

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 19, 2016

CLAIM NO. 201483547

CEVA LOGISTICS US, INC.

PETITIONER

VS.

APPEAL FROM HON. J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE

THOMAS SHEPARD
and HON. J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. CEVA Logistics US, Inc. ("CEVA") seeks review of the September 21, 2015, Opinion, Order, and Award of Hon. J. Gregory Allen, Administrative Law Judge ("ALJ") finding Thomas Shepard ("Shepard") sustained a work-related back injury and awarding temporary total disability ("TTD") benefits and temporary medical benefits. The ALJ found Shepard's injury did not merit a permanent impairment

rating, but was a temporary exacerbation of his ongoing and pre-existing low back condition. TTD and medical benefits were awarded spanning the period from May 3, 2014, through October 3, 2014.

On appeal, CEVA challenges the award of TTD benefits contending the award is not based upon substantial medical evidence. There is no dispute that on May 3, 2014, Shepard was involved in an accident in which the tractor and tanker he was driving was struck by a train while he was on CSX's facility in Corbin, Kentucky.

Shepard's November 11, 2014, deposition was introduced and he testified at the July 27, 2015, hearing. At the time of the injury, Shepard worked for CEVA as a fuel truck operator. It was his responsibility to fuel the trains located at CSX's facility in Corbin, Kentucky. This involved lifting a 40 pound nozzle along with a 100 pound hose attached to the back of his tanker.

During the November 11, 2014, deposition, Shepard provided the following account of what occurred on May 3, 2014:

Q: Tell me what you remember in the minute or two leading up to it and tell me about what happened.

A: Well, what happens is when you pull up to this road, when you get on to the main road that goes through the rail

yard, I'm pulling off the main line. I pull up to the main road. There's a track that goes here. The road, you have to make a real sharp turn in a semi, so it's trying to make the sharp turn, and you have to cross over a second track at the same time. Legally you can't stop on tracks with a tanker, a haz/mat vehicle, so it all has to be done at one time. I stopped. I looked before I left and I proceeded to go. Nothing was coming down the road. I looked both ways on the road, looked both sides of the track, nothing, so I proceeded to go. I got mid way [sic] to the second track, and it's very dark out there. The rail yard was not lit up at all, and that intersection was dark, and I seen [sic] something out of the corner of my eye moving and it didn't have any lights on the train or anything, and I just looked over and seen a train coming at me and it was moving at about twenty miles an hour, so there was no conductor trying to protect the back that should have been and there was no horns. There was [sic] no bells. The window was open on the truck. I didn't hear anything. I just seen something moving and the only thing I could do in my mind, I've got twenty years' experience of driving, is try to figure out what the least resistance to anything was and that's what I did.

Q: What did you do?

A: Put the truck in reverse and tried to get it off the tracks before the train met me. At about three feet before I got off the tracks the train picked up the truck and the trailer and dragged it twenty-five feet.

Q: What part of the tractor did the train hit?

A: The front tire.

Q: What side?

A: On the passenger side.

Shepard testified that as a result of the accident he immediately experienced middle and low back problems. He denied having any prior middle or lower back problems.

After the injury, Shepard was taken to Baptist Health Hospital, in Corbin, Kentucky where x-rays were performed and medication prescribed. Thereafter, Shepard was treated by Dr. Stephen Foster, a chiropractor. Shepard testified that on May 8, 2014, Dr. Foster took him off work and has never released him to return to work. He testified workers' compensation limited him to thirteen treatments by Dr. Foster. At the time of the hearing, Shepard continued to experience lower back pain both above and below the beltline. As a result, Shepard believes he is physically unable to return to work.

CEVA relied upon the August 19, 2014, report of Dr. Thomas J. O'Brien and his December 5, 2014, supplemental report. It also relied upon the treatment records of Dr. Foster relating to treatment he provided Shepard for low back problems both before and after the May 3, 2014, accident.

Shepard relied upon the Form 107 completed by Dr. Jeffrey Uzzle dated October 3, 2014.

The July 27, 2015, Benefit Review Conference ("BRC") Order and Memorandum reflects the parties stipulated Shepard sustained an alleged work-related injury on May 3, 2014, and CEVA had received due and timely notice. TTD benefits were paid from May 3, 2014, through July 18, 2014. The parties stipulated to the medical expenses paid by CEVA and Shepard's average weekly wage. The contested issues were: "benefits per KRS 342.730; work-relatedness/causation; unpaid or contested medical expenses (Futures); injury as defined by the Act; credit for overpayment of TTD - duration; exclusion for pre-existing disability/impairment; TTD - [plaintiff] underpayment as to rate; KRS 342.165 violation - [plaintiff]. Under "Other Matters" is the following: "Parties agree and stipulate that this claim is [sic] concerns only a low back injury."

In his September 21, 2015, decision, the ALJ determined Shepard had not carried his burden of demonstrating he sustained a permanent work-related injury as defined by the Act resulting in an impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to Evaluation of Permanent Impairment ("AMA Guides").

With respect to the issue of entitlement to TTD benefits, the ALJ provided the following analysis:

Here, the ALJ believes the plaintiff is entitled to an award of both temporary total disability benefits and permanent award of medical benefits.

KRS 342.0011(11)(a) defines TTD as follows:

[T]he 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.

The above definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

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.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Supreme Court further explained:

"[i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she 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 in 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. Id. at 580-581.

As the plaintiff has not returned to work with the defendant, the issue for consideration is that of achievement of maximum medical improvement. Dr. O'Brien saw the plaintiff on August 19, 2014. The

physician was asked if plaintiff had reached maximal medical improvement. Instead of answering the question positively or negatively, the physician indicated the term did "not apply" to the plaintiff. That answer is not helpful or definitive in analyzing this proceeding under the Kentucky Workers' Compensation Act and as set forth in the case law cited hereinabove.

That leaves the report of Dr. Uzzle. Dr. Uzzle saw the plaintiff on October 3, 2014 and placed him at MMI "if no further treatment is done." It appears to the ALJ that plaintiff's last documented treatment with Dr. Foster was on July 2, 2015. Given that Dr. Uzzle's own findings placed the plaintiff at, or above, his pre-accident baseline medical condition on October 3, 2014, the ALJ finds the plaintiff reached maximal medical improvement for temporary total disability benefits on that date. Thus, the plaintiff is awarded temporary total disability benefits beginning May 3, 2014 through October 3, 2014.

CEVA filed a petition for reconsideration raising three errors. First, it asserted the ALJ erred in the weekly amount of TTD benefits awarded. Next, CEVA asserted an error regarding Shepard's entitlement to medical benefits. Finally, it asserted the ALJ erred in relying upon the opinions of Dr. Uzzle in finding Shepard did not reach maximum medical improvement ("MMI") until October 3, 2014. With respect to this issue, CEVA asserted the same argument it makes on appeal.

In the October 26, 2015, Order, the ALJ sustained CEVA's petition for reconsideration to the extent he modified the weekly TTD benefit rate and clarified the language regarding Shepard's entitlement to temporary medical benefits. The ALJ overruled CEVA's petition for reconsideration concerning his reliance upon Dr. Uzzle's opinions in determining the date upon which TTD benefits and medical benefits ceased.

CEVA asserts the ALJ's award of TTD benefits is not supported by substantial evidence since the ALJ relied upon Dr. Uzzle's opinion in determining when Shepard attained MMI after previously finding his opinion regarding the extent of Shepard's injury not credible. In addition, CEVA contends Dr. Uzzle's opinion regarding MMI is not legally sufficient as he contradicted himself in the Form 107 concerning the date Shepard attained MMI. Due to this conflict and the ALJ's finding Dr. Uzzle's opinion regarding the nature and severity of Shepard's injury was not credible, CEVA argues Dr. Uzzle's opinion regarding the date of MMI cannot constitute substantial evidence.

CEVA contends the ALJ could not rely upon Dr. Uzzle's opinions regarding MMI after previously discounting his opinions. Consequently, the ALJ incorrectly stated he had no choice but to rely upon the opinions of Dr. Uzzle in

determining the date of MMI since Dr. O'Brien did not offer an opinion as to the date of MMI. CEVA concedes the ALJ correctly understood the standard to be employed when considering an award of TTD benefits.

Finally, CEVA contends as follows:

It is noteworthy that the plaintiff did not believe he was entitled to any additional period of TTD, and officially claimed only that TTD was underpaid as to rate (see final hearing transcript, Page 6). Further, the ALJ in his discretion found the opinions of Dr. Uzzle not to be credible. Likewise, the ALJ did not find the plaintiff's own testimony credible - 'the ALJ has serious questions regarding the accuracy of plaintiff's self-perceived complaints and inability to perform work.' The ALJ also discarded the opinions of Dr. O'Brien as to TTD benefits.

Accordingly, CEVA requests the award of TTD benefits be vacated and the claim remanded with directions Shepard is not entitled to an award of TTD benefits.

Shepard, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements concerning his entitlement to TTD benefits. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Shepard was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's

decision. 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 an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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 (Ky. 1977); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In his August 19, 2014, report, Dr. O'Brien was asked when he believed Shepard "meets maximal medical improvement following the work incident?" Dr. O'Brien responded: "The term maximal medical improvement 'MMI', healing plateau, end of healing 'EOH', et cetera do not apply to Mr. Shepard. He did not sustain any type of musculoskeletal injury in the work incident of May 3, 2014." Thus, the ALJ correctly noted Dr. O'Brien did not provide an MMI date.

In the Form 107 completed by Dr. Uzzle on October 3, 2014, Dr. Uzzle was required to answer the following question: "Date on which maximum medical improvement was reached." He responded "8/3/14." However, immediately

under this question and his response, Dr. Uzzle inserted the following language: "As of Today this individual is at MMI if no further treatment is done. Since no treatment has been afforded or none planned, this forces me to place Thomas at MMI as of today."

The ALJ was within his discretion in rejecting the opinions of Dr. Uzzle in determining whether the injury was severe enough to merit a permanent impairment rating and by extension an award of permanent partial disability benefits. However, the rejection of Dr. Uzzle's opinion pertaining to this issue did not prohibit the ALJ from relying on Dr. Uzzle's opinion as to the date of MMI. In workers' compensation claims the ALJ may reject portions of witnesses' testimony in resolving an issue but accept portions of that same witness' testimony in resolving another issue. The ALJ was within his discretion in rejecting the opinion of Dr. Uzzle that Shepard's injury was sufficient to justify a 7% impairment rating. However, he was also within his discretion in relying upon Dr. Uzzle's opinion as to the date Shepard attained MMI. Further, the ALJ was authorized to choose either August 3, 2014, or October 3, 2014, as the date of MMI.

There was no question the event as described by Shepard occurred. Therefore, the ALJ could conclude based

on Shepard's description of the events occurring on May 3, 2014, and the emergency room record of Baptist Health Hospital that he sustained a temporary lower back injury. Significantly, we note CEVA does not contest the finding of a temporary injury.

KRS 342.0011(11)(a) defines TTD as follows:

'Temporary total disability' means 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.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. 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.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the 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 MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work she was customarily performing at the time of the traumatic event.

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

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

Here, CEVA does not contend the ALJ failed to conduct the two-prong analysis discussed in Magellan Behavioral Health v. Helms, supra. In addition, CEVA does not question the ALJ's determination that from May 3, 2014, through October 3, 2014, Shepard had not attained a level of improvement that would permit a return to employment as defined by the case law cited herein. Rather, the sole issue was whether Dr. Uzzle's assessment of the date of MMI could be relied upon by the ALJ in determining the duration of TTD benefits. Since Dr. Uzzle's opinion constitutes substantial evidence supporting the ALJ's determination of the date of MMI, we are without authority to disturb the ALJ's decision on appeal.

We find no merit in CEVA's assertion that Shepard did not believe he was entitled to additional TTD benefits since he only claimed the weekly rate of TTD benefits should be greater. The BRC reflects that among the contested issues were credit for overpayment of TTD benefits, duration; underpayment as to rate; and benefits per KRS 342.730. Therefore, to the extent CEVA is arguing the issue of entitlement to additional TTD benefits was not preserved as a contested issue for consideration by the

ALJ, its argument is of no avail.

In United Parcel Service, Inc. v. Stoudemire, 251 S.W.3d 331 (Ky. App. 2008), the Court held that a worker properly preserved as an issue before an ALJ whether she was entitled to additional TTD benefits, even though the employer contended this issue was not raised at the BRC, when the extent and duration of disability issue was specifically designated as a contested issue to the ALJ. See also Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman, 233 S.W.3d 710, 713 (Ky. 2007), where the Court held that the parties' listing of contested issues which included the extent and duration of disability also included the worker's claim for additional TTD benefits. Although "extent and duration" is no longer listed as a potential contested issue on the BRC Order, it is clear "benefits per KRS 342.730" has replaced it. Entitlement to benefits per KRS 342.730 also includes entitlement to additional TTD benefits, thus CEVA's argument must fail.

Accordingly, the September 21, 2015, Opinion, Order, and Award and the October 26, 2015, Order on Defendant's Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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