

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 24, 2015

CLAIM NO. 201400370

FAUSTO ZETINA

PETITIONER

VS.

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

JAMES WILLIAMS PAINTING and
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. Fausto Zetina ("Zetina") appeals from the Opinion, Award and Order rendered November 19, 2014; the Recertified Opinion, Order and Award issued December 3, 2014; the Order on Reconsideration entered December 19, 2014; and the Order on Reconsideration entered January 5, 2015 by Hon. R. Scott Borders, Administrative Law Judge

("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for injuries Zetina sustained on October 10, 2011 when he fell from a ladder while working for James Williams Painting ("Williams").

On appeal, Zetina argues the ALJ had an erroneous understanding of the impairment ratings submitted, and he is entitled to PPD benefits based upon a 12% impairment rating rather than a 4% rating. We find substantial evidence supports the ALJ's determinations, which outline a clear understanding of the impairment ratings assessed, and no contrary result is compelled. Therefore, we affirm in part, vacate in part and remand for a determination of whether Zetina is entitled to additional TTD benefits.

Zetina filed a Form 101 on February 13, 2014, alleging he broke his nose and injured his right arm, right wrist, and left hand when he fell from a ladder on October 10, 2011 while working for Williams. Zetina's work history includes working for Goodyear in Mexico where he balanced and aligned tires. He has also worked in construction, painted and worked on a tobacco farm.

Zetina testified by deposition on April 21, 2014 and at the hearing held October 3, 2014. Zetina was born in Mexico on September 6, 1970, and currently resides in

Lexington, Kentucky. He is a high school graduate. Although Zetina indicated on the Form 101 he had attended some college, he denied this in his deposition. He began working for Williams in 2007, and worked there until the owner retired in December 2013, and the business closed.

On October 10, 2011, Zetina was working on a twenty-four foot ladder which shifted and fell. He was unable to jump free of the ladder, and was still on it when it impacted the ground. He hit his nose, and the ladder fell on his wrist. He was taken to the Urgent Treatment Center where his nose was treated because it was still bleeding. He was transferred to the University of Kentucky Medical Center where his right wrist was placed in a cast. He became dissatisfied with the University of Kentucky Medical Center due to a malunion of the bone. Zetina testified he returned to work for Williams on November 27, 2011 through February 1, 2012. He was then referred to Dr. Margaret Napolitano, a hand surgeon with Kleinert & Kutz for additional treatment.

Dr. Napolitano performed surgery, and implanted metal plates and screws. Zetina was restricted from work for a period of time. After he returned, he was unable to perform heavy lifting for a period of time. He was eventually released with no restrictions. He stated he

tried to do easier work, but still painted. After a year, he returned to Dr. Napolitano who subsequently removed the plates and screws. He again had some restrictions after removal of the hardware, but those have been lifted. He stated the removal of the hardware did not improve his condition, and he still experiences wrist pain after a few hours of work. Zetina stated he currently does odd jobs, but would still be working for Williams if the owner had not retired.

In support of his claim, Zetina filed the report of Dr. James Owen, who he saw for evaluation at the request of his attorney on February 21, 2014. Dr. Owen noted Zetina fell from a ladder while working, fracturing his right wrist. The bone was set and casted at the University of Kentucky Medical Center. The wrist did not heal correctly, and he was referred to Dr. Napolitano who performed surgery implanting plates and screws. Those were subsequently removed in a subsequent surgery.

Dr. Owen diagnosed Zetina with persistent diminished range of motion and grip strength of the right wrist. He assessed a 17% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Of this rating, 6% was due to restricted range of motion, and

the remainder was due to reduced grip strength. Dr. Owen stated Zetina should avoid lifting greater than twenty-one kilograms with the right upper extremity.

Zetina and Williams both submitted treatment records and reports from Dr. Napolitano, who first treated him on November 21, 2011. She noted he fell from a ladder and broke his right wrist for which a cast was applied. On December 14, 2011, she noted Zetina had a right distal radius fracture, intraarticular, and an "united right ulnar styloid fracture". She recommended surgery which included open reduction and internal fixation with plating, which was performed on January 16, 2012. She began Zetina on physical therapy on February 19, 2012. On March 26, 2012, she noted Zetina had attended six physical therapy sessions and she indicated he could proceed to work-hardening, and discontinue bracing. On April 30, 2012, she released Zetina to regular duty without restrictions. Napolitano noted Zetina's complaints of continued discomfort, and stated he could be re-evaluated for hardware removal in one year.

Zetina returned on April 13, 2013 to discuss hardware removal. This was done on May 2, 2013, and he returned on June 5, 2013 with complaints of a dull ache on the ulnar side of the right wrist. On June 26, 2013, Dr.

Napolitano released Zetina to return to work with no restrictions.

Williams filed the June 10, 2014 report prepared by Dr. Napolitano. She stated Zetina had reached maximum medical improvement ("MMI") and assessed a 4% impairment rating pursuant to the AMA Guides. She stated Zetina could work with no restrictions.

Dr. Napolitano testified by deposition on August 20, 2014. She outlined the treatment she had provided, including the two surgical procedures for the implantation and removal of hardware. She reiterated her assessment of a 4% impairment rating. Regarding inclusion for a rating for loss of grip strength, she testified, "So, when there is impairment in motion, I don't usually include grip strength as part of the impairment." She also stated, "So, I have - - in my experience - - I've done these ratings for years. And I have learned that you don't combine a loss of motion impairment with a loss of grip impairment. It's one or the other." She stated this is not a rare occasion where grip strength impairment would be combined with loss of range of motion in arriving at an impairment rating, and in this instance such a combination would be incorrect. Dr. Napolitano agreed to supplement her deposition testimony with a calculation based upon a loss of grip strength, but

she stated this should not be used in calculating a functional impairment rating.

Dr. Napolitano noted Zetina may experience occasional flare-ups of wrist pain or tendinitis. She stated he had no atrophy. She released Zetina to return to work without restrictions on April 30, 2012 after the first surgery, and on June 27, 2013 after the second surgery.

Subsequent to her deposition, Dr. Napolitano provided a note on September 8, 2014, filed by Zetina, calculating a rating based upon loss of grip strength. Prefacing her calculations, Dr. Napolitano stated, "For the record my position on Mr. Zetina's impairment rating does not change. My calculation is as it is and I do not believe loss of strength should be combined to the rating." She calculated the impairment utilizing loss of grip strength and arrived at 12%. However, she reiterated as follows:

As stated above you cannot add strength loss as a part of the impairment calculation as a result of the loss of wrist motion which ultimately resulted after the treatment of the wrist injury. This falsely inflates the impairment which in this case should only consist of loss of wrist motion and nothing else.

Williams also filed pages 507 through 514 of the AMA Guides concerning strength evaluation. These pages

confirm Dr. Napolitano's position declining to use loss of grip strength in the assessment of an impairment rating. It is noted both Drs. Owen and Napolitano opined Zetina had the capacity to return to the work performed at the time of the injury.

A benefit review conference ("BRC") was held prior to the hearing on October 3, 2014. The BRC order and memorandum reflect Williams paid Zetina TTD benefits from October 11, 2011 through November 27, 2011 and February 2, 2012 through February 19, 2012 at the rate of \$224.64 per week. The parties stipulated the correct average weekly wage was \$340.00 per week. The issues preserved for decision were benefits per KRS 342.730 and TTD benefits as to rate.

The ALJ rendered a decision on November 19, 2014 which inadvertently omitted page 10. The decision was re-certified on December 3, 2014. The ALJ, relying upon Dr. Napolitano, awarded the periods of TTD benefits previously paid by Williams, but noted there was an underpayment as to rate. He awarded TTD benefits at the rate of \$226.68 per week, which resulted in an underpayment of \$2.02 per week. The ALJ also awarded PPD benefits based upon the 4% impairment rating assessed by Dr. Napolitano, in the amount of \$5.99 per week. The ALJ determined Zetina was not

entitled to an enhancement of his award of PPD benefits because the cessation of his employment with Williams was not due to his "disabling injury" as required by Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671 (Ky. 2009).

Williams filed a petition for reconsideration arguing the ALJ erred in calculation of the PPD benefits which should have been awarded at the rate of \$5.89 per week rather than \$5.99 per week. Zetina filed a petition for reconsideration arguing the ALJ erred in awarding PPD benefits based upon a 4% impairment rating, and should have based the award on a 12% impairment rating. The ALJ granted Williams' petition for reconsideration, but denied the one filed by Zetina.

As the claimant in a workers' compensation proceeding, Zetina had the burden of proving each of the essential elements of his cause of action, including the appropriate impairment rating. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Zetina was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The

function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences could otherwise have been drawn from the record. Whittaker v. Rowland, supra. So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

On review, we find Zetina's appeal to be nothing more than a re-argument of the evidence before the ALJ. Zetina impermissibly requests this Board to engage in fact-finding and substitute its judgment as to the weight and credibility of the evidence for that of the ALJ. This is not the Board's function. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Regarding the appropriate impairment rating, the ALJ relied upon the 4% assessed by Dr. Napolitano which she provided both in her office notes, and during her deposition. Dr. Napolitano clearly stated her reasons for not including loss of grip strength in her assessment of impairment, and this is supported by the information contained in the pages from the AMA Guides which were filed as evidence. Although Dr. Napolitano provided a later calculation including the loss of grip strength, she

clearly noted she did not rely upon this, and outlined why it should not be added to the impairment rating she assessed. She clearly stated her reasoning for her opinion, and why the impairment rating assessed by Dr. Owen was incorrect. Likewise, the ALJ outlined why he relied upon Dr. Napolitano in finding the 4% impairment rating was appropriate. It is clear from his decision the ALJ understood the impairment ratings and committed no error.

Although Zetina points to evidence to the contrary, no different result is compelled. While Zetina can point to Dr. Napolitano's statement the impairment rating would be 12% if the loss of grip strength were added, she clearly stated why it was an incorrect assessment, and 4% impairment based upon the loss of range of motion is appropriate. Dr. Napolitano's opinions are clear, and constitute substantial evidence upon which the ALJ was free to rely. Therefore, the ALJ's decision in awarding PPD benefits based upon a 4% impairment rating is supported by substantial evidence, and no contrary result is compelled.

That said, this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). It is unclear whether Zetina was released to regular duty between

November 28, 2011 and February 1, 2012, and whether he was able to do his customary pre-injury work. Likewise, the ALJ did not address whether there was a period of time after the May 2, 2013 surgery to remove the hardware, and when he was released to return to work without restrictions on June 27, 2013 for which Zetina would be entitled to TTD benefits.

As both this Board and Kentucky Court of Appeals have noted, "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.

We note the following decisions from the Kentucky Court of Appeals which are applicable to this claim. Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App.

2009); and Central Kentucky Steel v. Wise, supra. We also note three recent decisions of the Kentucky Court of Appeals, Sonia S. Mull v. Zappos.Com, Inc., 2013-CA-001320-WC (rendered July 11, 2014); Delena Tipton v. Trane Commercial Systems, 2014-CA-00626 (rendered August 22, 2014); and Nesco Resource v. Michael Arnold, 2013-CA-001098 (rendered March 13, 2015), all designated not to be published, which are not cited as authority, but are referenced for guidance. In each of these cases, the injured worker was awarded TTD benefits during a time period when they were on light duty, and could perform some, but not all of their customary pre-injury job duties. As noted most recently in Nesco Resource, supra, the Court of Appeals clearly stated if an injured worker demonstrates the inability to return to his or her customary pre-injury work, (which includes all job duties), and has not reached MMI, he or she is entitled to TTD benefits pursuant to the Kentucky Worker's Compensation Act.

On remand, the ALJ must, based upon the evidence, determine whether Zetina was entitled to a period of TTD benefits from November 28, 2011 through February 1, 2012, and for a period subsequent to the May 2, 2013 hardware removal surgery. 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).

Therefore, the December 3, 2014 decision, and order on the petitions for reconsideration issued December 19, 2014 and January 5, 2015 by Hon. R. Scott Borders, Administrative Law Judge, are hereby **AFFIRMED, IN PART VACATED IN PART, and REMANDED** for further determination in accordance with the directions outlined above.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARTE OPINION.

STIVERS, MEMBER. I agree the claim must be remanded for a complete determination of Zetina's entitlement to TTD benefits. However, I disagree with the majority's holding regarding the standard for determining entitlement to TTD benefits.

The standard the majority espouses is as follows:

We note the following decisions from the Kentucky Court of Appeals, both published and unpublished, which are applicable to this claim. Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009); and Central Kentucky Steel v. Wise, supra, as well as a trio of recent decisions of the Kentucky Court of Appeals, Sonia S. Mull v. Zappos.Com, Inc., 2013-CA-001320-WC (rendered July 11, 2014); Delena Tipton v. Trane Commercial Systems, 2014-CA-00626 (rendered August 22, 2014); and Nesco

Resource v. Michael Arnold, 2013-CA-001098 (rendered March 13, 2015), all designated to not be published, which are not cited as authority, but are referenced for guidance. In each of these cases, the injured workers were awarded TTD benefits during a time period when they were on light duty, and could perform some, but not all of their pre-injury job duties. As noted most recently in the Nesco case, the Court of Appeals clearly stated if an injured worker demonstrates the inability to return to his or her customary pre-injury work, (which includes all job duties), and has not reached MMI, he or she is entitled to TTD benefits pursuant to the Kentucky Worker's Compensation Act.

I respectfully submit entitlement to TTD benefits is controlled by KRS 342.0011(11)(a) and the Supreme Court's holding in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000). KRS 342.0011(11)(a) defines temporary total disability 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.

Clearly, the statute only requires a return to employment. It does not require a return to the previous job with the ability to perform all job duties associated with the previous job. However, the statutory definition is to be tempered by the Supreme Court's holding in Central

Kentucky Steel v. Wise, supra. There, the Supreme Court further expanded the definition stating:

It 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**. (emphasis added)

Id. at 659.

The Supreme Court stated a return to employment means a return to work that is customary or that the employee was performing at the time of the injury. The Supreme Court did not state the employee is entitled to TTD benefits when he or she is not at MMI and is not capable of returning to the work he or she was performing at the time of the injury. The second prong is whether the employee is capable of returning to customary work or work he or she was performing at the time of his injury.

In Bowerman v. Black Equipment Co., 297 S.W.3d 858, 874 (Ky. App. 2009), the Court of Appeals stated:

Thus, as defined by the statute, there are two requirements for an award of TTD benefits: first, the worker must not have reached MMI; and, second, the worker must not have reached a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. Absent either requirement, a worker is not entitled to TTD benefits. Furthermore, pursuant to the construction assigned under

Wise, KRS 342.0011(11)(a) takes into account two distinct realities: first, even if a worker has not reached MMI, temporary disability can no longer be characterized as total if the worker is able to return to the type of work performed when injured **or to other customary** work; and, second, where a worker has not reached MMI, a release to perform minimal work does not constitute "a level of improvement that would permit a return to employment" for purposes of KRS 342.0011(11)(a). (emphasis added).

Bowerman, supra, reinforces the holding of Central Kentucky Steel v. Wise, supra, that in order to qualify for TTD benefits the worker must not have reached MMI and a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. See also Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004) wherein the Court of Appeals stated:

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.

The majority's holding that "if an injured worker demonstrates the inability to return to his or her customary pre-injury work (which includes all job duties) and has not reached MMI, he or she is entitled to TTD

benefits" pursuant to the Act applies an incorrect standard.

More importantly, the three unpublished decisions of the Court of Appeals cited by the majority cannot be relied upon as authority. In addition, two of the three unpublished opinions are currently on appeal to the Kentucky Supreme Court. Therefore, Central Kentucky Steel v. Wise, supra, is still binding precedent. Significantly, the Court of Appeals' holding in Bowerman, supra, concerning the applicable standard for determining entitlement to TTD benefits adopts the standard contained in Central Kentucky Steel v. Wise, supra.

Based on the standard imposed by the Court of Appeals in the three unpublished opinions, the majority is changing the standard for determining entitlement to TTD benefits set down in Central Kentucky Steel v. Wise, supra and Bowerman, supra. This is particularly unsettling since the Court of Appeals did not see fit to publish any of the three cases relied upon by the majority, and two of the three cases are on appeal to the Kentucky Supreme Court. Until the Kentucky Supreme Court directs otherwise we are bound by the standard set forth in Central Kentucky Steel v. Wise, supra.

The claim should be remanded to the ALJ with instructions to determine entitlement to TTD benefits based on the standard set forth in Central Kentucky Steel v. Wise, supra, and Bowerman, supra.

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