

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 30, 2015

CLAIM NO. 201402108

BRIT MCGAW

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

SPECIALTY MANUFACTURING
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

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

STIVERS, Member. Brit McGaw ("McGaw") appeals from the June 26, 2015, Opinion, Award, and Order and the July 30, 2015, Order on Petition for Reconsideration of Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). In the June 26, 2015, Opinion, Award, and Order, the ALJ awarded permanent partial disability ("PPD") and medical benefits. On appeal,

McGaw asserts the ALJ erred by failing to award temporary total disability ("TTD") benefits.

The Form 101 alleges McGaw fractured his thumb on April 30, 2014, within the scope and course of his employment with Specialty Manufacturing in the following manner: "hanging heavy metal parts on a rack - parts fell smashing my thumb." The Form 101 indicates two pins were surgically implanted into McGaw's thumb.

The April 15, 2015, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730 [handwritten: "proper rating"], unpaid or contested medical expenses, credit for [handwritten: "wages versus TTD"], and TTD. Under "other" is "costs for denying TTD."

McGaw was deposed on February 18, 2015. Specialty Manufacturing is a machine and tool shop. "They're making parts for other businesses to put things together to be assembled, and then also powder-coat them." He testified that he was employed at Specialty Manufacturing from April 2014 through October 2014, and he started out washing and drying machine parts.

McGaw was paid \$10 per hour and worked 40 hours per week.

McGaw described what occurred on the day of his injury:

A: Yes. It was around 7:00 in the morning. We were hanging these parts. They were about 10-feet long, and the guy that was- that was helping me, we'd never done these parts before.

And you hang them on racks, and you put the hooks in the racks, and these parts you normally have, they're more stable than these parts were.

And him [sic] and I did not do this. The people there- some of the people there were busy. We tried to ask them because we didn't know what to do with these. They told us to go and hang them anyway.

Well, we- normally, you put these hooks in the- in the holes, but because these parts were so heavy, we couldn't get these different types of hooks, so it wouldn't fit in the hole. It would hang on top of the rack.

Well, so as we were hanging one on- on the right side, then we went to hang one on the left side, and because the hooks weren't in the holes they would slide. Then they told us to go hang another one below each one of them.

Well, as we went to do that, because the parts I believe were a hundred-about 150 pounds a piece, we went to hang one; he hung his side up on his end. I went to go hang mine.

Well, because the weight was shifting, the top one on the right fell down as I was lifting the bottom one up underneath it, and that's when it got smashed.

Q: I see.

A: And then, I went to go tell the- the guy in charge, which I think his name was John at the time, and I told him and he- he said, he gave me a piece- one piece of ice and a paper towel and told me I'd be okay. He said, 'Give it a couple days and the swelling will go down.'

This was the week of Oaks and Derby so I gave it a couple days. Nothing was improving. They just told me to go back to work, I'd be fine. Well, I gave it that time. They said, 'You'll be okay.'

Well, by that Friday, I said- I wanted to let them know, 'Hey look, nothing's improving. I've got to do something about this.' You couldn't see my knuckle or anything at this point. And then-

Q: Because of- I'm sorry- because of the swelling?

A: Yes.

Q: Okay. So, go ahead.

A: And so I said to them, I said- because I wanted to give them a heads-up notice and let them know I'm going to be going to the Immediate Care Center, and I went there to the Immediate Care Center, and then that's when they told me that- that I was going to have- first- the surgery.

And then once they told me I had to have surgery, Workmen's Comp took a couple of weeks- well, actually a month- to approve the surgery, and then once they approved it, it started regrowing back the wrong way. So I was

in a cast normal- longer than what I was expected to be.

After his injury, McGaw was moved to a different position. He testified as follows:

A: It was where they- parts were being- smaller parts would be washed and dried in, like, a tumble machine. It was like rocks. I don't remember the exact name for it.

Q: Uh-huh. Had you done that at all before April 30th?

A: No.

Q: No; okay. Was that something that you had done- or how- how was that done before you moved to doing that exclusively? Was somebody else doing it? Was it a team effort kind of thing? How was that task done before you moved to do it full-time?

A: Somebody else was doing it before, but because I got injured, there was nothing else I could really do.

Q: Okay. Did- the other person, was he doing it full-time?

A: Yes. But he was also doing other areas also.

Q: Okay. So was he the only person that was doing it then?

A: No.

Q: No; okay. How many other people were doing that job?

A: It varied. Wherever they put- wherever they needed people, they'd put them.

Q: Okay. I mean, just an estimate, would five other people get that job, 10?

A: 10; anybody in the building.

Q: Anybody in the building; okay. Is that something that was done no matter the- was that like a- sort of a required process for any- a number of different types of jobs or- do you know?

A: I'm not sure.

He further testified as follows:

Q: Okay. Can you tell me about- so upon your return, you- were you moved to a separate department, or was it sort of like, 'Okay, we have another task for you'?

Was there any documentation saying, 'Hey, we're formally switching your position to doing this?' Or was it just more of a, 'We're going to have you start'- an informal kind of- 'We're going to have you start doing this now?'

A: Yes. They just moved me to another area. It wasn't formal or nothing [sic], because they wanted me to do something even though I couldn't do anything because I only had just my left hand.

Q: M-hm.

A: And I'm right-handed.

Q: M-hm. Did you ever hang anything on the assembly line after that?

A: Not at first, but then I wasn't really able to but I had to do it with one hand because I felt like if I didn't, they were going to reprimand me.

Q: M-hm. When did you start hanging things on the- the line again, if you recall?

A: I don't remember exactly.

...

Q: Okay. Let's see. When you returned and you sort of- your duties became, sort of, altered after that, how- and you were- were you packaging things or were you placing- I think you already mentioned this. Can you describe that for me one more time? I've already forgotten. Like when you- you took over a separate, sort of, role; is that right?

A: Yes.

Q: Okay. Can you- I think I might have missed a few things. You were- was it packaging, or what exactly was it that you were doing?

A: They were called 'Parker Parts.'

Q: Parker Parts.

A: And you would go off a piece of paper to tell you different parts. You'd go find these parts and put, like, little caps on them, yellow caps, or different little caps on them, and then put box- put them in boxes, how many was required to go in each box, and then I had to go to the computer

and print off labels, and then take them to the shipping area.

Q: Okay. How many of those were you doing about in a day? Was that just continuous?

A: Yes.

Q: Just yourself; okay. And you said you had not done that before. I think you said you had not done that before April 30th?

A: No.

...

Q: Okay. Now the job they moved you to after you after your injury, when you came back to work, that was- that was a real job for the company, something that was already in existence prior to your being assigned to that task?

A: Yes.

Q: Okay. And it wasn't something that was made up; correct?

A: No.

Q: Okay. And they paid you the same rate?

A: Yes.

Q: Okay. In terms of physical requirements, can you tell us how that differed from the job you were doing at the time you got hurt?

A: Yes, it was a lot less demanding but, yet, it was still hard enough for me to do because I only was using my-my left hand, which is not my dominant hand.

Q: Okay. Was there- was the amount of weight you had to lift different- or lift and carry different.

A: Yes.

Q: - on the new job?

A: Yes.

Q: And how so? Do you recall or can you tell us?

A: It varied depending on the amount of Parker Parts that had to be put together.

...

Q: Okay. Would it be fair to say it was a relatively light-duty-type job?

A: Yes.

Q: Now after- after your injury, you indicated that you left employ at Specialty Manufacturing. I think you indicated that was because you were having trouble doing the job- strike that; let me rephrase that.

After the doctor released you to return to work, did- what did Specialty Manufacturing do in terms of placement in a job position for you, if that makes sense?

A: They were wanting me to go back to my old job of hanging parts and things like that, but I was not fully capable of that.

Q: And tell us why that was?

A: Because of my thumb, because I could only use four of my fingers and not put any pressure on my right thumb, so I

was not able to do what they were wanting me to do.

Q: Okay. So you never- did you try at any time to go back to that full job?

A: Yes.

Q: And tell us what happened when you did that? How long were you able to do that, and were you able to accomplish those tasks?

A: I was only back there at that hanging parts for, say, maybe a week or two, and then I wasn't able to do it anymore because of the fact that I was- I would drop some parts because I couldn't- because I wasn't able to grip it. I wasn't able to grip it with my thumb.

McGaw gave his two-week notice in October 2014 and took a job with Bluegrass Tile immediately afterwards.

At the time of his deposition, McGaw testified his thumb was frozen in a hitchhiker position.

McGaw also testified at the April 27, 2015, hearing. Since his injury, McGaw did not have any extended absences from employment. He testified as followed:

Q: Okay. And so since this occurred on April 30th of 2014, did you have any periods of your employment where you had extended absences?

A: No, sir.

Q: Did you make the same money while you were working in the assembly

division as you did when you were hanging parts?

A: Yes, sir.

Q: Did you have any economic hardship or income problems while you were working in that accommodated position?

A: No, sir.

Q: All right. Now, you would miss work every once in a while to go to doctor's appointments, right?

A: Yes, sir.

Q: Were you paid during that time that you went to go see doctor's- to go see Doctor Tsai?

A: Yes, sir.

Regarding his post-injury position at Specialty Manufacturing, he testified as follows:

A: I was putting parts for- I can't remember the name of the parts now, but I was putting smaller parts in a box using my left hand.

Q: Okay. So that was a sorting- basically a sorting type job?

A: Yeah, and I had to count parts also.

Q: Okay. Is that something that if it weren't for you, somebody else would have had to do?

A: Yes, sir.

Q: Okay. If I say that's a real job for the company, is that- does that make sense?

A: Yes, sir.

Q: Okay. Now, was that the type of work that you usually and customarily would do for the company?

A: Off- not normally.

Q: Okay. Currently, would you still physically be able to do that job, that other job they gave you in your current condition?

A: To an extent, yes.

Andrew Fink ("Fink") also testified at the hearing. Fink was McGraw's supervisor beginning in June 2014. Regarding McGraw's post-injury employment at Specialty Manufacturing, Fink testified as follows:

Q: Okay. Now, you've heard Mr. McGraw talk about his work in the assembly division or I guess Parker Parts of Specialty Manufacturing; is that right?

A: Yes.

Q: Now, is that job- that's a job that is a real job, right? It wasn't something you guys created to help an accommodated position?

A: That is a real position.

Q: Okay. Why did you put him in that position rather than, you know, saying don't come back until you can do the hanging job?

A: At that point, it's more to accommodate someone's financial need. I mean, the goal is to make sure that an

individual gets the opportunity to work whenever they desire to.

Q: Okay. So it was- don't let me put- you know, this was the employer wanting to make sure that the employee got his full wages?

A: Absolutely.

...

Q: The work doing- that wasn't the- it was lighter duty work obviously, correct, at the-

A: You could say so.

Q: -separating the parts? It was something he could do one-handed, correct?

A: Yeah.

Q: His job that he was originally working on needed two hands?

A: Yes.

Medical records of Dr. Tsu Min Tsai were filed in the record. On May 8, 2014, McGaw was released to "primarily one-handed work using the effected extremity to assist occasionally." He was required to wear a splint. He was not considered to be at maximum medical improvement ("MMI"). On June 13, 2014, McGaw underwent surgery on his thumb. A medical record dated June 19, 2014, indicates McGraw was released to work on the same date with the restriction to not use his right arm. On July 17, 2014, Dr.

Tsai released McGaw to light duty work; on August 14, 2014, Dr. Tsai released McGaw to medium duty work; and on October 9, 2014, Dr. Tsai released McGaw to regular duty work and placed him at MMI.

In the June 26, 2015, Opinion, Award, and Order, the ALJ put forth the following findings of fact and conclusions of law regarding TTD benefits:

Plaintiff seeks TTD benefits even though he continued to work, at modified duty, through the time he was found at MMI and released to regular duty by Dr. Tsai on October 9, 2014. However, the Administrative Law Judge is not persuaded plaintiff missed the requisite number of days of work to qualify for TTD. KRS 342.040(1) states:

Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks . . .

Notably, KRS 342.040(1) does not make reference to "light duty" or a return to "regular" or "customary" employment. It has always been interpreted to mean that an injured claimant is not entitled to TTD benefits unless he misses at least 2 consecutive weeks of work. In other words, until an employee misses two weeks of work due to an injury, no TTD benefits are payable.

Again, this analysis, per statute, is wholly independent of any considerations of whether the employee returns to his same job or modified duty. Indeed, in interpreting KRS

342.040(1), the Kentucky Supreme Court, in a published opinion, observed:

*Clearly, this provision prohibits the payment of income benefits for the first 7 days of disability unless the disability continues for more than 2 weeks (14 days). KRS 342.040(1) does not prohibit the payment of income benefits for the extent to which the disability extends beyond the 7th day; therefore, by implication, the payment of benefits beginning on the 8th day of disability is authorized. We note that this provision is consistent with the principles of compensating workers who are injured at work but of **encouraging less seriously injured workers to return to work as quickly as they are able.** Pierson v. Lexington Public Library, 987 S.W.2d 316, 319 (Ky. 1999)(emphasis added).*

The court later observed:

*A longstanding policy of Chapter 342 is to encourage employers to pay income benefits voluntarily when warranted. KRS 342.040(1) requires them to begin to pay benefits when a **worker misses more than seven days of work after an injury.** Officeware v. Jackson, 247 S.W.3d 887, 891 (Ky., 2008). (emphasis added).*

Recalling the point our appellate courts have made clear recently, even if in unpublished opinions - see e.g., Quad/Graphics, Inc. v. Holguin, 2014 SC 000391-WC, rendered April 2, 2015 - if a statute in KRS 342 does not specifically convey the requested relief, it cannot be granted.

As applied to this case, the plaintiff never missed even seven consecutive days of work, let alone two weeks of

work. Indeed, even after leaving the defendant employer around the first part of October, 2014, he was not unemployed for any time as he immediately began working for another employer and, in any event was found at MMI by his treating physician as of October 9, 2014.

Moreover, as plaintiff and defendant both agree, the work to which plaintiff returned, although modified for plaintiff's restrictions - was unquestionably legitimate, bona fide work. Under these circumstances, it is determined plaintiff is not entitled to TTD benefits because he never missed the requisite amount of work as required by KRS 342.040(1).

McGaw filed a petition for reconsideration on July 8, 2015. Regarding the issue on appeal, McGaw asserted he is entitled to TTD benefits. In the July 30, 2015, Order on Petition for Reconsideration, the ALJ determined as follows regarding TTD benefits:

Plaintiff's next alleged error is the ALJ's refusal to award TTD benefits. The reasons for this determination were set forth in the original award, and the plaintiff's petition on this point is really just a reargument of the merits. However, the ALJ feels compelled to add that he does not believe binding authority supports plaintiff's position. To summarize briefly, plaintiff did not miss any work following his injury before he reached maximum medical improvement. The defendant employer provided light duty within his restrictions, which plaintiff acknowledged was legitimate,

bona fide work. Per KRS 342.040(1), he does not qualify for TTD benefits.

Moreover plaintiff relies on the Kentucky Supreme Court's unpublished decision in Quad/Graphics v. Mario Holguin, 2014-SC-000391-WC (Rendered April 2, 2015) as well as the Kentucky Court of Appeals' decision in Bowerman v. Black Equipment Co., Ky. App., 297 S.W.3d 858 (2009), to argue he is entitled to TTD benefits, as a matter of law, until he reaches MMI and has not returned to the exact same job he performed at the time of his injury. However, the ALJ is not persuaded these cases present actual authority for the position.

With regard to the Quad/Graphics case, it is not a published decision and, as such, does not provide binding precedent. Obviously, the Bowerman decision is a published decision and it is now being cited for plaintiff's proposition. However, a careful reading of the Bowerman decision shows it was not intended to create new law or otherwise overturn long-standing published authority or KRS 342.0011(11)(a). In Bowerman, the ALJ issued an interlocutory opinion with specific findings as to the plaintiff's ability to perform certain tasks and determined that plaintiff had not reached maximum medical improvement. When the ALJ later issued a final decision, she essentially reversed her prior findings without any new evidence to justify such a reversal. The Kentucky Court of Appeals in Bowerman determined that, in that situation, given those unique facts, the ALJ was bound by her interlocutory findings to award TTD benefits because of the prior, interlocutory findings which the ALJ was not free to reverse or

disregard without new evidence in her final decision. Nothing in that decision suggested the holding was intended to have any application beyond the specific facts presented. It was never suggested that prior, binding authority had been overturned on any point whatsoever.

Specifically, in Central Kentucky Steel v. Wise, Ky., 19 S.W.3d 657 (2000), the Kentucky Supreme Court pointed that, as amended December 12, 1996, KRS 342.0011(11)(a) provides temporary total disability benefits to a worker who has not yet reached maximum medical improvement but is released to perform certain restricted work but not the type of work which was customary before the injury. In the words of the Court:

CKS would interpret the statute so as to require a termination to TTD benefits as soon as the worker is released to perform any type of work. We cannot agree with that interpretation. It 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.

Then, in Double L. Construction v. Mitchell, Ky., 182 S.W.3d 509 (2006), the Court indicated:

The purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents.

These published, binding cases continued a consistent line of reasoning and precedent which perfectly

accorded with KRS 342.0011(11) and, not coincidentally, with common sense. However, plaintiff's claim here relies upon the flawed notion that TTD is required if the worker cannot return to **all** previous pre-injury job duties and has not reached MMI.

This is fundamentally flawed because it is at odds with KRS 342.0011(11)(a) and long-settled case law up until the Bowerman holding was taken out of context. This currently trending and flawed definition absolutely obviates and overlooks the "OR" in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), as the current trend would require TTD if the worker cannot return to his job at the time of injury. The 'work...that is customary **or**' part before 'that he was performing at the time of his injury,' is rendered utterly meaningless by the current, strained interpretation as championed by the plaintiff.

Having undertaken this analysis, the Administrative Law Judge is simply not persuaded the law of the land entitles plaintiff here, who never missed any work following his injury and returned to legitimate, bona fide work until he reached maximum medical improvement, to an award of TTD benefits. As such, plaintiff's Petition on this point is denied.

McGaw's testimony at the final hearing was clear.

He was not absent from his work from Specialty Manufacturing for an extended period of time following the April 20, 2014, injury. As noted by the ALJ in the June 26, 2015, Opinion, Award, and Order, KRS 342.040(1) requires

that an employee must miss at least two weeks of work before TTD benefits are payable. The statute, in relevant part, reads as follows:

Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability.

It is important to note that in his petition for reconsideration, *McGaw does not dispute the following factual finding made by the ALJ in the June 26, 2015, Opinion, Award, and Order:*

As applied to this case, the plaintiff never missed even seven consecutive days of work, let alone two weeks of work. Indeed, even after leaving the defendant employer around the first part of October, 2014, he was not unemployed for any time as he immediately began working for another employer and, in any event was found at MMI by his treating physician as of October 9, 2014.

Therefore, this Board must assume the above-cited factual finding is correct.

We note that while KRS 342.040(1) does not specifically refer to two weeks of *missed work* but, rather, "more than two (2) weeks" of disability, the Supreme Court

in Officeware v. Jackson, 247 S.W.3d 887 (Ky. 2008) clearly equates the language regarding "disability" with missed work. Consequently, as McGaw did not miss the requisite number of days of work following his injury, he is not entitled to TTD benefits and this determination made by the ALJ will not be disturbed.

Nevertheless, despite McGaw not qualifying for TTD benefits by virtue of the language in KRS 342.010(1), in the July 30, 2015, Order on Petition for Reconsideration, the ALJ analyzed McGaw's entitlement to TTD benefits pursuant to KRS 342.0011(11), Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), and Double L. Construction v. Mitchell, 182 S.W.3d 509 (Ky. 2006) and determined that McGaw, post-injury, was performing "legitimate, bona fide work until he reached maximum medical improvement" on October 9, 2014. Therefore, McGaw, under this analysis, is not entitled to TTD benefits. The determination that McGaw's post-injury job was not a job created for him but was an existing job is fully supported by the testimony of McGaw and his supervisor. The ALJ's determination McGaw is not entitled to TTD benefits will not be disturbed.

Accordingly, the June 26, 2015, Opinion, Award, and Order and the July 30, 2015, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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