Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 15, 2016

CLAIM NO. 201292724

CHERYL STOTTS PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

MURAKAMI MANUFACTURING USA
DR. YORELL MANNON-MATOS,
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, & REMANDING

* * * * * *

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

ALVEY, Chairman. Cheryl Stotts ("Stotts") appeals from the Opinion and Order on Remand rendered March 3, 2016 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits for a left upper

extremity injury, dismissal of PPD benefits for a right upper extremity injury, and medical benefits for injuries sustained on March 5, 2012 (right upper extremity) and June 6, 2012 (left upper extremity) while working for Murakimi Manufacturing USA ("MMU"). Stotts also appeals from the March 30, 2016 order sustaining MMU's petition for reconsideration amending the duration of her TTD benefits.

On appeal, Stotts argues the ALJ erred in not awarding TTD benefits from October 19, 2013 to April 25, 2014. We note the ALJ, in his opinion on remand, performed the analysis directed by the Board in our decision entered October 21, 2015. However, he failed to provide an analysis supporting the modification of the award of the second period of TTD benefits in the order on reconsideration issued March 30, 2016.

In the March 3, 2016 decision on remand, the ALJ awarded TTD benefits from May 29, 2012 through August 1, 2012 and again from October 31, 2012 through April 25, 2014. In the order section of that decision, he indicated the initial period of TTD was payable through August 11, 2012. In the order on remand, the ALJ corrected this to reflect August 1, 2012 as the correct date of termination of the first period of TTD benefits awarded. With this we have no quarrel, and affirm. Likewise, in the order on

reconsideration, the ALJ changed the beginning date of the second period TTD benefits from October 31, 2012 to March 1, 2013. This change was not appealed and we again have no quarrel with the ALJ's finding on this issue, and affirm. However, in the order on reconsideration, the ALJ changed the ending date of the second period of TTD benefits from October 18, 2013 to April 25, 2014 without providing an analysis or reason for doing so. He specifically made no findings supporting this change, other than parenthetically noting she had obtained a new job earning the same or higher rate of pay. Therefore we must vacate in part the order on the reconsideration issued March 30, 2016, and remand for an appropriate determination of the ending date of the second period of TTD benefits which complies with the recent decisions of the Kentucky Supreme Court in Livingood v. Transfreight, LLC, et. al., 467 S.W.3d 249 (Ky. 2015) and Trane Commercial Systems v. Delena Tipton, 481 S.W.3d 800, (Ky. 2016).

Stotts filed a Form 101 on April 1, 2013 alleging she experienced pain, numbness and tingling in her right arm, wrist, elbow and hand manifesting on March 5, 2012, while she was working on the assembly line at MMU. Stotts also alleged a left shoulder overuse injury on June 6, 2012 due to working while on light duty. The evidence

introduced during the claim was previously summarized in the decision rendered by this Board on October 2, 2015 and will not be reviewed again.

In an Opinion, Order & Award of Interlocutory Relief rendered November 13, 2013, the ALJ determined Stotts sustained a right upper extremity injury on March 5, 2012. He also determined she sustained a left shoulder strain and adhesive capsulitis due to the June 6, 2012 injury. The claim was placed in abeyance, and TTD benefits were awarded subject to credit for unemployment benefits. The ALJ also authorized the right cubital tunnel release surgery recommended by Dr. Yorrell Manon-Matos.

In an Opinion, Order and Award rendered May 8, 2015, the ALJ awarded TTD benefits from May 29, 2012 through April 25, 2014. He additionally awarded PPD benefits based upon a 5% impairment rating for the right upper extremity, and 2% for the left upper extremity, both assessed by Dr. Warren Bilkey. The ALJ also determined Stotts is entitled to medical benefits for both the right and left upper extremity injuries pursuant to KRS 342.020.

MMU appealed the ALJ's decision regarding the awards of both TTD and PPD benefits. In our decision rendered October 2, 2015, this Board determined the ALJ could rely upon the impairment rating assessed by Dr.

Bilkey for the left upper extremity condition, but not the rating assessed for the right upper extremity because at the time he saw her she had not undergone surgery, and had not reached maximum medical improvement ("MMI"). This Board also determined the ALJ's analysis regarding entitlement to TTD benefits was insufficient.

On remand, the ALJ rendered an amended decision on March 3, 2016. He determined the only impairment rating for the right upper extremity assessed subsequent to Stotts having reached MMI was the 0% by Dr. Matos. He therefore dismissed her claim for PPD benefits for the right upper extremity injury.

The ALJ also performed a more complete analysis regarding the award of TTD benefits, specifically finding as follows:

> In their Opinion, the Board also held that the undersigned Administrative Law Judge's one sentence analysis regarding the award of TTD benefits was insufficient to advise the parties in [sic] this Board of the basis of the remand and the ALJ must engage in the two prong analysis outlined in the Board's opinion during the time periods in question, and support his ultimate conclusion of whether Stotts was able to return to the type of work which is customary for her or which she had been performing prior to her injuries from the evidence of record.

The Administrative Law Judge will now engage in the two prong analysis outlined by the Board in regards to the Plaintiff's entitlement to TTD benefits for the periods in question.

KRS 342.0011(11)(a) defines temporary total disability as meaning, "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 the case of *W. L. Harper Construction Company vs. Baker*, 858 SW2d 202 (KY App. 1993), the Court held that [sic], to TTD is a question of fact. The Court said [sic]further set forth a two prong test for establishing entitlement to TTD benefits under this statute. The TTD benefits are payable as long as (1) maximum medical improvement has not been reached and (2) the injury is not reached a level of improvement that would permit a return to employment.

In *Halls Hardwood Floor Company vs. Stapleton,* 165 SW 3d 327 (Ky. App. 2000), the Court initially defined MMI is [sic] occurring when the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over.

In *Central Kentucky Steel vs. Wise*, 19 SW 3d 657 (KY 2000), the Supreme Court held that termination of TTD benefits should not solely be based upon whether a physician has provided a release to work, but rather the release must be viewed in light of the employees' prior work activities. The Court found that until MMI is achieved the employee is

entitled to a continuation of TTD benefits so long as he or she remains disabled from his customary work or the work he was performing at the time of the injury.

In this specific instance, the Administrative Law Judge notes that the Plaintiff testified in her first deposition that she worked light-duty through June 6, 2012, primarily sweeping with one arm and occasionally stocking the line with parts still using only one arm. She also testified that while working light-duty, she actually tried to clean but then she returned to regular duty without restrictions and was taken off the assembly line. She did admit to performing regular duty between August of 2012 and October of 2012, but from June 2012 through August of 2012 all she did was pick up trash.

Therefore, in this specific instance Administrative Law Judge finds that the Plaintiff was temporarily and totally disabled from May 29, 2012, through August 1, 2012, and then again from October 31, 2012, through April 25, 2014. In so finding, the Administrative Law Judge believes that the Plaintiff's testimony is sufficient to indicate to him that while she may have been working for the Defendant/Employer during the aforementioned time periods she was doing so at light-duty work which was not her usual and customary work therefore entitling her to TTD benefits.

AUTHORITIES

KRS 342.0011 (11)(a)
Central Kentucky Steel vs. Wise, 19 SW 3d 657 (KY 2000)

> *W. L. Harper Construction Company vs. Baker*, 858 SW2d 202 (KY App. 1993)
> *Halls Hardwood Floor Company vs. Stapleton*, 165 SW 3d 327 (Ky. App. 2000)
>
> **ORDER**
>
> IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:
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> The Plaintiff, Cheryl Stotts[sic] claim against the Defendant/Employer, Murakimi Manufacturing, USA, and/or their insurance carrier for permanent partial disability benefits arising out of a March 5, 2012, right shoulder injury, shall be and the same is hereby DISMISSED.
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> The Plaintiff, Cheryl Stotts, shall recover from the Defendant/Employer, Murakimi Manufacturing, USA, and/or their insurance carrier, TTD benefits payable at the rate of $300.31 per week commencing May 29, 2012, and continuing through August 11, 2012, recommencing October 31, 2012, and continuing through April 25, 2014, together with interest at the rate of 12% per annum on all due and unpaid installments of said compensation, with the Defendant/ Employer taking credit for benefits previously paid by them.
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> All other matters previously addressed in the Opinion and Award of May 8, 2015, that are not inconsistent with the findings and rulings set forth in this order, are incorporated herein by reference.

MMU filed a petition for reconsideration on March 14, 2016 arguing the ALJ committed a patent error regarding the award of TTD benefits. It asserted his finding in the

analysis section of the decision was inconsistent with the order section, and requested this error be remedied. MMU also argued the ALJ failed to grant a credit for any overlapping period of unemployment benefits received. MMU also argued the ALJ erred in awarding TTD benefits from October 31, 2012 through March 1, 2013, the date she was terminated, because she continued to earn wages during this time period while working on light duty. MMU requested an analysis of entitlement to TTD during this period of time pursuant to Trane Commercial Systems v. Tipton, supra. Finally, MMU argued the ALJ erred by awarding TTD benefits for the period from October 19, 2013 through April 25, 2014 when she was working for another employer.

In sustaining MMU's Petition for Reconsideration, the ALJ amended his decision as follows:

> The Plaintiff, Cheryl Stotts, shall recover from the Defendant/Employer, Murakami Manufacturing USA, Inc, and/or their insurance carrier, TTD benefits payable at the rate of $300.31 per week commencing on May 29, 2012, and continuing through August 1, 2012 (date Plaintiff returned to work full duty for the Defendant/Employer), and then again from March 1, 2013 (date she was terminated by the Defendant/Employer) through October 18, 2013 (date she began working for a subsequent employer earning same/greater wages). TTD benefits are payable together with an interest at the rate of 12% per annum on all due and unpaid installments

> [sic] of said benefits with the Defendant/Employer taking credit for benefits credit for benefits [sic] previously paid by them, and taking credit for any unemployment benefits that overlap any payments of TTD herein.

Although the ALJ performed the analysis previously directed by this Board, he did not provide findings of fact, analysis, or explanation which allow for meaningful review of his modification of the end date for the second period of TTD benefits in the order on reconsideration. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973); New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004).

As we noted previously, and as cited by the ALJ in his decision on remand, 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, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court 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."

Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

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 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.
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> . . .
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> 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.
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> Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), regarding 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).
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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 Livingood v. Transfreight, LLC, et al., supra, the Kentucky Supreme Court addressed the ALJ's denial of Livingood's request for additional TTD benefits during the period he had returned to light duty work by stating,

"Except for bathroom monitoring, Livingood had performed the other activities before the injury; further they were not a make-work project." The Court specifically stated as follows:

> As the Court explained in *Advance Auto Parts v. Mathis*, No. 2004-SC-0146-WC, 2005 WL 119750, at (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, 39 4 Ky. L. Summary 54 (Ky. 1992). (Emphasis added).
> Id. at 254-255.

More recently, in Trane Commercial Systems v. Tipton, supra, the Kentucky Supreme Court again addressed whether an employee was entitled to TTD benefits upon returning to light duty work prior to reaching MMI. The Court first noted:

> "'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." KRS 342.0011(11)(a). Or, to put it positively, an employee is entitled to receive TTD benefits until such time as she reaches maximum medical improvement (MMI) or has improved to the point that she can return to employment. There is no dispute that Tipton reached MMI on July 7, 2011. However, the parties dispute whether Tipton reached the point that she could "return to employment" when she returned to work for Trane assembling circuit boards. The ALJ and the Board concluded that her return to work and return to employment occurred at the same time. As noted above, the Court of Appeals disagreed. For the reasons set forth below, we disagree with the Court of Appeals.
> Id. at 803

The Court additionally stated the following:

> We take this opportunity to further delineate our holding in *Livingood,* and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he 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." *Double L Const., Inc.,* 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD

benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.

As we have previously held, "[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 [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise,* 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; *and* the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.
Id. at 807

That said, the modification of the award of the second period of TTD benefits in the order on reconsideration is hereby vacated. While Stotts may have indeed began working for a different employer after October 18, 2013, nothing in Trane Commercial Systems v. Tipton, supra, mandates the ALJ terminate her TTD benefits on that date. That case does not compel or mandate a termination of TTD benefits. It merely establishes the ALJ must perform an appropriate analysis of entitlement to such benefits. In this instance, the ALJ's order on reconsideration is completely bereft of any analysis to support his modification of the termination date of the second period of TTD benefits. On remand, the ALJ must determine, based upon the evidence, the appropriate ending date of the second period of TTD benefits awarded in consideration of the direction of the Kentucky Supreme Court in Livingood v. Transfreight, LLC, et al., supra, and Trane Commercial Systems v. Tipton, supra.

This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). However, any determination must be supported by the appropriate analysis and findings.

Accordingly, the Amended Opinion and Order on Remand rendered March 3, 2016, and the March 30, 2016 Order on Reconsideration issued by Hon. R. Scott Borders, Administrative Law Judge, are hereby **AFFIRMED IN PART, and VACATED IN PART.** This claim is **REMANDED** for a more detailed analysis of Stotts' entitlement to TTD benefits and the appropriate award in conformity with the views expressed herein.

ALL CONCUR.

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