Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 20, 2015

CLAIM NO. 201372715

BUFFALO TRACE DISTILLERY PETITIONER

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

CHRIS MITCHELL and
HON. STEPHANIE KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Buffalo Trace Distillery ("Buffalo Trace") appeals from the Opinion, Award and Order rendered July 22, 2015 by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"), and the order on reconsideration issued September 4, 2015, awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD")

benefits and medical benefits to Chris Mitchell ("Mitchell") for injuries he sustained on July 24, 2013.

On appeal, Buffalo Trace argues the ALJ erred in awarding TTD benefits from August 1, 2013 through January 21, 2014; and additionally erred in awarding PPD benefits based upon the impairment rating assessed by Dr. Joseph Dobner. For the reasons set forth below, we disagree, and affirm.

Mitchell filed a Form 101 on May 22, 2014 alleging he experienced a pop and pain in his left foot on July 24, 2013 as he was stepping off of a step while working at Buffalo Trace. In the Form 104 filed with the claim, Mitchell stated his employment history included work in a mail room, as a laborer for a glass company, and as a distillery production worker.

Mitchell testified by deposition on July 29, 2014, and again at the hearing held June 1, 2015. Mitchell, a resident of Frankfort, Kentucky, was born on July 12, 1967. He is a high school graduate, and has one year of college coursework. In addition to that listed in the Form 104, his employment experience includes working in a jewelry store, stockroom manager for a shoe store, and farm labor. He stated Buffalo Trace is a distillery in Frankfort, Kentucky. He stated that prior to his accident

he usually worked overtime, averaging approximately sixty hours of work per week. He stated his job prior to the accident consisted of taking sealed bottles from the line, placing them in boxes, sealing the boxes, and stacking them on a skid.

At the time of the accident, Mitchell was descending stairs after retrieving some paperwork. As he stepped off of a stair, he experienced a pop and pain in his left foot. He reported the incident and went home. The next day he was unable to wear boots, and was sent home. He saw Dr. Dobner the next day. Buffalo Trace continued to pay him his regular pay for five days, until he began receiving TTD benefits. He stated he eventually had to repay Buffalo Trace for the five days he was paid.

Mitchell was off work until October 15, 2013, but was prohibited from working over forty hours per week. He stated after working for eight hours, his left foot symptoms increased, and he had to elevate it when he returned home from work. He was eventually released to full duty in January 2015. Mitchell stated he now works as a production attendant for Buffalo Trace which involves inspecting and labeling. He now earns less per hour than he did prior to the accident. He stated he is able to sit in his current job, however the work he was performing at

the time of the accident involved constant standing or walking. He stated he continues to experience occasional pain in the back of the arch of his left foot, toward the heel, which he described as feeling like a toothache. He stated the more the walks on it, the more his left foot bothers him. He stated he takes over-the-counter Aleve when the foot bothers him, and he performs exercises recommended by Dr. Dobner three to four times per week.

In support of his claim, Mitchell filed a report from Dr. Dobner dated March 6, 2014. Dr. Dobner noted Mitchell returned to work on October 15, 2013. The last time he saw Mitchell, he noted full range of motion. He diagnosed Mitchell with plantar fasciitis. He noted the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), did not properly address Mitchell's condition, but he assessed a 2% impairment rating. Mitchell subsequently filed additional records from Dr. Dobner for treatment administered from July 25, 2013 through January 21, 2014. Those records reflect Mitchell was initially completely incapacitated from work, was subsequently released to light duty, and then received a release to work without restrictions on January 21, 2014.

In an undated response to an inquiry from plaintiff's counsel in a November 19, 2014 letter, Dr. Dobner reiterated Mitchell has a 2% impairment rating based upon the AMA Guides. He noted Mitchell was asymptomatic prior to the work incident, therefore he determined there was a dormant, non-disabling condition aroused into disabling reality by the work incident. He stated Mitchell's weight did not necessarily cause his problem, but may have delayed recovery. Mitchell filed various office notes of Dr. Dobner from 2005 through 2014, which include treatment for unrelated conditions.

Dr. Dobner testified by deposition on January 8, 2015. He is an orthopedic surgeon in Frankfort, Kentucky. He stated he began treating Mitchell on July 25, 2013 for a left foot condition occasioned by stepping off of a step at work. Although he noted Mitchell always exhibited normal motion, strength and gait, he continued to have pain in the left foot. He initially diagnosed a tibial strain, but after an MRI was performed, he noted Mitchell had experienced an acute tear of the plantar fascia with some chronicity. He noted by October 10, 2013 that Mitchell's tenderness had improved and he was released to return to work with no lifting over one hundred pounds on a maximum basis, or over fifty pounds frequently. Mitchell was also

limited to working no more than eight hours per day. In January 2014, Dr. Dobner found Mitchell had reached maximum medical improvement ("MMI"), and released him to full duty work. Dr. Dobner noted Chapter 17 of the AMA Guides did not properly address Mitchell's condition, so he used Chapter 18, the pain chapter, in assessing the 2% impairment rating. He stated no additional treatment or restrictions are required. Dr. Dobner noted a misstep as reported by Mitchell can cause plantar fasciitis to become symptomatic. He noted Mitchell had no symptoms of plantar fasciitis prior to the work incident.

Buffalo Trace filed the September 4, 2013 records review report prepared by Dr. William Nemeth, an orthopedic surgeon in Texas. Dr. Nemeth opined Mitchell has plantar fasciitis with a chronic tear, not caused by the work incident. Based upon his review of the records, Mitchell's plantar fasciitis is longstanding, not an acute injury.

Buffalo Trace also submitted the October 16, 2014 records review report of Dr. George E. Quill, an orthopedic surgeon from Louisville. Dr. Quill noted Mitchell misstepped on a stair, but did not fall. He opined the July 2013 incident at work caused no permanent harmful change. He stated Mitchell's symptoms are due to a chronic pre-existing condition, with no findings consistent with a

plantar fascia. He stated Mitchell has no impairment pursuant to the AMA Guides, and would have no permanent restrictions. He stated planar fasciitis is a self-limited condition which responds to appropriate stretching, weight loss, and appropriate shoe gear.

The Benefit Review Conference Order and Memorandum dated March 4, 2015 notes Buffalo Trace paid TTD benefits from August 1, 2013 through September 15, 2013. The contested issues listed were benefits per KRS 342.730; work-relatedness/causation; unpaid/contested medical expenses; injury as defined by the Act; credit for salary continuation; and TTD benefits.

The ALJ rendered a decision on July 22, 2015 awarding TTD benefits from August 1, 2013 through January 21, 2014. She awarded PPD benefits based upon the 2% impairment rating assessed by Dr. Dobner, commencing on July 24, 2014. The ALJ declined to enhance the award of PPD benefits by the three multiplier contained in KRS 342.730(1)(c)1 due to the lack of permanent restrictions. The ALJ also awarded future medical benefits which are reasonable and necessary for treatment of the work-related left foot injury.

The ALJ specifically found as follows:

> Therefore, based upon the medical opinion of Dr. Dobner, Plaintiff's credible testimony regarding his persistent symptoms, and Plaintiff's abnormal left foot MRI findings, this ALJ finds Plaintiff has met his burden of proving a left foot injury resulting from the July 24, 2013 work accident.

Regarding her reliance upon the impairment rating assessed by Dr. Dobner, the ALJ stated she found it adequately reflects the findings on the MRI and Mitchell's continued symptoms. She stated, "Considering Plaintiff's continued symptoms and limitations, this ALJ finds Plaintiff's left foot condition warrants a 2% impairment rating, relying on Dr. Dobner's assessment of impairment."

Buffalo Trace filed a petition for reconsideration on August 3, 2015, arguing Mitchell was only entitled to an award of TTD benefits through October 14, 2013 when he returned to work. It also argued the impairment rating assessed by Dr. Dobner could not be relied upon because it was not assessed in accordance with the AMA Guides. Mitchell filed a petition for reconsideration on August 3, 2015 noting a typographical error in the ALJ's decision stating the date of injury was July 24, 2013, not July 24, 2014. In separate orders issued September 4, 2015, the ALJ denied Buffalo Trace's

petition for reconsideration, and revised her decision to reflect the correct date of injury.

As noted previously, Buffalo Trace argues on appeal the ALJ erred in awarding TTD benefits through January 21, 2014, and in relying upon the impairment rating assessed by Dr. Dobner in awarding PPD benefits. It is acknowledged an ALJ has wide range discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). It is further acknowledged KRS 342.285 designates the ALJ as the finder of fact, and is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

In reaching a determination, the ALJ must provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review. Kentland

Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). In this instance, the ALJ provided a sufficient basis for her award of TTD benefits during the period from August 1, 2013 through January 21, 2014, and the award of PPD benefits based upon the impairment rating assessed by Dr. Dobner.

As both this Board and Kentucky Court of Appeals noted previously, temporary total disability is defined as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement permitting a return to employment. KRS 342.0011(11)(a). This definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the

> question presented is one of fact no matter how TTD is defined.

Both prongs of the test in W.L. Harper Const. Co., Inc. v. Baker, supra, must be satisfied before TTD benefits may be awarded. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Court further explained, "[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." In other words, where a claimant has not reached 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.

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. The Court stated as follows:

> 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. (Emphasis added)

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), 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.
>
> . . . .
>
> 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.

Regarding Mitchell's entitlement to TTD benefits from August 1, 2013 to January 21, 2014, we find the ALJ properly set forth the basis for her determination. Although Mitchell was allowed to return to work on October 15, 2013, he had weight limitations, and was limited in the number of hours he could work. He was not released to full duty work until January 21, 2014. Although Mitchell testified he returned to his regular job, albeit at fewer hours than he worked prior to his injury, he continued to experience symptoms in the left foot, and by the end of the day he had significant difficulty. He bid onto a less physically demanding job despite the fact it paid less per hour so he would not be on his feet as much, and continue to work.

Contrary to Buffalo Trace's argument, the ALJ's determination is consistent with the holding from the Kentucky Court of Appeals in Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009); and Central Kentucky Steel v. Wise, supra. In Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015), the Kentucky Supreme Court held as follows:

> As the Court explained in *Advance Auto Parts v. Mathis,* No. 2004–SC0146–WC, 2005 WL 119750, at *3 (Ky. Jan. 20, 2005), and we reiterate today, *Wise* does not "stand for the principle that

> workers who are unable to perform their customary work after an injury are always entitled to TTD." Livingood had the burden of proof on the issue. Where the ALJ finds against the party with the burden of proof, the standard of review on appeal is whether the evidence compelled a contrary finding. *FEI Installation, Inc. v. Williams,* 214 S.W.3d 313 (Ky.2007). The Board and the Court of Appeals were not convinced that it did. Nor are we. "The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Western Baptist v. Kelly,* 827 S.W.2d 685, 688 (Ky.1992).

The ALJ determined Mitchell, the party with the burden of proof, was entitled to TTD benefits from August 1, 2013 through January 21, 2014.[1] She found although Mitchell had returned to work, he had not reached MMI, and had limitations on both his ability to lift, as well as the time he could spend at work, thus preventing his full return to this pre-injury job. The evidence supports the ALJ's determination Mitchell did not reach MMI until January 21, 2014. It is reasonable to conclude, based upon the ALJ's findings of fact, especially her interpretation

[1] Although on page 14 of her decision the ALJ referenced TTD benefits were awarded from June 21, 2012 through October 14, 2012 at $528.27 per week, this was corrected in the order portion of her decision on page 15 to reflect the award period of August 1, 2013 through January 21, 2014. The August 1, 2013 start date is not disputed by the parties.

of the testimony of Dr. Dobner regarding his release which allowed Mitchell to return to light duty he was unable to perform the full scope of his pre-injury work. Based upon an overall review of the the ALJ's findings, it is clear her determination satisfies the two-part test set forth above. Because her determination is both adequate and consistent with those requirements, it will not be disturbed.

Likewise, we find the ALJ did not err in awarding PPD benefits based upon the 2% impairment rating assessed by Dr. Dobner. Dr. Dobner explained Chapter 17 of the AMA Guides did not adequately address Mitchell's condition, and additionally explained why he found Chapter 18 to be more appropriate. Although Buffalo Trace introduced evidence from two reviewing physicians, neither specifically challenged the methodology employed by Dr. Dobner. In its brief to this Board, counsel for Buffalo Trace asserts his own interpretation of the appropriate methodology in arguing Dr. Dobner is incorrect.

This argument represents an independent review of the AMA Guides by an attorney, not a physician. This Board has consistently stated the proper method for impeaching a physician's methodology pursuant to the AMA Guides is through cross-examination or the opinion of another medical

expert. For example, in Brasch-Berry General Contractors v. Jones, 189 S.W.3d 149 (Ky. App. 2006), the ALJ relied on a physician who placed the worker in a DRE lumbar Category IV and assigned a 26% impairment rating, even though he repeatedly testified that if the AMA Guides were strictly followed, the worker would only qualify for a Category III impairment. Two other physicians in that claim placed the injured worker in a lumbar Category III which called for an impairment of 10-16%. The Court affirmed the Board's reversal of the ALJ's decision since the medical opinion which persuaded the ALJ was not in accordance with the AMA Guides and therefore, did not qualify as substantial evidence. Here, Dr. Dobner provided his reasons for relying upon chapter 18, including Mitchell's continued complaints, and the objective finding of a plantar fascia tear on the MRI. That said, the ALJ's determination Mitchell has a 2% impairment will not be disturbed.

Accordingly, the decision rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, on July 22, 2015 and the September 4, 2015 order on reconsideration, are hereby **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, AFFIRMS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

STIVERS, Member. Respectfully, I disagree with that portion of the Board's opinion affirming the award of temporary total disability ("TTD") benefits. Citing to Quad/Graphics v. Holguin, 2014-SC-000391-WC, rendered April 2, 2015, Designed Not To Be Published, the ALJ noted the Supreme Court affirmed the denial of an offset for light duty wages paid to an injured worker during the period TTD benefits were paid. The ALJ noted Mitchell reached maximum medical improvement ("MMI") on January 21, 2014. She noted Mitchell was released to return to full duty on January 21, 2014. However, the ALJ also noted that from July 24, 2013, through January 21, 2014, Mitchell was working under light duty restrictions and his work was sedentary.

Based on the applicable statutes and controlling case law, the ALJ found Mitchell was entitled to TTD benefits from June 21, 2012, through October 15, 2012, at the rate of $528.27. This cannot be reconciled with the ALJ's Order in which she awarded TTD benefits from August 1, 2013, through January 21, 2014.

More importantly, the ALJ did not analyze Mitchell's entitlement to TTD benefits in accordance with the applicable case law. In order for Mitchell to be entitled to TTD benefits, he must not have reached MMI and a level of improvement which would permit a return to

employment as defined in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) and Magellan Behavioral Health v. Helms, 140 S.W.2d 579 (Ky. App. 2004). In Central Kentucky Steel v. Wise, supra, the Kentucky Supreme Court defined a return to employment to mean a return to "the type that is customary or that he was performing at the time of his injury." Id. at 660.

Here, the date of MMI is not in question. However, the ALJ failed to determine when Mitchell reached a level of improvement that permitted a return to the type of work which is customary to the injured employee or that which he had been performing prior to being injured. Stated another way, the ALJ did not resolve whether Mitchell's return to light duty was work that was customary or that he was performing at the time of the injury.

The majority notes Mitchell was allowed to return to work on October 15, 2013, with weight limitations and limitations on the number of hours he could work. It also notes Mitchell testified he returned to his regular job at fewer hours than he worked prior to the injury. Regardless of the conditions surrounding Mitchell's return to work on October 15, 2013, the sole issue is whether there was a return to employment as defined by Central Kentucky Steel v. Wise, supra. The award of TTD benefits should be

vacated and the claim remanded for a proper analysis pursuant to Central Kentucky Steel v. Wise, supra, and Magellan Behavioral Health v. Helms, supra.

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