

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 30, 2015

CLAIM NO. 201374687

AMERIPACK

PETITIONER

VS.

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

CHARLES WALKER, IV
and HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

STIVERS, Member. Ameripack appeals from the June 24, 2015, Opinion, Award, and Order and the August 7, 2015, Order on Petition for Reconsideration of Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"). The ALJ awarded Charles Walker, IV ("Walker") temporary total disability ("TTD") benefits from June 26, 2013, through October 31, 2013;

permanent partial disability ("PPD") benefits commencing on June 26, 2013; and medical benefits.

On appeal, Ameripack asserts the ALJ erred by awarding any additional period of TTD benefits. It asserts the time period at issue should be divided into two different periods. The first period is June 28, 2013, through July 26, 2013, when Walker "worked light duty in the shop and earned the same wages as he had prior to the injury." The second period is from July 27, 2013, through October 31, 2013, when Walker was released to work full duty and began new employment with Artisan.

The Form 101 alleges on June 26, 2013, Walker injured his right shoulder in the following manner:

Claimant sustained work related injury to his Right Shoulder when he lifted/tilted a heavy 'turntable' from ground level to turn on its side in order to grease/oil the wheels. Claimant suffered a permanent work related injury as defined by Kentucky's Workers' Compensation Act (KRS 342), resulting in a permanent impairment rating pursuant to the 5th Edition of the *AMA Guides*.

Walker was deposed on March 2, 2015. He started working at Ameripack in 2010 as a service technician. He testified his day to day duties as a service technician were:

A: I would clock in. Most days I would load parts and equipment that I would need and the service truck I was assigned to go out to certain facilities and service machines or fix broken machines.

Q: So you made calls in a certain area to go into actual businesses?

A: A lot of areas.

Q: What was your main service area?

A: Lower part of Kentucky all the way to Michigan.

Q: Now, what type of equipment would you service?

A: Mainly pallet wrappers.

Q: Was that just something you learned how to do on the job there [sic] Ameripack?

A: Yes.

Q: What types of physical demands would there be with servicing those pallet wrappers?

A: Lifting.

Q: What types of items would you have to lift?

A: The turntable.

Q: Do you have an estimate on how much one of those would weigh?

A: My estimate would be between two and 300 pounds.

Q: Would you have to lift those all the way off the ground by yourself?

A: Yes.

Q: Is that somewhere where you would be like lifting it from the floor up to chest height or what types of movements would you have to do?

A: You would have to lift it from by your ankles, roughly, up to your chest.

Q: How often would you have to lift one of those turn tables?

A: It depends on where I was at.

Q: Is it something you would do on a daily basis?

A: Most days.

Q: Would there be any other heavy items you'd have to lift on a regular basis besides the turntables?

A: No.

Q: Would the turntables vary in size depending on the type of pallet wrapper or were they pretty uniform?

A: Most of the time they were standard size.

Q: Would you have to use any special types of tools or anything?

A: Yes.

Q: What types of tools would you use?

A: We would use two-by-fours and a pry bar.

Q: Anything else?

A: No.

Q: Would you have to do very much overheard work?

A: No.

Q: Would you have to climb ladders very often?

A: No.

Q: Would you be on the road for quite a bit for work?

A: Yes.

Q: if you were going to go work on a pallet wrapper, would you basically just do one a day?

A: No.

Q: About how many would you get to on a normal day?

A: It depends on my location.

Q: Would the facilities where you'd be going have more than one pallet wrapper that you'd service if you were there?

A: Yes.

Q: If you could just kind of explain why you would to lift the turntable and what that process included?

A: You would have to lift the turntable because under the turntable, there's four wheels that have to be greased periodically depending on how much use the customer- or depending on how many times the customer used the machine. Some people- some customers use their machine, put a pallet on it every 30 seconds for an entire day. So that's quite a bit of use.

So you would have to turn- take the turntable off the machine to grease the wheels, check the chain that's under the turntable that causes that- or allows the turntable to turn, check the gear box and the oil in the gear box and look for significant wear and tear, do a general maintenance.

Q: Would the turntable area, I guess, be the main thing you were checking with the pallet wrappers then?

A: Correct. That was the main part, but there were others as well.

Q: Okay. And were those areas I guess less physically demanding to have to service those areas?

A: Correct.

Q: Any other normal duties at Ameripack that we haven't talked about that you can think of?

A: If I wasn't on the road servicing, I would be in the shop helping tag or refurbish old pallet wrappers.

Q: On a normal week, about how many days would you be on the road compared to in the shop?

A: Four out of five.

Q: When you were in the shop, what kind of physical demands would there be for you?

A: Putting- picking up metal, putting on a bandsaw to cut and tag, remove turntables, install new gear boxes, grease.

Q: Would it be similar physical demand overall too if you were on the road?

A: That's correct.

Concerning his return to work following his injury, Walker testified:

Q: Based on the records we received, it looks like the last time you saw Doctor Jacobs was sometime around October 2013. Does that sound about right to you?

A: Sounds about right, yes.

Q: He did not recommend any additional treatment for you at that point in time?

A: No.

Q: You haven't followed up with him since then?

A: No.

Q: Did you go anywhere else for medical treatment between June and October of 2013?

A: No.

Q: Were you able to keep working at Ameripack in a light-duty capacity?

A: Yes.

Q: What type of work were you doing after Doctor White gave you the restriction?

A: Shop work, greasing, pushing a broom.

Q: Did you just keep working there for about another month or so after you injury?

A: Yes, roughly.

Q: What was the reason you left?

A: Better pay.

Q: did you start with Artisan Mechanical?

A: Yes.

Q: Were you able to go through the process of giving Ameripack two-weeks notice and that sort of thing?

A: Yes.

Q: Artisan Mechanical just had a better position available for you than what you were doing at Ameripack?

A: Yes.

Q: What type of position did you get when you were hired at Artisan Mechanical?

A: Laborer.

Q: Are you still working there?

A: Yes.

Q: What type of work do you do there?

A: Turn wrenches, pipefitter, mechanic work.

Q: Is it similar to some of the mechanic work you've done in the past?

A: Close.

Q: Can you tell me about some of the similarities and differences to what you've done in the past?

A: Turn wrenches, grease.

Q: What type of equipment do you typically work on now?

A: It's kind of hard to explain, big bearings, rollers, install new piping, work on cranes.

Q: Is that all stuff you had on-the-job training to do?

A: Yes.

Q: Do you typically work in Kentucky?

A: Yes, sir.

Q: Do you go out on a different job site depending on what the job calls for?

A: Yes.

Q: Do you do very much lifting with Artisan Mechanical?

A: No.

Q: What's the heaviest thing you would have to lift on a regular basis there?

A: Five pounds, ten at the most.

Q: Do you have to climb ladders very often?

A: No.

Q: Do very much overhead work?

A: No.

Q: With the turning wrenches, you don't have to do very- where you're reaching above shoulder level with the wrenches?

A: Sometimes.

Q: When you do that, are you able to use your right arm or do you use your left arm for that?

A: Left arm.

Q: Otherwise, you typically use your right arm for turning wrenches?

A: No, left.

Q: Have you always done it that way?

A: No.

Q: You started using your left arm turning wrenches after June 2013?

A: Yes.

Q: Have you doctors recommended any formal restrictions for you at this point in time?

A: No.

Q: Is using your left arm for turning wrenches something that you do personally just out of caution?

A: No.

Q: Can you explain why you use your left arm for turning wrenches?

A: Because I can no longer use my right arm the way I need to.

Q: What happens if you try to use your right arm for turning wrenches?

A: If I try to use it, I have sharp pains in the front and top of my shoulder.

Q: Are you still getting full-time hours through Artisan Mechanical?

A: Yes.

Q: Are you making more money than you were with Ameripack?

A: Yes.

Walker testified about the types of problems he is still having with his right shoulder:

A: I have pains in the front of my shoulder, of my right shoulder, and the top of my right shoulder on a daily basis. I would say it's like sticking a lot of needles in both the top and front side of my shoulder.

Q: When you say it's like needles, is that similar to the sensation you get if you fall asleep on your arm or something like that or more like a stabbing sensation?

A: More like a stabbing sensation?

Q: Do you get any numbness or tingling in your arm?

A: No.

Q: Does the pain pretty much stay in that front and top of the right shoulder that you described?

A: Yes.

Q: Do you get any pain shooting down towards your elbow?

A: No.

Q: You talked about the difficulty you would have trying to do wrench work with your right arm. What other activities aggravate you with your right shoulder?

A: Sleeping.

Q: You're not able to sleep on your right side?

A: No.

...

Q: Are you able to reach overhead with your right arm if you need something?

A: I'm limited.

Q: So if you're using your right arm below shoulder level, do you have any significant problems with it?

A: No significant problems, no.

Q: You might notice discomfort depending what certain activity it might be?

A: Correct.

Q: Do you have any trouble lifting items with your right arm?

A: Yes.

Q: How much are you comfortable with your right arm before you notice discomfort?

A: About five to ten pounds.

Q: Any other activities that you've noticed you have more trouble with your right arm?

A: Showering.

Q: Does that kind of fall into that range of motion where you can't move your arm around as freely?

A: Yes.

Q: Does it interfere with your ability to complete your job duties?

A: No.

Q: Are you taking any medications for the shoulder?

A: Yes.

Q: What medications are you taking?

A: Aleve.

Walker also testified at the May 4, 2015, hearing. Concerning the post-injury work he performed, Walker testified:

Q: When you took those restrictions back to your employer, did they have you go back doing your service tech job or did they have you doing something different?

A: Something different.

Q: What did they have you do?

A: They had me in the shop sweeping, cleaning, washing parts.

Q: Was this your regular work or the customary work you had done previously?

A: No.

Q: How long did you continue working for the employer doing these things in the shop, the sweeping or cleaning parts?

A: About a month.

Q: During this entire month, were you under the care of Dr. White or had you come under the care of an orthopedic surgeon, a Dr. Jacob?

A: Jacob.

Q: Were you still under restrictions?

A: Yes.

Q: During the time you continued to work for the employer for about a month, did you ever return back to your regular and customary work as a service technician?

A: No.

Q: Were you able to find another job?

A: Yes.

Q: Who was that with?

A: Artisan Mechanical.

Q: In this new job, were you able to do that work and was it within your restrictions?

A: Correct, yes.

Q: Did it involve the heavy lifting and things like that?

A: No.

The March 31, 2015, Independent Medical Examination ("IME") report of Dr. Thomas Loeb was introduced. Dr. Loeb diagnosed a "strain or sprain to the right shoulder" and "mild tendinopathy in the rotator cuff tendons." Dr. Loeb opined Walker reached MMI within six months of the onset of his injury. He assessed a 4% permanent impairment rating all of which he attributed to the June 26, 2013, work injury.

The October 16, 2014, IME report of Dr. Jules Barefoot was introduced by Walker. Dr. Barefoot diagnosed: "Infraspinatus and supraspinatus tendinopathy with arthrosis of the AC joint, right shoulder." He assessed a 7% whole person impairment rating attributing all of the impairment rating to the June 26, 2013, work injury. There is no overt statement regarding MMI in Dr. Barefoot's report.

In the June 24, 2015, Opinion, Award, and Order, the ALJ set forth the following findings regarding TTD benefits:

KRS 342.0011(11)(a) defines 'temporary total disability' to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that '[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.' Id. at 659. In other words, where a claimant has not reached maximum medical improvement ("MMI"), TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

To demonstrate entitlement to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury. See Mull v. Zappos.com, Inc., No. 2013-CA-001320-WC, 2014 WL 3406684, at *8 (Ky. App. July 11, 2014); Tipton v. Trane Commercial Sys., No. 2014-CA-000626-WC, 2014 WL 4197504, 1 (Ky. App. Sept. 12, 2014).

The Defendant did not pay any TTD benefits in this claim, and the ALJ must now address the appropriate period of TTD benefits. Plaintiff was issued light duty work restrictions on June 28, 2013. Later, Dr. Jacob issued a

fifteen (15) pound lifting restriction. Plaintiff continued to work in a light duty capacity through July 2013, when he obtained employment with Artisan Mechanical, which did not require as much heavy lifting. Plaintiff's light duty work with the Defendant consisted of working in the shop which included sweeping, cleaning and washing parts. Plaintiff did not refurbish or rebuild any machines while working in a light duty capacity. Also, Plaintiff did not perform any service calls while working in a light duty capacity.

The ALJ notes that part of Plaintiff's pre-injury, customary work required him to work in the shop one (1) day/week, but this was only one aspect of his job. Plaintiff was required to perform service calls and repair various machines, and he did not perform these job duties while working in a light duty capacity. This ALJ finds that Plaintiff did not perform his customary job while working in a light duty capacity, and is entitled to TTD benefits during this period.

This ALJ notes Livingood v. Tranfreight, LLC, 2013-CA-000349-WC (Ky. App. Jan. 31, 2014), and finds it to be distinguishable from the facts presented in this claim. In Livingood, the Board found that 75% of the claimant's light duty work was the work he customarily performed, which supported the denial of TTD benefits. In the claim *sub judice*, Plaintiff's post-work-injury work duties required him to work exclusively in the shop. Prior to the work accident, Plaintiff only worked one (1) day/week in the shop. The other four (4) days were spent working/repairing on machines and performing service calls. In this claim, Plaintiff's post-work-accident,

light duty resulted in him performing only 20% of his pre-injury, customary job duties. As such, Plaintiff is awarded TTD benefits from June 28, 2013 through October 31, 2013 at the rate of \$313.62/week.

Ameripack filed a petition for reconsideration asserting, among other arguments, that the ALJ erred by awarding TTD benefits from July 27, 2013, through October 2013.

In the August 7, 2015, Order on Petition for Reconsideration, the ALJ stated, in relevant part, as follows:

The remainder of the Defendant's Petition for Reconsideration pertains to Plaintiff's award of temporary total disability benefits. Plaintiff was awarded temporary total disability benefits from June 26, 2013 through October 31, 2013 at the rate of \$313.13/week.

KRS 342.0011(11)(a) defines 'temporary total disability' to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that '[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.' Id. at 659. In other words, where a claimant has not reached maximum medical improvement ("MMI"), TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

Plaintiff was issued light duty work restrictions on June 28, 2013, and this is an uncontroverted fact. Later, Dr. Jacob issued a fifteen (15) pound lifting restriction. Plaintiff continued to work in a light duty capacity through July 2013, when he obtained employment with Artisan Mechanical, which did not require as much heavy lifting. Plaintiff was questioned regarding the lifting requirements at Artisan Mechanical:

Q: In this new job, where [sic] you able to do that work and was it within your restrictions?

A: Correct, yes.

Q: Did it involve the heavy lifting and things like that?

A: No. (Hearing Transcript p. 10).

The Defendant contends that Plaintiff is not entitled to any temporary total disability benefits after he began employment with Artisan Mechanical on or about July 27, 2013. The Defendant maintains there is no

evidence that Plaintiff performed any light duty work at Artisan Mechanical. Based upon Plaintiff's testimony, this ALJ finds that Plaintiff's work at Artisan Mechanical did not require as much lifting as Plaintiff's pre-injury job with Defendant. Based upon Plaintiff's testimony, and Dr. Jacob's restrictions, Plaintiff is entitled to temporary total disability benefits from June 28, 2013 through October 31, 2013 at the rate of \$313.62/week. This portion of the ALJ's decision will not be disturbed, and the Defendant's Petition for Reconsideration on this issue is **DENIED**.

The ALJ's Opinion and Order and subsequent Opinion and Order on Reconsideration reveal she did not analyze Smith's entitlement to TTD benefits utilizing the correct standard. Although the ALJ cited to Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. App. 2000), she never fully carried out the correct analysis.

TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" In Central Kentucky Steel v. Wise, supra, the Kentucky Supreme Court explained that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of

his injury." Id. at 659. (emphasis added). Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

More recently, in Magellan Behavioral Health v. Helms, supra, the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The court in Magellan Behavioral Health v. Helms, supra, stated:

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.

. . .

The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581. (emphasis added).

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), with regard to the standard for awarding TTD, the Supreme Court elaborated as follows:

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. See Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' See KRS 342.0011(11)(c).

. . .

Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

As evidenced by the language in both the June 24, 2015, Opinion, Award, and Order and the August 7, 2015, Order on Petition for Reconsideration the ALJ failed to truly differentiate between "minimal work," "customary

work," and the work Walker was performing at the time of his injury. Central Kentucky Steel v. Wise, *supra*, In the June 24, 2015, Opinion, Award, and Order, the ALJ stated that "Plaintiff's post-work-accident, light duty resulted in him performing only 20% of his pre-injury, customary job duties." This is an incorrect standard. Additionally, in the August 7, 2015, Order on Petition for Reconsideration, the ALJ stated that Walker's work at Artisan Mechanical "did not require as much lifting as Plaintiff's pre-injury job with Defendant." This, too, is an incorrect standard. Thus, even though when he returned to work, Walker may not have been performing the exact type of work he was performing at the time of the injury, if he was performing work that was customary he would not be entitled to TTD benefits. On remand, the ALJ's analysis must *specifically* address the type of work Walker was performing after returning to work post-injury utilizing the standards enunciated in Central Kentucky Steel v. Wise, *supra*.

Importantly, the ALJ also failed to make a definitive statement regarding the date Walker reached maximum medical improvement ("MMI"), a critical part of any analysis regarding entitlement to TTD benefits. The ALJ's analysis of Walker's entitlement to TTD benefits is erroneous as a matter of law.

On remand, the ALJ must provide a definitive statement regarding when Walker reached MMI utilizing the medical testimony filed in the record. Then, utilizing the standards set forth in Central Kentucky Steel v. Wise, supra, the ALJ must make a determination as to the nature of the work Walker was performing after returning to work at both Ameripack and Artisan Mechanical pursuant to the standard articulated in Central Kentucky Steel v. Wise, supra. On remand, the ALJ must draw a clear distinction between "minimal work," "customary work," and the work Walker was performing at the time of the injury and recognize that these are three distinct and separate standards. Id. at 659. Further, the ALJ's reliance on Mull v. Zappos.com, Inc., No. 2013-CA-001320-WC, 2014 WL 3406684 (Ky. App. July 11, 2014) is misplaced as the Supreme Court of Kentucky in Zappos.com, Inc. v. Mull, 2014-SC-000462-WC (October 29, 2015) reversed the Court of Appeals rejecting the standard enunciated by the Court of Appeals for determining entitlement to TTD benefits. Thus, on remand after arriving at the date of MMI, the ALJ must determine when Walker was capable of returning to the type of work which is customary or to work he had been performing prior to the work injury.

Accordingly, the award of TTD benefits as set forth in the June 24, 2015, Opinion, Award, and Order and reinforced in the August 7, 2015, Order on Petition for Reconsideration is **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award containing an analysis consistent with Central Kentucky Steel v. Wise, supra, and for additional findings consistent with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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