

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-002056-WC

BLAU MECHANICAL, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-97166

MARTIN R. BREFELD;  
HON. R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD OF  
KENTUCKY

APPELLEES

### OPINION REVERSING

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BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Blau Mechanical, Inc. ("Blau") has petitioned for review of the September 14, 2007, opinion of the Workers' Compensation Board ("Board") which partially affirmed Administrative Law Judge Scott Borders' ("ALJ Borders") February 23, 2007, decision granting Martin R. Brefeld ("Brefeld") temporary total disability ("TTD")

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

benefits upon a reopening for a medical fee dispute regarding a proposed back surgery. For the following reasons, we reverse.

Brefeld sustained work-related lower back injuries while employed by Blau on January 22, 2003, and February 10, 2004. He filed a claim with the Kentucky Office of Workers' Claims ("OWC") which was ultimately settled on the basis of permanent partial disability. The agreement included a provision reserving Brefeld's right to payment for reasonable and necessary future medical expenses pertaining to the work-related injuries. Subsequent to the settlement, based upon the lack of improvement in Brefeld's condition, his primary care physician, Dr. John B. Kelly ("Dr. Kelly") referred him to Dr. Michael Rohmiller ("Dr. Rohmiller") who recommended L4-5 decompression and bilateral discectomy surgery. This recommendation was submitted to Utilization Review which denied approval for the surgery. Brefeld appealed the denial and a Final Utilization Review decision affirmed the denial. Blau then filed a motion with the OWC to reopen based on the medical fee dispute and promptly filed its Form 112. The motion to reopen was granted and the matter was assigned to ALJ Borders.

Upon reopening, the claim was set for a Benefits Review Conference ("BRC") on January 11, 2007, but the BRC was continued until January 24, 2007. The only contested issues listed to be heard were reasonableness/necessity and the work-relatedness of the proposed surgery. At the hearing, upon Brefeld's request, ALJ Borders added as a contested issue TTD from April 7, 2006,<sup>2</sup> until Brefeld attained maximum medical improvement ("MMI"). As of the date of the hearing, Brefeld had not filed an independent motion to reopen seeking TTD, and the record indicates no such motion was ever filed. Brefeld gave no prior notice to Blau of his intent to pursue TTD

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<sup>2</sup> Brefeld alleged he had stopped working on April 7, 2006, due to his extreme back pain.

benefits. At the conclusion of the hearing the matter was submitted to the ALJ for decision without briefing from the parties.

On February 23, 2007, ALJ Borders entered his decision finding the proposed surgery to be compensable.<sup>3</sup> ALJ Borders further found Brefeld had been totally disabled since April 7, 2006, and ordered Blau to pay TTD benefits “until terminated by Order of the undersigned or other ALJ to whom this claim may be assigned.” Blau filed a petition for reconsideration alleging the ALJ’s award of TTD was improper as Brefeld had not filed a motion to reopen seeking such benefits. Blau further argued it had not conceded the issue as having been properly raised nor that TTD benefits were payable. On March 14, 2007, the ALJ denied Blau’s petition. Blau timely appealed the ALJ’s decision to the Board contending the ALJ had improperly granted TTD benefits, or, alternatively, had utilized an improper TTD rate.

On September 14, 2007, the Board entered its opinion affirming in part, reversing in part, and remanding in part. The Board agreed with Blau that ALJ Borders erred in granting TTD beginning April 7, 2006, as Brefeld had not asserted entitlement to such benefits prior to the BRC. Thus, the award of TTD from April 7, 2006, to February 23, 2007, was reversed. However, the Board concluded Brefeld had properly raised entitlement to TTD at the February 24, 2007, hearing and the issue was properly decided by ALJ Borders as it had been tried by express consent. This appeal followed.

First, we note Brefeld failed to file a brief before this Court, and we thus accept Blau’s statement of the facts and issues as correct. However, we do not believe the other possible sanctions under CR 76.12(8)(c) are appropriate.<sup>4</sup>

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<sup>3</sup> Blau did not contest the ALJ’s finding on this issue before the Board and has not contested it before this Court.

<sup>4</sup> In relation to the failure of an appellee to file a brief, CR 76.12(8)(c) states:

[i]f the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts

Next, we must address the question of whether Blau's filing of a motion to reopen in order to dispute medical expenses placed the issue of TTD before ALJ Borders. In accordance with controlling precedent, we hold it does not. In the recent case of *Bartee v. University Medical Center*, 244 S.W.3d. 91 (Ky. 2008), the Supreme Court of Kentucky considered and resolved this precise question. Based upon a set of facts substantially similar to those presented herein, the Supreme Court held an employer's motion to reopen a workers' compensation case to dispute certain medical expenses does not place the issue of TTD before the ALJ. In *Bartee*, the employee moved to reopen the case for a ruling on the question of entitlement to TTD. That motion was denied as having been filed outside the time limitations set forth in Kentucky Revised Statutes ("KRS") 342.125(3) and (8). However, at the BRC the employee again raised the issue of entitlement to TTD benefits. The ALJ awarded TTD benefits because he believed it was a natural extension of the medical dispute. The Board affirmed the ALJ's award based upon different reasoning. The Board held KRS 342.125(4) gave the ALJ broad authority to award TTD from the date of the employer's motion. The Supreme Court disagreed, holding the employee had not properly sought to invoke the jurisdiction of the ALJ to rule on the issue of TTD and the Board had erred in concluding otherwise.

The facts presented here are strikingly similar to those considered by the Supreme Court in *Bartee*. The employer sought reopening of a claim to dispute a medical expense. The employee failed to properly follow statutory mandates for requesting TTD benefits, but instead attempted to "piggy-back" the issue on the employer's motion. However, ALJ Borders allowed the issue to be heard, granted the

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and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

award, and the Board affirmed. In light of the clear holding in *Bartee*, we hold the Board erred in affirming ALJ Borders' award of TTD benefits in the absence of Brefeld's motion to reopen to request such payments. ALJ Borders improperly considered the matter and we must therefore reverse and remand this matter for further proceedings.

Finally, we must consider the Board's opinion that *Bartee* is inapplicable to the case at bar as the issue of TTD entitlement was tried by express consent. Again, we disagree. The Board concluded Blau had consented to or waived its right to contest ALJ Borders' consideration of TTD benefits when it failed to object to inclusion of the issue, citing *Kroger Co. v. Jones*, 125 S.W.3d 241 (Ky. 2004). However, Brefeld did not give prior notice of his intention to seek TTD benefits and Blau did not cede the issue as contested or even properly before the ALJ. A careful review of the record reveals there was no express consent by Blau to try the issue as was determined by the Board. We are unable to conclude from the record before us that Blau intentionally waived a known right. See *Bartee, supra*, 244 S.W.3d at 95 (citing *National Surety Marine Ins. Corp. v. Wheeler*, 257 S.W.2d 573 (Ky. 1953)).

Therefore, for the foregoing reasons, the opinion of the Workers' Compensation Board is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:  
Douglas A. U'Sellis  
U'sellis & Kitchen, PSC  
Louisville, Kentucky

BRIEF FOR APPELLEE:  
No brief filed.