Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 27, 2013

CLAIM NO. 201179365

CATO FASHIONS PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

SHERRY INGRAM
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART,
AND REMANDING

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

ALVEY, Chairman. Cato Fashions seeks review of the opinion and order rendered June 14, 2013 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Sherry Ingram ("Ingram") temporary total disability ("TTD") benefits from January 6, 2011 to February 28, 2012, permanent partial disability ("PPD") benefits and medical benefits for a work-

related left knee injury sustained on January 6, 2011. Cato Fashions also seeks review of the July 22, 2013 order denying its petition for reconsideration. The sole issue on appeal is whether the ALJ erred in awarding TTD benefits from January 6, 2011 through June 29, 2011. Therefore, we will only review and summarize the lay and medical evidence pertinent to that issue.

Cato Fashions argues Ingram was not entitled to TTD benefits during this time period because she continued to work "at regular duty and earning her regular wages." Because we believe the ALJ erred as a matter of law, we reverse, and remand this claim for the ALJ to enter an order finding Ingram was not entitled to TTD benefits from January 6, 2011 through June 29, 2011.

Ingram filed a Form 101 alleging she injured her low back, left hip and left knee on January 6, 2011 when her shoe hit the edge of a buckled tile. Ingram also testified by deposition on May 14, 2012 and at the hearing held June 11, 2013.

Ingram, a resident of Lexington, Kentucky, was born on May 20, 1951 and is a high school graduate. She began working for Cato Fashions in July 2008 as a cashier. Prior to her injury, her job required her to assist customers by retrieving merchandise, setting up dressing

rooms, performing cashier duties, and stocking the floor. When merchandise arrived by truck, she was responsible for unloading some of the boxes, especially the fragile ones. The boxes typically consisted of clothing and accessories. Ingram testified she was required to physically lift boxes weighing fifteen to thirty pounds, carry them to the sales floor, unpack them, and stock the store. Her job required standing the majority of her shift, as well as frequent walking. Ingram worked part-time at the time of her injury.

On January 6, 2011, Ingram testified she tripped over a raised piece of buckled tile while walking to the lockers to gather her personal belongings. She fell onto her left knee, twisted her body and fell over onto her left hip. She reported the incident to her supervisor and then went home. She immediately experienced low back and left knee pain, and soreness. She later developed left hip problems.

Ingram first sought treatment with Dr. Gregory D'Angelo for her left knee in February 2011. On June 29, 2011, he performed surgery to repair a torn meniscus. Subsequent to the surgery, Dr. D'Angelo ordered physical therapy and administered several injections. Ingram testified Dr. D'Angelo has recommended a left knee replacement at some point in the future. He assessed a

permanent impairment rating and restricted her to sedentary work only.

Dr. Mary Hinkle treated Ingram for her low back and hip. She prescribed Prednisone for the hip and referred her to Dr. Christian Ramsey for her low back after an MRI revealed a bulging disc. Ingram began treating with Dr. Ramsey in December 2011, who ordered physical therapy.

At the hearing, Ingram testified she currently experiences left knee pain and swelling, as well as intermittent back pain. Her knee symptoms make it difficult to do daily activities, traverse steps and perform household chores. She cannot stand for prolonged periods of time due to swelling. Pursuant to the restrictions assigned by Dr. D'Angelo and her physical limitations, Ingram testified she can neither return to her job as a cashier with Cato Fashions nor any of her previously held positions.

At her deposition, Ingram testified she continued to work following the January 6, 2011 work accident until her June 29, 2011 left knee surgery. During this time period, Ingram testified she worked with difficulty the same hours and the same job as before the accident. The only modification of her previous job duties was she was no longer required to lift boxes. Ingram stated she was not provided a chair while she was performing her cashier duties

and did not have to take extra breaks. Ingram has not returned to work since the June 29, 2011 surgery and is now restricted to sedentary work.

Both parties filed the records of Dr. D'Angelo, an orthopedic surgeon, who also testified by deposition on June 1, 2012. The records reflect he began treating Ingram on February 8, 2011 for left knee pain and swelling following a fall at work occurring a month prior. She continued to see Dr. D'Angelo on a monthly basis until her June 29, 2011 surgery. During this time period, the records reflect Dr. D'Angelo continued to return Ingram to work with no formal restrictions, despite ongoing complaints of left knee pain and swelling. A left knee MRI demonstrated a meniscus tear and mild to moderate chondromalacia in all three compartments. The June 29, 2011 operative report reflects Dr. D'Angelo performed a left knee arthroscopy, medial meniscectomy, and tricompartmental chondroplasty. Subsequent to the surgery, Ingram was restricted to sedentary work and was ordered to attend physical therapy. She also received a series of three Euflexxa injections.

In a January 27, 2012 letter, Dr. D'Angelo diagnosed a torn left knee meniscus with osteoarthritis and declined to assess a permanent impairment rating since Ingram had not yet attained maximum medical improvement

("MMI"). On February 28, 2012, Dr. D'Angelo opined Ingram had reached MMI but "will require further treatment in the future such as knee replacement." Dr. D'Angelo permanently restricted her to sedentary work which he defined as lifting a maximum of ten pounds, and occasionally lifting and/or carrying such articles as dockets, ledgers, and small tools. Jobs are sedentary if walking and standing are required only occasionally and other sedentary criteria are met. In an April 11, 2012 letter, Dr. D'Angelo noted Ingram has been unable to return to her previous job, which required lifting up to seventy-five pounds and frequent standing/walking. He assessed a 1% impairment rating pursuant the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, for her left knee condition.

In the June 11, 2013 benefit review conference order and memorandum, the parties identified the following contested issues: benefits per KRS 342.730, work-relatedness/causation, injury as defined by the ACT, exclusion for pre-existing disability/impairment, TTD, and entitlement to future medical benefits. The parties stipulated Ingram last worked on June 29, 2011. In a separate agreed order dated June 27, 2013, the parties stipulated Cato Fashions paid TTD benefits at a rate of $144.40 per week from July 19, 2011 through March 26, 2012

totaling $5,776.00 and medical expenses totaling $13,781.28.

In the June 14, 2013 opinion and order, the ALJ found Ingram sustained a work-related left knee injury due to the January 6, 2011 accident based upon her testimony and Dr. D'Angelo's medical records. The ALJ adopted Dr. D'Angelo's assessment of impairment and assigned a 1% impairment rating as a result of her work-related left knee injury. Pursuant to the analysis set forth in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ found the three multiplier pursuant to KRS 342.730(1)(c)1 applicable. He also found Ingram entitled to medical benefits. Regarding TTD benefits, the ALJ stated as follows:

> 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.
>
> Based upon the plaintiff's testimony, which I found to be credible and convincing, and the medical records of Dr. D'Angelo, which have been filed in the record, I make the factual determination that Mrs. Ingram was temporarily totally disabled from January 6, 2011 to February 28, 2012, when Dr. D'Angelo found that she had reached maximum medical improvement.

Accordingly, the ALJ awarded TTD benefits at the rate of $199.27 per week "beginning on January 6, 2011 to and including February 28, 2012," PPD benefits and medical benefits.

Both parties filed petitions for reconsideration. Ingram requested a clarification and an additional finding of fact establishing the workplace injury brought into disabling reality her left knee osteoarthritis, and thus compensability for treatment, including the recommended left knee replacement.

Cato Fashions filed a petition for reconsideration requesting the ALJ clarify the specific body parts for which future medicals were awarded since Ingram alleged several injuries, but the opinion only discussed her left knee condition. Cato Fashions argued, as it now does on appeal, the ALJ applied the incorrect legal standard in determining the duration of TTD benefits. It stated TTD benefits are only payable where the claimant has not reached MMI and has not reached a level of improvement which would "permit a return 'to his job, or some other employment, of which he is capable, which is available in the local labor market.'" Cato Fashions asserted Ingram continued to work following the January 6, 2011 accident up until June 29, 2011, the day of her left

knee surgery. Therefore, she is not entitled to TTD benefits from January 6, 2011 through June 29, 2011 under the two prong test and requested the ALJ "rescind and set aside his Order regarding the dates during which TTD should be paid."

In the July 22, 2013 order on reconsideration, the ALJ denied both petitions. Regarding the issue of TTD, the ALJ stated as follows:

> 4. I note that in the Stipulations the parties stipulated that the plaintiff last worked on June 29, 2011. The parties have tendered an Agreed Order which I signed on June 27, 2013, in which both parties agreed that temporary total disability benefits were paid at the rate of $144.40 per week from July 19, 2011 through March 26, 2012, for a total of $5,776.00. The parties further agreed that medical benefits were paid on behalf of the plaintiff in the total amount of $13,781.28. The award of temporary total disability benefits to the plaintiff in the Opinion and Order dated June 14, 2013 was based upon the above Stipulations and the evidence from the plaintiff's treating orthopedic surgeon, Dr. D'Angelo. Dr. D'Angelo stated in his medical report dated April 11, 2012 that he placed the plaintiff at maximum medical improvement on February 28, 2012 and put her on permanent physical restrictions. Dr. D'Angelo noted that the plaintiff's regular duty position required lifting up to 75 pounds and frequent standing and walking. The plaintiff reported to Dr. D'Angelo that she had not been able to return to her

> previous job due to continued left knee pain. In addition to the persuasive medical evidence from Dr. D'Angelo, I relied upon the Opinion of the Kentucky Supreme Court in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky.2000), where the Supreme Court noted that it would not be reasonable to terminate temporary total disability benefits to the employee where the employee is released to perform work which is not the type of work that is customary or which the employee was performing at the time of the plaintiff's injury.

On appeal, Cato Fashions again argues the ALJ erred in awarding TTD benefits during the period Ingram continued to work following the work accident. It asserts Ingram testified she continued to work from January 6, 2011 to June 29, 2011. Cato Fashions asserts:

> [Ingram] continued to work at regular duty and earning her regular wages until the left knee surgery. Thus, Ms. Ingram did not satisfy the second prong of the test under [W.L. Harper Constr. Co. Inc. v. Baker, 858 S.W.2d 202 (Ky. App. 19930] for an award of TTD benefits for the period of January 6, 2011 through June 29, 2011. This evidence is unrebutted.

Since Ingram was successful before the ALJ regarding the duration of TTD, the question on appeal is whether his determination is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as

evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

We note the Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested

with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

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 that would permit a return to employment. KRS 342.0011(11)(a). The above 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.

Thus, Cato Fashion correctly notes 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 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." 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**. (Emphasis added). 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.

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.
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> . . . .
>
> 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.

In this case, the ALJ specifically found Ingram did not reach MMI until February 28, 2012, relying upon Dr.

D’Angelo’s opinion. This determination is supported by substantial evidence. The issue here does not concern a termination of TTD benefits, but rather when entitlement began.

The evidence is uncontroverted Ingram continued to work for Cato Fashions following her fall until June 29, 2011. Ingram testified she worked the same hours and the same job as before, but experienced difficulties in performing her duties. She also stated she was not required to lift boxes during this time period since co-workers would bring them to the cashier station. Dr. D’Angelo’s records reflect he began treating Ingram for her left knee condition on February 8, 2011 and continued to see her on a monthly basis until her surgery on June 29, 2011. On each of the monthly visits, Dr. D’Angelo continued to return Ingram to regular work with no formal restrictions.

Nothing in the record indicates Ingram’s position during this time period was “minimal work” or a “make work” job. She therefore was not precluded from performing the same work she performed prior to the left knee injury, with the exception of lifting. Significantly, during this time period, Dr. D’Angelo did not impose any formal restrictions.

We note Ingram continued to work at her usual job, with only slight modification, until June 29, 2011, earning

the same or higher pay. We find as a matter of law, she was not entitled to an award of TTD benefits until she was in fact temporarily totally disabled. Therefore the ALJ erred in awarding TTD benefits during the contested time period.

Accordingly, the opinion and order rendered June 14, 2013 and the July 22, 2013 order on reconsideration by Hon. William J. Rudloff, Administrative Law Judge, are **REVERSED IN PART**. This claim is **REMANDED** for entry of an amended opinion, award, and order in conformity with the views expressed herein.

ALL CONCUR.

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