Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 27, 2014

CLAIM NO. 201200223

DAVID REGAN PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

CLARK MANAGEMENT
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. David Regan ("Regan") seeks review of the Opinion and Award rendered January 13, 2014 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits against Clark Management for a work-related right knee

injury he sustained on October 6, 2011. Regan also seeks review of the February 11, 2014 order overruling his petition for reconsideration.

The ALJ awarded Regan TTD benefits from the date of surgery, December 7, 2012, through the attainment of maximum medical improvement ("MMI") on March 7, 2013. On appeal, Regan argues TTD benefits should begin December 30, 2011, the day following his termination from Clark Management. Because the ALJ failed to set forth adequate findings of fact or provide an explanation which would allow meaningful review regarding this issue, we vacate in part and remand.

Regan filed a Form 101 alleging a right knee injury on October 6, 2011 when he slipped and fell at work. Records filed by Clark Management indicate he was hired as a property maintenance supervisor on September 6, 2011 and was discharged on December 29, 2011 for reasons unrelated to his work injury. The claim was bifurcated on the issues of causation/work-relatedness, notice and fraud.

Regan testified by deposition on April 19, 2012 and at the hearing held August 24, 2012. Regan has been a maintenance director or supervisor for the majority of his working life. His last employer was Clark Management, a property management company which owned several low-income

properties in Southern Louisville. He worked there as a maintenance supervisor from September 2011 to December 2011, which required performance of a wide variety of property maintenance and landscaping tasks. Regan testified he slipped and fell on October 6, 2011, landing hard on both knees at a job site. Regan stated he continued working until December 29, 2011, the day he was terminated, despite persistent knee pain since he could choose work orders which were simple and easy. Regan has not returned to any type of work since his termination.

Regan did not seek medical treatment until after he was terminated on December 29, 2011. He began treating with Dr. Joseph Dobner on January 3, 2012, who recommended surgery for a torn meniscus in his right knee. Regan testified he experiences constant sharp, throbbing right knee pain, and is limited in his daily activities. He stated he does not believe he could return to his position as maintenance supervisor in his current condition. Regan indicated he applied for Social Security disability benefits in May 2012 and received unemployment benefits from a previous employer from January 2012 until approximately August 2012. Regan stated since his termination, he has not applied for any jobs, but he has reviewed job listings on Craig’s List.

Both parties submitted the records of Dr. Dobner. On January 3, 2012, Regan presented with bilateral knee complaints stemming from an October 2011 fall at work. Dr. Dobner diagnosed a torn medial meniscus and ordered a right knee MRI. On January 31, 2012, Dr. Dobner recommended an arthroscopic right knee meniscectomy and stated "the patient was given an excuse to be taken off work. This work status is in effect until surgery."

Regan also filed the April 19, 2012 report of Dr. Jared W. Madden who noted Dr. Dobner restricted Regan from work until he had the recommended surgery. Dr. Madden diagnosed a right medial meniscus tear and chronic pain syndrome due to trauma. He opined Regan's injuries are the cause of his complaints and he had not reached MMI. At the time of the evaluation, Dr. Madden stated Regan does not retain the physical capacity to return to the type of work performed at the time of injury. He further stated:

> I agree with the restrictions currently in place made by Dr. Dobner, the patient should remain off work until surgical repair of the injury and adequate rehabilitation is complete. Failure to follow Dr. Dobner's recommendations could result in additional injury.

Clark Management filed Dr. Peter Kirsch's January 26, 2012 report and Dr. Phillip Corbett's June 19, 2012

report. Dr. Kirsch opined Regan's knee complaints and treatment were not work-related. Dr. Corbett stated Regan's injury date appeared to coincide with a contusion to the patellofemoral joint but he later declined to express an opinion regarding the work-relatedness of his injury. Dr. Corbett found no need for permanent restrictions based upon the October 6, 2011 injury, but recommended a surgical resection of the meniscus. He further stated:

> It would appear, however, on the basis of today's performance that the patient can perform most of the work that I believe is associated with his trade. The patient's issues regarding squatting, kneeling, and crawling may become problematic if required on a frequent basis.

Several lay witnesses were deposed regarding the issues of injury and notice, which will not be summarized further. In an opinion rendered October 23, 2012, the ALJ relied upon Dr. Madden's report in determining Regan's right knee condition was causally related to the October 6, 2011 work injury. The ALJ also found due and timely notice and no evidence of fraud. The ALJ awarded medical expenses for the right knee condition, including the recommended surgical repair by Dr. Dobner. The ALJ awarded TTD benefits pending the attainment of MMI and placed the claim in abeyance.

Thereafter, Regan underwent right knee surgery on December 7, 2012.

The claim was removed from abeyance on July 13, 2013. A benefit review conference ("BRC") was held on October 1, 2013. The BRC order indicated Clark Management paid TTD benefits from November 20, 2011 to July 3, 2013 and medical expenses pursuant to the October 2012 interlocutory opinion. The BRC order identified the issues of benefits per KRS 342.730, work-relatedness/causation, notice, unpaid or contested medical expenses, injury as defined by the ACT, TTD duration, and compensability of injections and physical therapy were preserved for determination.

Regan again testified by deposition on August 20, 2013 and at the hearing held November 14, 2013. Regan testified he underwent surgery on December 7, 2012 and physical therapy. Despite the additional treatment, Regan stated his right knee condition has worsened. Regan last treated with Dr. Dobner in June 2013, who restricted him from lifting over ten pounds and recommended knee replacement surgery. Regan acknowledged he has not returned to work in any capacity. He again stated he is unable to return to his former job as maintenance supervisor due to his knee condition.

Clark Management filed the June 4, 2013 and July 19, 2013 reports of Dr. Frank Bonnarens, who diagnosed knee swelling secondary to the lateral release which is a normal sequelae of such surgery; status post medial meniscectomy; and underlying arthritis. Dr. Bonnarens opined the medial meniscus tear is work-related and the underlying arthritis is pre-existing. He concluded Regan reached MMI for his work-related medial meniscus tear three months post-surgery, on March 7, 2013. Dr. Bonnarens assessed a 3% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), found Regan retains the physical capacity to return to his former work without restrictions, and requires no further treatment for his right knee condition. Clark Management also filed the vocational report by Paula Shifflett, who opined Regan is not permanently and totally disabled.

Regan submitted the June 25, 2013 report of Dr. Madden who re-evaluated him after the December 2012 surgery. Dr. Madden diagnosed a medial meniscal tear secondary to fall, degenerative joint disease, status-post failed arthroscopic repair of right medial meniscus and several other unrelated conditions. He assessed a 2% impairment rating pursuant to the AMA Guides related to the October 6, 2011 work injury. He restricted Regan to lifting twenty

pounds occasionally and five to ten pounds frequently, standing/walking four hours in a normal work day and to never climb, balance, stoop, crouch, kneel or crawl.

In the January 13, 2014 Opinion and Award, after summarizing the evidence, the ALJ reinstated his findings from the October 2012 interlocutory opinion regarding notice and causation. Relying upon the opinions of Dr. Bonnarens, the ALJ determined Regan sustained a 3% impairment due to the work injury, reached MMI three months following surgery on March 7, 2013, and retained the ability to return to the same type work performed at the time of the injury. Regarding TTD benefits, the ALJ stated "Because the Plaintiff continued to work after the date of injury and only became unable to work immediately after surgery, TTD benefits are therefore due to the Plaintiff from the date of surgery, December 7, 2012, through March 7, 2013 and there has been an overpayment." Accordingly, the ALJ awarded TTD benefits from December 7, 2012 through March 7, 2013, PPD benefits and medical benefits.

Regan filed a petition for reconsideration raising the same argument he now makes on appeal. In an order dated February 11, 2014, the ALJ summarily overruled Regan's petition. On appeal, Regan challenges the ALJ's determination he is entitled to TTD benefits commencing

from the date of surgery, on December 7, 2012. Regan argues he is entitled to TTD benefits beginning December 30, 2011, the day following his termination, and continuing until he attained MMI on March 7, 2013. Regan points to Dr. Dobner's January 2012 records recommending surgery and restricting him from work until he underwent such surgery; Dr. Madden's April 12, 2012 report indicating he agreed with Dr. Dobner's restriction from work; and Dr. Corbett's June 19, 2012 opinion Regan needed surgery but could probably perform most of his job duties. Therefore, Regan argues "based upon the evidence, no physician placed Regan at [MMI] or indicated he could return to work his usual and customary job without restriction until after he finally had surgery on December 7, 2012." Accordingly, Regan insists he is entitled to TTD benefits beginning on December 30, 2011 through March 7, 2013.

As the claimant in a workers' compensation proceeding, Regan had the burden of proving each of the essential elements of his cause of action, including entitlement to and duration of TTD benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Regan was unsuccessful, the question is whether a contrary result is compelled, however in this

instance that cannot be determined because the ALJ failed to provide a basis for his determination.

We begin by noting it is undisputed Regan attained MMI on March 7, 2013. It is likewise undisputed Regan is not entitled to TTD benefits during the time he continued to work following the October 6, 2011 injury until his termination on December 29, 2011 and is entitled to TTD benefits from the date of surgery on December 7, 2012 until reaching MMI on March 7, 2013. Therefore, the question before the Board is whether the ALJ erred in finding Regan not entitled to TTD benefits from the time he was terminated on December 29, 2011 until his surgery on December 7, 2012. In the opinion, the ALJ found "Because [Regan] continued to work after the date of injury and only became unable to work immediately after surgery, TTD benefits are therefore due to [him] from the date of surgery, December 7, 2012, through March 7, 2013 . . ."

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). 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.

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. 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.

KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). 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).

That said, the ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's 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., supra. This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the claim was remanded to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

Here, the ALJ failed to set forth adequate findings of fact and provide an explanation which would allow meaningful review regarding his determination of entitlement to TTD benefits during the time period in question. The ALJ's one sentence explanation is inadequate particularly in light of the fact the issue was specifically reserved in the BRC order and the ALJ summarily overruled Regan's request for additional TTD benefits in his petition for reconsideration. Because the ALJ failed to provide a

proper analysis regarding the entitlement of TTD benefits during the period of time Regan was not working prior to his surgery, the award of TTD benefits is vacated. On remand, the ALJ must determine whether Regan is entitled to additional TTD benefits from December 30, 2011 to December 7, 2012 utilizing the two-pronged analysis referenced above. As fact-finder, it is the prerogative of the ALJ to determine whether or not Regan is entitled to TTD during the time period in question, if it is supported by the evidence. The ALJ shall provide the basis for his determination.

Therefore, those portions of the January 13, 2014 Opinion and Award and the February 11, 2014 Order by Hon. Jonathan Weatherby, Administrative Law Judge, relating to the duration of TTD benefits are hereby **VACATED.** This claim is **REMANDED** to the ALJ for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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