have determined which fits within the broad grant of authority to DOL under section 50-6-238. Lastly, the determinations of the DOL regarding Tennessee Worker's Compensation Law are not without a basis in the law and the record.

The facts and law on which the Court's decision is based are as follows.

Facts

From the Court's review of the record, it considers the Respondents' statement of the facts at pages 2-3 of their April 21, 2011 Brief to be an accurate summary, and adopts and reproduces that statement:

The Employee, Edward T. White, worked for Tru Check, Inc. and sustained a compensable injury to his knee on April 27, 2006. (Petition at 6) On July 31, 2007, the employer made a request for a BRC. (Finks Affid., ¶6) The BRC was scheduled for September 10, 2007, but was rescheduled at the request of the employee. (Finks Affid., ¶7) The Department's records do not indicate that either party requested that the BRC be reconvened. (Finks Affid., ¶8)

In April 2009, Dr. Driessnack placed Mr. White at MMI following an arthroscopic surgery. (Brief of the Petitioner, 1) In December 2009, Dr. Kaelin [treating physician] evaluated Mr. White and also placed him at MMI because Mr. White declined to have knee-replacement surgery. (Brief of the Petitioner at 1) In April 2010, Mr. White elected to go forward with the surgery, however, Mr. White's consulting doctor, Dr. Mays, recommended that he have an infected tooth pulled before surgery could proceed. (Petition at 7) In late April 2010, Petitioners sent a letter to Mr. White stating that Petitioner was reserving the right to claim temporary total disability payments [from April 2009 forward] as an advance for future permanent partial disability. (Petition at 7) Mr. White filed a Request for Assistance on May 12, 2010, with the Department of Labor and Workforce Development. (Finks Affid., attached documents) The RFA stated that Mr. White was not at MMI (maximum medical improvement), that he needed to have knee surgery because he was in pain, and that the employer refused to authorize the surgery. (Finks Affid., attached documents) Specialist Andrea Taylor reinstated temporary total disability and found that Mr. White had not reached MMI. (Petition at 7) Petitioners appealed the decision to Administrator's Designee J. Allen Brown. (Petition at 7) Mr. Brown affirmed Specialist Taylor's findings and modified the order to require Petitioners to pay for Mr. White's oral surgery. (Petition at 8) Petitioners filed a Petition for Judicial Review under the common law writ of certiorari and the UAPA. (Petition at 2) The petition was not signed by a party or sworn to.

In addition to the foregoing facts, the Court has located in the record other facts that it has relied upon in deciding this matter:

- Deviating from Dr. Driessnack, the Employee's treating physician, Dr. Kaelin, stated in June 2009 that the Employee had not reached maximum medical improvement.
- The August 12, 2010 Request for Administrative Review of a Workers' Compensation Specialist's Order filed by the Petitioners (Exhibit 4 to April 27, 2011 Notice of Filing in this Court) states on page 2 item (d) that the Petitioners sought a ruling from the Administrator's Designee to determine whether tooth extraction must be paid for by the Petitioners.
- Further down the page of the Statement, the Petitioners, on page 2 (exhibit 4 of April 27, 2011 Notice of Filing), state that one of the issues the Claimant submitted in its RFA was that the Petitioners be responsible for payment of the tooth extraction.

Method of Judicial Review

The authority the Court has determined for judicial review in this case is Tennessee Code Annotated section 4-5-322(a)(1). That section provides that:

A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

A full discussion of the Court's analysis of the applicability of section 4-5-322(a)(1) is provided in a February 24, 2011 Memorandum and Order. The portions of that discussion relevant to the issues herein are that the foregoing statute performs at the administrative level

the function a Rule 10 appeal provides for trial court decisions under the Tennessee Rules of Appellate Procedure and, therefore, lends itself to the task of immediate court review of alleged abusive conduct by an agency. That is, when the circumstances claimed are not just an incorrect decision by a specialist or designee but, instead, a decision violative of fundamental rights, such that review of a final agency decision is inadequate, immediate judicial review is available under section 4-5-322(a)(1) of a preliminary, procedural or intermediate DOL decision. Additionally fitting is that immediate review of a preliminary, procedural or intermediate decision of the DOL under 4-5-322(a)(1) is not unchecked. Merely incorrect decisions by the DOL will be declined for review by the trial court because there is an adequate remedy under Tennessee Code Annotated section 50-6-238(b) if the case is filed before a trial court, but DOL decisions that are fundamentally illegal can be immediately reviewed.

More specifically, the way subsections 50-6-238(a) and (d)(1) (2) and (3) work is that subsection (a) vests authority in the specialist to order temporary benefits, and subsection (d)(1) (2) in the designee. Next, once a specialist or designee has ordered the employer to pay benefits, payment is mandatory. TENN. CODE ANN. § 50-6-238(d)(1)(B)(ii) and (2)(B). The statute further provides that if the employer fails to pay, the Commissioner “shall” assess a penalty. TENN. CODE ANN. § 50-6-238(d)(3). Lastly and significantly, appeal of the penalty is provided to the employer “pursuant to the Uniform Administrative Procedures Act.” TENN. CODE ANN. § 50-6-238(d)(3). From this statutory system, the Court’s reasoning

is that by providing for review under the UAPA in subsection (d)(3), which is the final step (assessment of a penalty by the Commissioner) of the section 50-6-238 statutory scheme of DOL ordering temporary benefits, the Legislature has indicated its intent and it logically follows that alleged illegal and/or abusive preliminary and intermediate decisions by DOL concerning temporary benefits under section 50-6-238 leading up to assessment of a penalty are susceptible to immediate judicial review under the UAPA section 4-5-322(a)(1).

As to the record the Court uses for judicial review under section 4-5-322(a)(1), the orders of the Specialist and Designee in issue are clearly part of the record. Additionally, in this case the Court required the parties in an April 25, 2011 order to file all information that had been filed with the Specialist² and the Designee:

Because this case seeks review of the decision of the Worker's Compensation Specialist, the record for judicial review necessarily consists of

²DOL Rule 0800-2-5.05 lists the following documents to be filed when an RFA is submitted to the Specialist:

- (a) Medical Records, including impairment ratings given;
- (b) Medical Bills;
- (c) Employer's First Report of Injury;
- (d) Wage Statement;
- (e) Employment Application and/or Personnel records, including work status;
- (f) Statutory basis for denial and documentation supporting such;
- (g) Job Description/Analysis of employee's job prior to injury;
- (h) Education level of the employee;
- (i) Employment history of the employee;
- (j) Issues in dispute;
- (k) Prior medical records of employee, including psychiatric records if relevant to the merits of the claim;
- (l) List of all the employee's prior workers' compensation claims;
- (m) List of any prior litigation the employee has been involved in;
- (n) List of any prior criminal convictions which would be admissible pursuant to the Tennessee Rules of Evidence;

all information (i.e., medical records, bills, injury reports, wage statement, personal information about employee, etc.) which was provided to the Worker's Compensation Specialist during the "Request for Assistance" process. The Court is particularly concerned that it may not have complete copies of exhibits attached to the Request for Assistance forms that were filed by the parties with the Specialist, and/or that the Court may not have correspondence and/or exhibits provided to the Specialist subsequent to the filing of the Request for Assistance forms.

Thus, from the filings of the parties, the record before this Court consists of the attachments to the Amended Petition, the attachments to the April 27, 2011 Notice of Filing by Petitioners, and the affidavit of Mark Finks, Director of the Administrative Review Program at DOL, filed by the Respondents.

Analysis

As noted above, there are three instances of illegality and abuse of authority claimed by the Petitioners:

- The Specialist *sua sponte* reinstated temporary total disability benefits, even though the attorneys did not seek that relief (paragraph 9 of the Amended Petition);
- The Specialist ordered that the Employee had not achieved maximum medical improvement despite a physician's opinion to the contrary (paragraphs 9-10 of the Amended Petition); and
- The Designee mandated that the Petitioners pay for unrelated oral surgery for which the Employee had not sought payment (paragraph 12 of the Amended Petition).

The Court shall first address the last one listed above concerning payment by the Petitioners for oral surgery for the Employee.

Tooth Extraction

(1) Inconsistent Positions

The Petitioners at paragraph 12 of their November 18, 2010 Amended Petition and at page 10 assert that the Designee acted outside of his statutory authority in ordering the Petitioners to pay for tooth extraction because the Employee did not request that relief when it filed the RFA. In its brief, the Petitioners argue that:

Treatment for the dental condition was never sought. The Specialist at the earlier level agreed with both parties that the dental condition was unrelated. All of the parties agreed that the dental treatment was unrelated and stipulated to that fact during the informal phone conference prior to the review of the Administrator's Designee.

Brief of Petitioners, page 8 (Apr. 1, 2011). The Court dismisses this claim because the Petitioners have taken inconsistent positions.

The Court has been unable to locate any evidence in the record of a stipulation regarding the dental treatment. To the contrary, the evidence in the record supports the finding that one of the impasses which led to the request for assistance from the Workers' Compensation Specialist, and ultimately the Administrator's Designee, was the issue of compensability of the preoperative dental work. The record reveals that the oral surgery had been discussed by both parties prior to the Employee filing the request for assistance form.

In fact, in an April 15, 2010 letter to the Employer, counsel for the Employee informed the Employer about the results from the preoperative dental appointment and inquired as to how the Employer wanted to proceed with future medical treatment.

It was required by the treating physician that Mr. White get a clearance from a dentist prior to the surgery due to the potential of infection setting up in the area that is to be operated on. As you can see from the note of the dentist Dr. Mays, he will not clear Mr. White until he receives a removal of tooth No. 18. Mr. White has not had any problems with his teeth and was not planning on having this tooth removed but understands that if it is a requirement for the surgery that he will have it extracted, but the cost should fall upon workers' comp[ensation] whose authorized physician has required this measure prior to proceeding with the procedure.

The reason that I am writing this letter is that the Case Nurse Manager made a disparaging comment to Mr. White concerning the workers' comp[ensation] paying for this procedure and in the same breath told him she would turn it in for approval. Please let me know if there is any problem with getting this performed and whom you want to send him to as an oral surgeon for the extraction.

Letter to Dave Rich (Counsel for Petitioner), April 15, 2010.

Additionally, as noted above in the Fact section, the Petitioners stated in their filings below with the Designee that the Employee had sought payment for tooth extraction in the RFA:

Claimant [the Employee] submitted the subject Request for Assistance with the Tennessee Department of Labor asserting two (2) reasons for the Department of Labor's intervention:

- 1.) Employer's claim of a permanent partial disability credit for previously advanced TTD benefits from April 2009 was incorrect; and

- 2.) Employer be responsible for providing Claimant with dental treatment that is wholly unrelated to his April 27, 2006 work injury.

Employer's Position Statement in Advance of Administrative Appeal, August 12, 2010.

Furthermore, in that same filing the Petitioners specifically requested on page 2 item (d) that the Designee issue a ruling on whether the Petitioners had to pay for the tooth extraction.

Therefore, based on the record before the Court, it is evident that the issue of compensability of ancillary preoperative dental treatment was properly before the Worker's Compensation Specialist and the Administrator's Designee. Having invoked and acknowledged at the administrative level the authority of the Designee to rule on the issue of the tooth extraction, the Petitioners cannot challenge in this Court that the Designee lacks such authority.

(2) Basis for Ruling In Law and The Record

As to the Petitioners' challenge to the order of DOL that the Petitioners' payment for the tooth extraction is clearly violative of Tennessee law, the Court's research reveals that the legal conclusion of the Designee is not irrational or a clear error of law.

In paragraph 6 of the August 27, 2010 order, the Designee required the Petitioner to pay for a preoperative oral extraction of a tooth to enable the Employee to proceed with the work related knee replacement surgery. The Designee reasoned that the oral surgery was

compensable because “Employers in Tennessee take employees as they find them, with all their personal infirmities. Pulling the Employee’s tooth and treating his infection are a reasonable and necessary condition precedent to obtaining the recommended total knee replacement surgery.” *Administrator Designee J. Allen Brown’s Order*, page 3, ¶ 6 (Aug. 27, 2010). The Petitioner argues that this preoperative oral surgery is wholly unrelated to the Employee’s work injury and is not compensable under Tennessee’s Worker’s Compensation scheme.

The issue of whether certain medical benefits qualify as compensable benefits under Tennessee’s Worker’s Compensation scheme is governed by Tennessee Code Annotated section 50-6-204(a)(1):

(a)(1)(A) The employer or the employer's agent shall furnish free of charge to the employee such medical care and treatment made reasonably necessary by accident as defined in this chapter, including medical and surgical treatment, medical and surgical supplies, hospitalization, nursing services, psychological services, dental services, crutches, artificial members, and prescription eyeglasses or eyewear.

TENN. CODE ANN. § 50-6-204(a)(1) (West 2011). According to the statute, the employer is only liable for “medical care and treatment made reasonable necessary by accident.” Generally, courts in both Tennessee and other jurisdictions have approached the determination of whether medical care is “reasonably necessary” based on the specific facts of the case. In Tennessee, as cited by the Designee, this statute is informed by the rule of law that an employer takes an employee as he finds him despite any preexisting conditions that could be aggravated by a work-related injury. *Cage v. Yasuda Fire & Marine Ins. Co. of*

America, No. W2004-01669-SC-WCM-CV, 2005 WL 14121135, at *8 (Tenn. Workers Comp. Panel 2005).

However, while this rule is applicable in workers' compensation cases, it can be problematic in cases like this one, where the work-related knee injury has not aggravated any preexisting condition, but has just highlighted a "dormant" preexisting issue—an infected tooth. With regard to ancillary preoperative treatments—such as the oral surgery in this case—courts are divided on whether these types of procedures should be compensable under workers' compensation statutes.

In *Public Service Company of Colorado v. Industrial Claim Appeals Office*, 979 P.2d 584 (Colo. App. 1999), the Court addressed the issue of whether "an employer can be held liable for treatment of a nonindustrial condition necessary to prepare a claimant for surgery to treat a compensable industrial injury." In that case, a claimant suffered a compensable neck injury which required surgery. *Id.* at 584. Prior to the surgery, the claimant was referred to a psychologist who also diagnosed the claimant with depression caused by the industrial injury and a nonindustrial bipolar disorder, which if not treated pre-operatively, would compromise the claimant's recovery from neck surgery. *Id.* The Administrative Law Judge ordered the employer to pay for this ancillary pre-operative treatment as reasonably necessary. *Id.*

On appeal, the Court affirmed this decision and held that "the employer can, in certain circumstances, be held liable for such [ancillary preoperative treatments]." *Id.* In its

reasoning, the Court did acknowledge that these types of cases involving ancillary preoperative treatments are fact specific and courts in other jurisdictions are not uniform in their application of compensability.

While ancillary preoperative treatments that are deemed requisite to the ultimate course of treatment for an industrial injury have not been specifically authorized in Colorado, such preoperative treatments have been held compensable in other jurisdictions. *See Arrowhead Press, Inc. v. Industrial Commission*, 134 Ariz. 21, 653 P.2d 371 (1982) (claimant required treatment for unrelated bronchitis before surgery for industrial injury; court held the unrelated condition to be compensable because the bronchitis treatment was necessary for treatment of industrial condition); *Forni v. Pathfinder Mines*, 834 P.2d 688 (Wyo. 1992) (treatments for claimant's pre-existing depression and diabetes were ancillary and necessary to prepare claimant for surgery for a work-related injury and were, therefore, compensable); *5 Larson's Workers' Compensation Law* § 61.13(e) (1998). *See also Milco Construction v. Cowan, supra* (treatment that prevents deterioration of claimant's medical condition may be compensable).

However, other cases in these same jurisdictions have been decided differently. *See Beasley v. Industrial Commission*, 175 Ariz. 521, 858 P.2d 666 (1993) (declining to extend *Arrowhead* and denying compensation where treatment for the nonindustrial condition is necessary notwithstanding the industrial injury); *State ex rel. Wyoming Workers' Compensation Division v. Girardot*, 807 P.2d 926 (Wyo. 1991) (announcing a "rule of reason," applied later in *Forni*, and denying treatment of unrelated by-pass heart surgery, which cost \$35,000, that was necessary before surgery on work-related hernia, which cost only \$3790). These different outcomes within the same jurisdiction serve only to underscore the factual nature of this determination.

Id. at 585.

Based upon these authorities, this Court sees that reasonable minds can differ on the compensability of ancillary preoperative treatments because the analysis is driven by the facts of the case. However, in making a compensability determination, "[m]edical treatment by

physicians designated by the employer or physicians selected by the employer's doctors is presumed to be "reasonably necessary." 20 TENN. WORKERS' COMP. PRAC. & PROC. § 13:2 (2009-10). Here, it is undisputed that the treating orthopedic surgeon, Dr. Richard Driessnack—the physician designated by the Employer—required the Employee to seek clearance from a dentist prior to being approved for the work related knee replacement. There is no evidence in the record that the Employee requested the dentist appointment himself without the knowledge of the Petitioners. Therefore, relying upon the facts developed thus far, the Court finds that the decision of the Administrator's Designee to order dental treatment has a basis in law and in fact. While the decision is nevertheless susceptible to reversal by a trial judge on a more fulsome record including doctors' depositions, the decision of the Designee on the preliminary record is not irrational or illegal.

(3) Adequate Remedy

Lastly, should a trial court subsequently determine that the tooth extraction should not have been required to be paid by the Petitioners, reimbursement for costs is provided to them pursuant to Tennessee Code Annotated section 50-6-238(b). Thus, final review by a trial court provides an adequate remedy in this instance.

In sum, then, with respect to the issue of tooth extraction, the Petitioners have failed to demonstrate under Tennessee Code Annotated section 4-5-322(a)(1) that there is a basis for this Court to intervene and change the ruling of DOL.

Maximum Medical Improvement and Temporary Total Disability Benefits

Recapping, the facts underlying the Petitioners' claims regarding maximum medical improvement and temporary total disability benefits are that:

- In April 2009, Dr. Driessnack placed Mr. White at MMI following an arthroscopic surgery;
- In June of 2009 Dr. Kaelin opined that the Employee had not reached MMI;
- In December 2009, Dr. Kaelin evaluated Mr. White and at that time placed him at MMI because Mr. White declined to have knee-replacement surgery;
- In April 2010, Mr. White elected to go forward with the surgery, however, Mr. White's consulting doctor, Dr. Mays, recommended that he have an infected tooth pulled before surgery could proceed;
- In late April 2010, Petitioners sent a letter to Mr. White stating that Petitioner was reserving the right to claim temporary total disability payments as an advance for future permanent partial disability;
- Mr. White filed a Request for Assistance on May 12, 2010, with the Department of Labor and Workforce Development;
- The RFA stated that Mr. White was not at MMI (maximum medical improvement), that he needed to have knee surgery because he was in pain, and that the employer refused to authorize the surgery; and

- Specialist Andrea Taylor reinstated temporary total disability and found that Mr. White had not reached MMI.

Paragraphs 3 and 5 of the order of the Administrator's Designee are the operative provisions on this issue:

3. The Employer/Carrier's position is that the Employee reached MMI in April and/or June of 2009. They assert that the temporary disability benefits they paid from June 4, 2009, through April 26, 2010 were paid in error and are a credit against any permanency the Employee may have. In the alternative, they assert that the Employee reached MMI again as of May 2010 because his treatment is at a stalemate due to the fact that he will not have his tooth pulled. The Employer/Carrier's position is that the Employee reached MMI in 2009 is contrary to the medical proof and case law. Two orthopedic surgeons, Dr. Driessnack and Dr. Charles Kaelin undeclared MMI and recommended a total knee replacement surgery. It is well settled that temporary disability benefits are payable through the latest date of MMI. *Fagg v. Hutch*, 755 S.W.2d 446 (Tenn. 1988). It is also well settled that an Employee can have more than one period of temporary disability benefits. *Cleek v. Walmart*, 19 S.W.3d 770 (Tenn. 2000). Considering the above, the Employee is entitled to additional periods of temporary disability benefits which will be addressed below after the issue of the compensation rate is addressed.

* * * *

5. Regarding the issue of past temporary disability benefits, the Employee was voluntarily paid temporary disability benefits for fifty-one (51) weeks at a weekly compensation rate of \$293.33 from June 26, 2006 through October 22, 2006 (17 weeks), from March 10, 2007 through May 4, 2007 (8 weeks), from December 23, 2008 through April 13, 2009 (16 weeks), and from June 4, 2009 through August 12, 2009 (10 weeks). As stated previously, the Employee's weekly compensation rate is \$240.02, not \$293.33. The Employee was overpaid \$53.31 per week for fifty-one (51) weeks in the total amount of \$2,718.81. Because he was not working and not at MMI, the Employee is entitled to an additional period of temporary disability benefits from April 14,

2009 through June 3, 2009, a period of fifty-one (51) days, in the total amount of \$1,748.72. Because he was not working and not at MMI, the Employee is entitled to an additional period of temporary disability benefits from April 27, 2010 through May 12, 2010, a period of sixteen (16) days, in the total amount of \$548.62. The evaluating Specialist corrected awarded temporary disability benefits from May 13, 201 through August 11, 2010, a ninety-one (91) day period, but at the different weekly compensation rate. The award of temporary disability benefits from May 13, 2010 through August 11, 2010 is Modified by applying a weekly compensation rate of \$240.02 which results in a past award of \$3,120.26 for that period. Deducting past overpayments of temporary disability benefits in the amount of \$2,718.81 from the additional amounts of past temporary disability benefits owed in the amount of \$5,417.60 produces a past award of temporary disability benefits owed to the Employee in the amount of \$2,698.79. As such, the August 11, 2010 Order For Past Due Temporary Disability and Medical Benefits is Modified by awarding a net past due amount of temporary disability benefits owed to the Employee of \$2,698.79.

The Petitioners assert that the order of the Specialist, resulting in the order of the Administrator's Designee, is an abuse of authority because the Employee in the RFA did not request reinstatement of benefits, and the order is illegal as it violates Tennessee law on maximum medical improvement and temporary total disability benefits. The Court dismisses each of these arguments.

(1) Abuse of Authority

Once a party files an RFA with the Workers' Compensation Specialist, the Tennessee Code provides the Specialist with broad authority to grant temporary disability and medical

benefits. The standard set for the Specialist is a determination of “appropriateness” of benefits “in light of available information”:

(2) If, in light of available information, a workers’ compensation specialist determines that it is appropriate to order the payment of temporary disability benefits to an employee, then a workers’ compensation specialist may order the initiation, continuation or reinstatement of the benefits by an employer or the employers’ workers’ compensation insurer.

(3) If, in light of available information, a workers’ compensation specialist determines that it is appropriate to order the employer or insurer to provide medical benefits, the specialist’s authority shall include, but not be limited to, the authority to order specific medical treatment recommended by the treating physician, and the authority to require the employer to provide the appropriate panel of physicians to the employee, including a panel of appropriate specialists. The workers’ compensation specialist shall also have the authority to enforce the provision of the panel of physicians as required under § 50-6-204(a)(4).

TENN. CODE ANN. § 50-6-238(a)(2) & (3) (West 2011).

After the Specialist has entered an order either granting or denying temporary benefits, an aggrieved party may appeal the Specialist’s decision to the Administrator’s Designee who has authority to order the payment of temporary benefits:

(2)(A) After receipt of a written request for administrative review of a specialist’s order, an informal conference with the affected parties shall be conducted by the administrator or the administrator’s designee. The informal conference with the administrator or the administrator’s designee shall occur within ten (10) calendar days of the date the administrator received the written request for administrative review. The administrator’s designee shall be a Tennessee licensed attorney, shall have a minimum of five (5) years of experience with the Workers’ Compensation Law, compiled in this chapter, and shall not be the specialist who issued the order that is the subject of administrative review.

(B) Within seven (7) calendar days following the conclusion of the informal conference, a written order shall be issued and signed by the administrator or administrator's designee. If the order issued and signed by the administrator or administrator's designee orders the payment of workers' compensation benefits to or on behalf of the employee, the party against whom the order is issued shall comply with the order within ten (10) calendar days of the receipt of the order of the administrator or administrator's designee.

TENN. CODE ANN. § 50-6-238(d)(2)(A) &(B) (West 2011). It is in the face of these statutory provisions on the authority of the Specialist and Designee that the Petitioners contend that DOL acted outside its authority by assessing temporary disability benefits when that relief was not requested in the RFA.

Looking, then, first to the RFA filed by the Employee's attorney, the Court sees that it states under "Describe Complaint or Reason For Request":

On May 8, 2010, Mr. White received a letter from AIG stating they had terminated Mr. White's TTD benefits back to 4.8.2009. They are relying on an office note dated 4.8.2009 from Dr. Driessnack, who was seen by Mr. White for a surgical consultation. On 6.4.2009, Mr. White returned to his authorized treating physician, Dr. Kaelin, who noted that Mr. White was NOT at MMI; and Mr. White's TTD payments were reinstated. Mr. White is in desperate need of knee surgery as he continues to suffer from swelling excruciating pain and difficulty walking. AIG continues to refuse authorization for the knee surgery. Mr. White also is requesting refills of prescriptions for Celebrex and Tamadol.

The Court's determination is that the RFA is ambiguous. One can not say with certainty whether the issue the Employee was presenting to the Specialist on temporary benefits was defensive, i.e. to dispute the Employer's claim of an overpayment backdated to April 2009,

and/or offensive, i.e. to seek an order for the Employer to continue to pay benefits as per the June 2009 opinion of Dr. Kaelin.

Given the ambiguity of the RFA, this Court can not conclude that the Specialist and/or the Designee's orders decided issues not presented in the RFA. The Court is unable to conclude that the DOL violated the standard in section 50-6-238(a)(2) of an "appropriate" order for the payment of temporary disability benefits "in light of available information."

(2) Illegality

With respect to the Petitioners' other challenge, the Court concludes that the DOL rulings below on temporary benefits are not clearly illegal. The Court begins its analysis on this point with the conclusion as a matter of law that the DOL, pursuant to Tennessee Code Annotated section 50-6-238(a)(2), has the authority to order payment of past due benefits. Even though the statute speaks in terms of "initiation, continuation or reinstatement," the Court concludes that use of the word "reinstatement" of benefits includes the authority to order payment of past due benefits. Accordingly, that portion of the DOL orders below that ordered the Employer to pay back temporary benefits is within the scope of the DOL's statutory authority.

Next, as a matter of proof, there is evidence in the record that the Employee's treating physician, Dr. Kaelin, disagreed with Dr. Driessnack, the orthopedic surgeon. Dr. Kaelin stated in a June of 2009 letter furnished to the Specialist that the Employee had not reached

maximum medical improvement. There was, then, proof in the record for the Designee to award temporary total disability benefits from June 4, 2009, through August 12, 2009, based upon Dr. Kaelin's opinion, and, thus, that decision was not irrational or abusive so as to require intermediate review by this Court pursuant to Tennessee Code Annotated section 4-5-322(a)(1). As to an award of temporary total disability benefits for April 14, 2009, through June 3, 2009, this, as well, arguably, comes within the time Dr. Kaelin stated that the Employee had not reached maximum medical improvement. Again, this decision may be determined not to be correct when a trial court hears all of the proof at trial and after the physicians have been deposed, but the decision by the Designee, relying upon Dr. Kaelin's letter of no MMI as of June 2009, is neither irrational nor illegal.

As to the DOL award of temporary total disability benefits for April 25, 2010, through May 12, 2010, and May 13, 2010, through August 11, 2010, and the order for ongoing temporary disability benefits, these awards may be somewhat incorrect, depending on when the Employee had the knee replacement surgery.

Just because the Employee is not working, is not a basis for payment of temporary total disability benefits. Under Tennessee law, "[t]emporary total disability 'refers to the injured employee's condition while disabled to work by his injury and until he recovers as far as the nature of his injury permits. . . .'" *Smith v. Fleeman's Transport, Inc.*, No. M2004-01709-WC-R3-CV, 2005 WL 2276892, at *3 (Tenn. Workers Comp. Panel 2005) (quoting *Redmon v. McMinn County*, 354 S.W.2d 435 (1962)). "Temporary total disability benefits

are terminated when an injured employee either becomes able to work at any employment permitted by the nature of his injuries or has attained maximum recovery.” *Prince v. Sentry Ins. Co.*, 908 S.W.2d 937, 939 (Tenn. Ct. App. 1995) (citation omitted).

Moreover, the Court is unable to locate a physician’s explicit statement that for the April 25, 2010 and forward time period the Employee is not at maximum medical improvement. In fact the letter of Dr. Driessnack in May of 2010 confirms that if the Employee does not have the knee replacement surgery, he has reached MMI. But it is this conditional “if” to Dr. Driessnack’s opinion that creates the issue.

It may be that the Designee based the award of temporary total disability benefits from April 25, 2010 forward on the assumption that the Employee was having knee replacement surgery. Under Tennessee law, a worker’s compensation claimant may receive temporary total disability benefits before and after a compensable surgical operation. *See, e.g., Manchester v. Bridgestone Firestone, Inc.*, No. M2005-01313-WC-R3-CV, 2007 WL 152221 (Tenn. Worker’s Comp. Panel 2007) (claimant paid temporary total disability benefits for six week rehabilitation period after surgery on work related injury); *Yates Services, L.L.C. v. Black*, M2005-02694-WC-R3-CV, 2006 WL 3455192 (Tenn. Worker’s Comp. Panel 2006) (claimant received temporary total disability benefits prior to work related surgery and following work related surgery up until the date the claimant returned to work). In that regard, there is a note from Dr. Driessnack that the Employee was taken off work effective May 13, 2010 due to his knee replacement surgery. Perhaps this fact is the reference in the

Designee's order at paragraph 3 to "Two orthopedic surgeons, Dr. Driessnack and Dr. Charles Kaelin undecleared MMI and recommended a total knee replacement."

It is difficult to tell from physicians' letters and in the absence of physician depositions and an evidentiary hearing what the circumstances are. However, returning as the Court must to the abuse or irremedial conduct of DOL that is required under 4-5-322(a)(1) for this Court to intervene, the facts are not here. In that there is proof in the record that the Employee was slated to undergo knee replacement surgery in May and that the surgery would proceed since the condition precedent tooth extraction was ordered to be furnished by the Petitioners, it follows that the Employee would necessarily be temporarily disabled during the surgery and recuperation. An award of temporary total disability benefits related to the Employee's recuperative time during and after the surgery, which arguably could encompass the time April 25, 2010–August 11, 2010 and thereafter, is not irrational or illegal though it may prove to be incorrect with more proof presented to the trial court.

Thus, the foregoing analysis reveals that while the order of the Designee related to maximum medical improvement and temporary total disability benefits may ultimately be overturned by a judge in a trial on the merits with depositions from the physicians, there is some basis in the preliminary record that was before DOL and is before this Court for the awards and, therefore, the orders below are neither irrational nor illegal.


Lastly, to the extent that the decisions below are determined by a trial court to be incorrect, there is an adequate remedy under section 50-6-238(b) for the trial court to rectify

any erroneous award of temporary disability benefits. Thus, the decision below provides no basis to be overturned by this Court pursuant to section 4-5-322(a)(1).

Conclusion

When the Petitioners first came before this Court seeking immediate review of a preliminary order of the DOL, the Petitioners characterized the circumstances as violations by DOL of fundamental rights, rulings clearly violative of Tennessee law, no basis in fact for the DOL rulings, and rulings outside of DOL's authority. On that premise, the Court convened a hearing under section 4-5-322(a)(1). From its review of the record, however, the Court concludes such circumstances do not exist. At most, some of DOL's rulings may be determined to be erroneous by a trial judge after a full trial on the merits and physicians' deposition testimony. But on the preliminary record of the proceedings below, the Court has found no illegality, no irrational rulings, no violations of statutory authority and no irremedial conduct of DOL to warrant intervention by this Court under Tennessee Code Annotated section 4-5-322(a)(1).

It is therefore ORDERED that the petition is dismissed with prejudice. Court costs are taxed to the Petitioners. This is a final order.



ELLEN HOBBS LYLE
CHANCELLOR

cc: David Rich
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