

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 10, 2016

CLAIM NO. 201398836

FORD MOTOR COMPANY (LAP)

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

JEFFREY B. ROGERS
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Ford Motor Company ("Ford") seeks review of the April 15, 2015, Opinion, Award, and Order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") finding Jeffrey B. Rogers ("Rogers") sustained a left shoulder injury on September 25, 2012, while in the employ of Ford. The ALJ awarded temporary total disability

("TTD") benefits, permanent partial disability ("PPD") benefits enhanced pursuant to KRS 342.730(1)(c)1, and medical benefits. Ford also appeals from the May 27, 2015, Order overruling its petition for reconsideration.

On appeal, Ford challenges the ALJ's decision on three grounds. First, Ford contends the ALJ erred in awarding TTD benefits during the periods Rogers was working. Second, Ford argues the impairment rating assessed by Dr. James Farrage, upon which the ALJ relied, does not constitute substantial evidence. Third, the ALJ erred in enhancing Rogers' benefits by the three multiplier pursuant to KRS 342.730(1)(c)1.

The parties stipulated Rogers sustained an injury on September 25, 2012, and was paid TTD benefits from January 2013 through June 23, 2013, and again from March 18, 2014, through April 13, 2014.

Rogers' February 5, 2014, and January 7, 2015, depositions were introduced into evidence and he testified at the February 26, 2015, hearing. In his initial deposition, Rogers testified he had no previous problems with his left shoulder. He began working for Ford in 1992. At the time of the injury he was working as a standup forklift truck driver. He estimated earning in excess of

\$28.00 per hour working ten or eleven hours a day, four days a week, and sometimes on Sunday.

Rogers was injured while standing and operating his forklift. Rogers turned the forklift quickly causing him to be knocked off balance and his arm to be pulled. He immediately felt something in his shoulder. Rogers went to Ford's medical department. The medical department referred him to Dr. Greg Rennirt, an orthopedic surgeon, who examined Rogers on October 3, 2012. When an MRI revealed a rotator cuff tear, Dr. Rennirt advised him to get his shoulder fixed.

Dr. Peter Sallay performed surgery in January 2013.¹ After surgery and undergoing physical therapy, Rogers still experienced soreness and tenderness in his shoulder, and pain in the upper arm when he raised it. He was scheduled to see Dr. Sallay on February 14, 2014.

Rogers testified he returned to work at the end of June 2013 performing his same job as a standup forklift driver. Although he earned the same hourly rate he was not sure if the hours worked were the same. He testified he worked four days a week and an occasional Sunday. Approximately two weeks before his February 2014

¹ The medical records of Dr. Farrage reveal the surgery was performed on January 8, 2013.

deposition, Rogers changed jobs to a sit-down forklift driver. He described his job as follows:

Q: What job are you doing now?

A: I'm on a sit-down forklift now.

Q: When did that transition occur?

A: Two weeks ago.

Q: So you were doing the standup until about two weeks ago?

A: Yeah.

Q: Why the move?

A: It's a better job. I'm not on my feet ten hours a day.

Q: You have been on your feet for several years it sounds like doing that standup job?

A: Well, actually, I never did it before I came here. I only done [sic] it a couple of months before the injury.

Q: The injury, okay.

A: Yeah, I never saw anyone [sic] until I came to Louisville.

Q: The sit-down job, what specifically do you do?

A: I pick up racks or parts and move them and dunnage. I've got several different other things that I do, other than what I did with the standup. I'm must not running 360 feet back and forth nonstop all daylong [sic].

This one here is a little bit more time consuming as far as waiting on

people to run their parts, so it's not as a [sic] busy, I should say.

Q: You have a little more variety it sounds like?

A: Right. More downtime sitting around waiting.

Q: Now, do you have to lift or anything in this position?

A: No.

Q: So you're sitting down all the time?

A: Right.

Q: As far as the last two weeks, how has the job been going? Are you able to physically do it?

A: Like day and night difference.

Q: A little easier now?

A: A lot better.

Q: The steering wheel you're using now, does it got the knob on it, or is it a regular steering wheel?

A: It has the knob, but it's different. Because on the standup, you're driving whatever and you're balancing yourself, and you're putting pressure on your arm, where the sit-down, all you're doing is turning. There's no pressure comparison to the standup fork truck.

Q: Is this job easier on your back, also?

A: Oh, yeah, back, knees, feet.

Q: Was this a job you bid on, or how did that work?

A: Well, it was surveyed. When a job opens, they survey then sit-down people. Then they take the next third move is a standup, and they survey, so it's all surveyed. They make two moves, then they go to the standup driver, and then they go seniority.

Q: So this is a job that you're hoping to have for a while?

A: Right, hopefully, eight more years, and then I'll retire.

During his second deposition on January 7, 2015, Rogers testified that after his first surgery, the shoulder pain prevented him from raising his arm and sleeping on it. Rogers was unsure if he returned to work as a standup forklift driver after his first surgery; if he did, it was for a very short period. He believes he returned to work after his first surgery in June 2013 as a sit-down forklift driver and continued to perform that job up until the time of his second surgery. Dr. Sallay performed a second surgery in March 2014.² Rogers estimated he was off work approximately three months after his second surgery. He received workers' compensation benefits the entire time he was off work.

Rogers' only restriction is to refrain from lifting above his shoulders. He has no problems performing

² Dr. Ellen Ballard's medical records reveal the second surgery was performed on March 18, 2014.

his current job as it does not require him to raise his left hand overhead. The shoulder still aggravates him but not like before the second surgery. He still has difficulty performing any work where his arm is above shoulder level. Rogers estimated his pain level before the second surgery was six or seven on a scale of zero to ten, and after the second surgery, one or two depending on the extent he uses his arm. However, his pain rating dramatically increases the more his arm is above shoulder level. He takes Zipsor for long-standing low back pain, and it also helps his shoulder symptoms.

Rogers speculated his restriction of not lifting above his shoulders disqualifies him from performing numerous jobs at Ford. He explained in depth why he could not return to his job as a standup forklift driver. Rogers testified the standup forklifts are no longer in service as Ford replaced them with new sit-down forklifts. He noted the standup forklifts are all sitting in a corner. He believed he missed approximately six months of work due to the first surgery and three months after the second surgery.

At the hearing, Rogers testified that from November 13, 2012, through January 7, 2013, Ford placed him

on the dock checking empty dunnage going into the semi-trailers. Rogers testified:

Q: At work. All right. Let's talk about what type of work you were assigned to or was provided to you by Ford Medical?

A: They had - since I had restrictions, they put me on the dock checking empty dunnage going into semi trailers [sic], which was two a day.

Q: All right. And how much work did that require?

A: Very little.

Q: All right. Is the - what did you do actually?

A: I got up and looked inside the dunnage before the guys loaded it on the truck.

Q: How many times did you do that during a work day?

A: Well, two trailers, so it might have been 15, 30 times.

Q: All right. Was this a big job?

A: No.

Q: Was it considered - would you consider it bona fide work?

A: No.

Q: Were you sitting primarily and doing nothing?

A: Pretty much.

When he returned to work following his first surgery, Ford placed him performing the same job of

checking empty dunnage. Rogers did not consider it *bona fide* work. He explained this job was not a job Ford normally had someone performing, and no one was performing that job as of the date of the hearing.

Rogers returned to work after the second surgery as a sit-down forklift truck driver. Although he is working fewer hours, both he and Ford considered this job *bona fide* work. Rogers is able to work as a sit-down forklift truck driver within his restriction of no lifting above shoulder level.

Rogers testified he has less strength whenever he raises his arm above his shoulders. Recently, he had to request help hanging a flower planter above his head and changing a light fixture. He experiences more symptoms with increased use of his arms and shoulders. Rogers believes his restrictions and limitations prohibit a return to his pre-injury work activities.

Ford introduced the medical records of Dr. Sallay dated June 21, 2013, July 26, 2013, and September 6, 2013. In his September 6, 2013, note, Dr. Sallay noted Rogers was working full duty without any restrictions and for the most part had tolerated his job. However, he had some days in which he was "more sore" than others. Dr. Sallay concluded Rogers had reached maximum medical improvement ("MMI") and

was doing reasonably well, although he did not have 100% recovery of his shoulder function. Dr. Sallay assessed a 5% whole person impairment rating and placed no formal restrictions on Rogers' work. In assessing this impairment rating, Dr. Sallay did not refer to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Following the second surgery, Ford introduced the June 20, 2014, office note of Dr. Sallay. In that note, Dr. Sallay stated Rogers retained residual symptoms mainly above the shoulder level which would likely be a long term issue for him. Further surgery was unnecessary. At that time, Rogers had attained MMI. Dr. Sallay stated Rogers' "PPI rating is 4% which is equivalent to 2% of the whole person." Rogers had a permanent restriction of no lifting or repetitive reaching above the shoulder level. Rogers was not to engage in repetitive reaching or lifting above chest level with the left side. In assessing this impairment rating, Dr. Sallay did not reference the AMA Guides.

Rogers introduced the report of Dr. Farrage generated as a result of an examination on January 8, 2014. Dr. Farrage's impression was "post-arthroscopic left rotator cuff repair and subacromial decompression with

ongoing complaints of pain, restricted range of motion, decreased strength, and impaired functional capacity." He concluded Rogers had attained MMI. Rogers had the physical capacity to lift up to thirty pounds on occasion, frequently lift up to fifteen pounds, and push and pull up to fifty pounds on occasion. He should avoid above-shoulder level activity and ladder climbing. Dr. Farrage believed Rogers retained the physical capacity to return to his previous job. Pursuant to the AMA Guides, he assessed a 5% whole person impairment rating.

After the second surgery, Rogers introduced the July 7, 2014, letter of Dr. Farrage in which he stated:

Based upon the more specific information regarding [Rogers'] job description prior to his work-related injury and his currently established permanent restrictions, it would be medically inadvisable for [Rogers] to return to the competitive physical demands of his previous job description without undue potential for symptom exacerbation and placing the surgical repair at significant risk of re-injury.

Ford countered with the January 7, 2015, report of Dr. Ballard generated after performing an independent medical evaluation ("IME") on that same date. As a result of her examination and review of various medical records, Dr. Ballard concluded Rogers reached MMI in June 2014 and

based on the AMA Guides has a 3% whole person impairment related to the work accident. She imposed a restriction of no overhead work using the left arm. Significantly, Dr. Ballard stated:

I have reviewed the impairments. Dr. Sallay previously assigned a 5% impairment. This would appear to be the correct impairment. It has not changed since his second surgery. This is not substantively different from the impairment assigned by Dr. Farrage. Although he motions are slightly different, the total is not.

Concerning the impairment rating attributable to the injury and Rogers' entitlement to enhanced income benefits, in her April 2015 decision, the ALJ provided the following findings of fact and conclusions of law:

The medical evidence supports a finding Rogers sustained 5% whole person impairment due to the work injury. It also strongly supports a finding Rogers does not retain the physical capacity to perform the job he performed at the time of injury. The rating from all three IME physicians is fairly consistent. Dr. Farrage found 5%. Dr. Sallay found 5% following the first surgery. Even though Dr. Ballard assessed 3% whole person impairment, she reviewed the ratings as assigned by Dr. Farrage and Dr. Sallay and found them to be accurate. She also noted specifically that the rating would not change as a result of the second surgery.

All the physicians have stated Rogers should not return to the type of

work he performed at the time of injury. The parties stipulated his pre-injury wage was higher than his post injury wage.

When conducting a *Fawbush* analysis, the first question is whether claimant retains the physical capacity to return to the work he was doing at the time of the injury. The answer is that he cannot. Defendant Employer argues he is able because the job of a stand up driver is no different for the sit down driver with the exception of standing and sitting. Plaintiff provided the only testimony on this issue and stated the stand up [sic] driver is required to use his arms and shoulders much more. He does not believe he is able to do the job of a stand up driver.

The next question to ask is whether he has returned to work at the same or greater wage as he earned at the time of the injury. The parties stipulated he has not.

Therefore, the three (3) multiplier is applicable.

Concerning Rogers' entitlement to TTD benefits, the ALJ provided the following findings of fact and conclusions of law:

Since the first injury, Plaintiff has either worked full time at same or greater wages (with the exception of overtime) or he was off work receiving TTD benefits. Plaintiff contends he is entitled to TTD benefits from September 26, 2012, the day after his injury, until June 20, 2014 when he was placed at MMI by his treating physician. Plaintiff also contends, under this scenario, Ford is entitled to a credit

for TTD already paid. Plaintiff's testimony is that while on light duty, Ford found him something that would keep him busy. He did not believe his job sitting on the dock checking empty dunnage was a bona fide job and called it a "created" position. This testimony is uncontroverted.

This legal issue presented herein is whether Plaintiff is entitled to TTD while working and being paid full wages.

Ford argues Plaintiff is not entitled to TTD during the periods of time he was at work earning the same or greater wages. Ford's argument and legal analysis on this issue is well researched and very well presented. In a nutshell, Ford argues the ability to return to the plant, clock in, earn more than \$28.00 per hour for 40 hour work weeks, and await placement on a restricted job falls within the definition of a return to customary work *Central Kentucky Steel v. Wise*, 19 S.W. 3d 657 (Ky. 2000). The full wages paid to Plaintiff were not "minimal" or "trivial" in nature, but were instead bona-fide full wage payments made in order to keep a restricted worker in the "real" workforce. It argues this factual situation is different than those in which an injured worker only returns to some type of work for a few hours a week when convalescing from and injury.

KRS 342.0011(a) has been interpreted by our courts as establishing a two-pronged test for the determination of the duration of an award of TTD. *Double L Const., Inc. v. Mitchell*, 182 S.W.3d 509 (Ky. 2005). TTD benefits are payable so long as: (1) MMI has not been reached, and (2)

the injury has not reached a level of improvement that would permit a return to employment. *Magellan Behavioral Health v. Helms*, 140 S.W.2d 579 (Ky. App. 2004).

In *Magellan Behavioral Health v. Helms*, *supra*, the Court of Appeals 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 of 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*, 19 S.W. 3d 657 (Ky. 2000) 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 "or" implies that the employee does not have to have returned to the same job but may be working at one that is considered customary work for the injured worker.

In another unpublished opinion, *Sidney Coal Co., Inc. v. Charles*, No. 2006-SC-000711-WC, 2007 WL 2404503, (Ky. Aug. 23, 2007), the Kentucky Supreme Court, analyzed how TTD and light duty interact to achieve the purposes of the Act:

One of the primary goals of Chapter 342 is to encourage injured workers to return to work. This reduces their economic hardship as well as their employers' liability. Consistent with that goal, income benefits compensate a worker only for a portion of the wages lost due to injury and are subject to a cap. Also consistent with that goal, employers often provide suitable light-duty work until an injured worker reaches MMI or is able to return to regular duty. This keeps the worker in the habit of working for income and helps the employer to show that any permanent disability is not total. It is counterproductive to require a worker whose employer does not provide or ceases to provide suitable work in such circumstances to forego any other work in order to avoid forfeiting TTD. Not only does it discourage a return to work, it also imposes a greater financial hardship than is necessary.

Entitlement to TTD does not require a temporary inability to perform any type of work, and a finding that claimant is able to perform minimal work does not preclude an award of TTD, *Double L Construction, Inc. v. Mitchell*, *supra*. The evidence establishes that Plaintiff was allowed to remain at work with full pay rather than stay off work earning TTD, much less than his regular salary. However, Rogers believes the work to which he

returned was not his "customary work" per *Central Kentucky Steel, supra*.

Logic might dictate a finding that Rogers is not entitled to TTD during the times he had returned to work on light duty and his employer paid his full salary, but the strong trend of our appellate courts is otherwise. See *Nesco Resource v. Michael Arnold*, No. 2013-CA-001098. This recent decision from the Kentucky Court of Appeals in a similar scenario seems to stand for the proposition that TTD and wages are separate matters; therefore, a claimant is entitled to TTD even while working an alternative duty bona fide job.

Even though an award of TTD in this case would result in a windfall for Plaintiff and would go beyond the purpose of the workers' compensation act, based on the controlling law, Plaintiff is entitled to TTD for the requested periods with a credit for those periods where TTD has already been paid.

The ALJ awarded TTD benefits from September 25, 2012, through June 20, 2014.

Ford filed a petition for reconsideration addressing the inconsistencies in Rogers' depositions and hearing testimony concerning the type of work performed prior to and after the first surgery. It contended Rogers is not entitled to TTD benefits while working as a sit-down forklift truck driver and is only entitled to TTD benefits during the periods he was off work. Ford requested an amended award of TTD benefits.

Alternatively, if the ALJ declined to amend the award of TTD benefits, Ford requested specific findings of fact regarding Rogers' entitlement to TTD benefits during the time he was working at Ford. It specifically requested an explanation of whether the job he was performing during the time the ALJ awarded TTD benefits was one he would be regularly performing as a Ford employee.

Ford also requested the ALJ reconsider enhancement by the three multiplier, contending there is no supporting medical evidence.

In the May 27, 2015, Order overruling the petition for reconsideration, the ALJ did not resolve the inconsistencies in Rogers' testimony. Rather, the ALJ stated:

After reviewing the opinion, the ALJ believes this extremely controversial issue is presented in this petition for the purpose of preserving it for appeal, as expected. The opinion covers the reasoning behind the decision on pages 12 - 15 and nothing more can be said on the issue to add to reason for the conclusion.

Concerning Ford's request to set aside enhancement by the three multiplier, the ALJ stated:

The next issue is the award of the 3x multiplier. The ALJ found as stated on pages 11 - 12, based on Plaintiff's credible testimony, that he could not return to the same work duties he

performed at the time of the injury and, therefore, awarded the 3x multiplier.

In support of its argument Rogers is not entitled to additional periods of TTD benefits other than the benefits voluntarily paid, Ford relies upon the Kentucky Supreme Court's recent holding in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). Ford asserts Rogers testified in his initial deposition he returned to work following his first surgery on June 24, 2013, as a standup forklift truck driver and continued to perform this job until two weeks before his February 5, 2014, deposition. Ford argues since Rogers was performing the exact job he performed at the time of the injury, he is not entitled to TTD benefits from June 24, 2013, through late January 2014.

Ford also contends Rogers is not entitled to TTD benefits while performing the job of sit-down forklift driver to which he transferred. During his deposition testimony of January 7, 2015, Ford notes Rogers testified he continued to do the sit-down forklift job through the time of his second surgery in March 2014. Thus, he is not entitled to TTD benefits while working on light duty between June 24, 2013, when he returned to work and March 17, 2014, the day before his second surgery. Ford also

notes Rogers' testimony at the hearing is clearly inconsistent with his testimony in his depositions.

In the alternative, Ford argues the claim should be remanded for additional findings as to the nature of the jobs Rogers was performing during the time periods at issue.

Ford next asserts the impairment ratings of Drs. Ballard and Sallay are the only impairment ratings which constitute substantial evidence. Ford notes Dr. Ballard assessed an impairment rating on January 7, 2015, after Rogers' second surgery. On the other hand, Dr. Farrage's evaluation occurred one year earlier on January 8, 2014, two months before Rogers underwent the second surgery on March 18, 2014. Ford contends since Rogers acknowledged the second surgery improved his condition, the range of motion in his shoulder improved. It also contends the medical records unequivocally establish Rogers improved after the surgery. Therefore, Dr. Farrage's impairment rating cannot constitute substantial evidence since it was assessed prior to Rogers' second surgery and when he was not at MMI. Ford requests reversal of the award and remand for an award based on either the impairment rating of Dr. Sallay or Dr. Ballard.

Finally, Ford argues the ALJ erred in enhancing Rogers' benefits by the three multiplier since Dr. Sallay released him to return to work with the sole restriction of no lifting or repetitive reaching above shoulder level. Ford contends Rogers' duties at the time of his injury required absolutely no work at or above the shoulder level. Further, the ALJ could not rely upon Dr. Farrage's statement in his July 7, 2014, letter that it would be medically inadvisable for Rogers to return to his prior job. It notes Dr. Farrage previously indicated Rogers was not medically disqualified from returning to his pre-injury work activities.

Ford insists Dr. Farrage's change of heart is litigation driven. It observes Drs. Sallay and Ballard agree Rogers has the physical capacity to perform the job he performed at the time of the injury. In addition, Dr. Farrage was initially of that same opinion. Ford notes Dr. Farrage saw Rogers one year before Dr. Ballard and prior to his most recent surgery which greatly improved the left shoulder condition. Thus, Dr. Farrage's amended opinion regarding Rogers' work capabilities is not based on a true understanding of his current condition.

Ford argues there is no dispute Rogers' job, as a standup forklift driver, required no work at or above the

shoulder level and Rogers is currently doing the same job he performed at the time of his injury. It notes Ford got rid of the standup forklift driver positions and now Rogers drives a sit-down forklift job both of which only entail below shoulder work. Thus, Ford asserts enhancement of the three multiplier is not supported by substantial evidence and should be reversed.

Concerning Ford's first argument, 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.

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.

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 or she remains disabled from performing customary work or the work performed 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 on 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).

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249, 254 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury, stating as follows:

As the Court explained in *Advance Auto Parts v. Mathis*, No. 2004-SC0146-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."

Two months after rendering Livingood v. Transfreight, LLC, supra, the Supreme Court rendered Zappos.com v. Mull, 2015 WL 6590024, October 29, 2015, Designated Not To Be Published, specifically rejecting the Court of Appeals' interpretation of "a return to employment" as set forth in KRS 342.0011(11)(a).³ There, the ALJ awarded TTD benefits during a period Mull had not

³ A determination of the existence of "a return to employment" necessarily requires a finding of whether the employee was performing customary work.

returned to her regular employment but worked light duty. TTD benefits were awarded during the period Mull had not attained MMI and had not reached a level of improvement which would permit her to return to her regular customary employment. Zappos.com appealed to this Board and we reversed the award of TTD benefits. The Court of Appeals reversed the Board and reinstated the award of TTD benefits. In reversing the Court of Appeals, the Supreme Court stated:

The Board held:

Here, Zappos accommodated Mull's restrictions with a scanning position, which she testified was a normal part of her employment prior to the injury. Zappos correctly notes Mull acknowledges she was capable of continuing to perform the light duty work but ceased her employment with Zappos for personal reasons completely unrelated to the work injury. Nothing in the record establishes the light duty work constituted 'minimal' work and she worked regular shifts while under restrictions. She was also capable of performing, and continued to perform for more than one year post-injury, her primary fulltime employment with Travelex. Given Mull was capable of performing work for which she had training and experience, and voluntarily ceased her

employment for reasons unrelated to her injury or the job duties, substantial evidence does not support the award of TTD benefits and we therefore reverse.

Mull subsequently appealed to the Court of Appeals, which reversed the Board and reinstated the award of TTD benefits. The Court of Appeals held that the phrase "return to employment," as found in KRS 342.0011(11)(a), "was only achieved if the employee can perform the entirety of her pre-injury employment duties within the confines of the post-injury medical restrictions." Thus, since Mull no longer retained the physical ability to perform any activities requiring gripping and grabbing with her right hand, and her pre-injury employment required such tasks, the Court of Appeals held she was entitled to TTD benefits. We disagree, and reverse the Court of Appeals.

The Board's review in this matter was limited to determining whether the evidence is sufficient to support the ALJ's findings, or if the evidence compels a different result. *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). Further, the function of the Court of Appeals is to "correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Id.* at 687-88. Finally, review by this 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." *Id.* The ALJ,

as fact-finder, has the sole discretion to judge the credibility of testimony and weight of evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

As stated above, pursuant to KRS 342.0011(11)(a), in order for a claimant to be entitled to TTD benefits, she must satisfy a two-prong test: (1) she must not have reached MMI; and (2) she must not have reached a level of improvement that would permit her return to employment. *Double L Constr., Inc. v. Mitchell*, 182 S.W.3d 509, 513 (Ky. 2005). *Wise* stands for the proposition that TTD benefits for a claimant should not be terminated just because she is released to perform minimal work if it is not the type of work that was customary or that she was performing at the time of his injury. 19 S.W.3d at 657. However, "*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 v. Transfreight, LLC*, --- S.W.3d ---- (Ky. 2015). Accordingly, the ALJ must analyze the evidence in the record and determine whether the light duty work assigned to the claimant is not minimal and is work that she would have performed before the work-related injury.

In *Livingood*, the claimant, a forklift driver, could not drive a forklift due to his light duty work restrictions. Instead, while on light duty restrictions he changed forklift batteries, monitored bathrooms for vandalism, and checked to make sure freight was correctly placed around the facility. The ALJ determined that since *Livingood* had performed those tasks before, and the work was not a make-

work project, he had returned to employment and was not entitled to TTD benefits. Id. at _____. The ALJ's findings were affirmed by this Court.

In this matter, Mull satisfied the first prong of the TTD benefit test because she had not reached MMI. But, the ALJ did not perform an in depth analysis of the second requirement, whether the light duty work Mull performed was a return to her regular and customary employment. However, despite the lack of an in depth analysis the facts of this matter are relatively clear, and we must agree with the Board that substantial evidence does not support the ALJ's award of TTD.

Prior to her injury, Mull's job tasks included retrieving a product, scanning it, and placing it in a shipping box. Mull was trained in all of these tasks. After the injury, Mull was restricted to scanning items. Mull testified that scanning was a normal part of her pre-injury employment. The light duty work is not a significant diversion from her original employment and there is no indication the work was minimal. Mull also received the same hourly wage. Mull returned to her regular and customary employment at Zappos and she does not satisfy the second requirement to receive TTD benefits.

Slip Op. at 4-7.

More recently, in Trane Commercial Systems v. Tipton, supra, the Supreme Court reinforced its decision in Zappos.com v. Mull, supra, again rejecting the Court of

Appeals' definition of "a return to employment" stating as follows:

The Court of Appeals in this case held that Tipton was entitled to TTD while she was working full-time for Trane and earning the same hourly rate. This holding by the Court of Appeals was based on a misunderstanding of *Bowerman* and an understandable misinterpretation of what "return to employment" means.

Id. at 806.

The Supreme Court provided the following clarification regarding the standard to be applied in determining when an employee has not reached a level of employment permitting "a return to employment":

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 ALA 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 806-807.

Based on this standard, the Supreme Court determined the ALJ and the Board correctly decided Tipton was not entitled to additional TTD benefits, reasoning as follows:

Applying the preceding to this case, we must agree with the ALJ that Tipton was not entitled to TTD during the period in question. Tipton's physician released her to perform light and sedentary work, which Trane provided for her. Additionally, although Tipton had not previously assembled circuit boards, she had assembled the air conditioning units and had tested them. Furthermore, she did not produce any evidence that assembling circuit boards required significant additional training or that it was beyond her intellectual abilities. In fact, it appears that Tipton was certainly capable of and wanted to perform the circuit board assembly job because she bid on and was awarded the job after her release to full-duty work. Thus, there was ample evidence of substance to support the ALJ's denial of Tipton's request for additional TTD benefits, and we reverse the Court of Appeals.

Id. at 807.

We decline to reverse the award of TTD benefits and remand with directions to find Rogers is not entitled to TTD benefits during periods other than when benefits were voluntarily paid. However, we agree the ALJ's analysis is deficient as it does not comport with the law regarding entitlement to TTD benefits.

Assuming Rogers testified credibly at the hearing, the fact he worked at light duty on the dock from November 13, 2012, through January 7, 2013, and from June 24, 2013, through March 17, 2014, does not perforce entitle

him to an award of TTD benefits during those time periods. To be entitled to TTD benefits, Rogers must not have been at MMI and must not have improved enough to return to the type of employment "that was customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, at 657. Of course, the work to which he returned cannot be minimal.

In analyzing Rogers' entitlement to TTD benefits from September 25, 2013, through June 20, 2014, the ALJ failed to determine, as required by the statute and case law, the date Rogers attained MMI and the point at which Rogers had improved enough to return to the type of employment that was customary or that he was performing at the time of his injury. In addition, the ALJ failed to enter specific findings of fact resolving the obvious inconsistencies between Rogers' testimony in both depositions and his hearing testimony.

During his February 2014 deposition, Rogers testified he returned to work following his first surgery in the last week of June 2013 working the same job as a standup forklift driver. He earned the same hourly rate and worked approximately the same number of days- four days a week and occasionally on Sunday. Rogers testified that two weeks before his February 5, 2014, deposition, he moved

to a sit-down forklift driver position which he characterized as a better job since it involved no lifting and permitted him to sit at all times. During his January 2015 deposition, Rogers offered the following testimony regarding the job he performed after the first surgery:

Q: When you went back to work - well, let me back up for just a minute. Following the first surgery when we took your previous deposition, you had gone back to the same job that you were performing at the time you were injured, which was -

A: No.

Q: You never went back to the stand-up forklift?

A: No. Well, let me think, it's been so long.

Q: That's okay. We can -

A: I don't think I did. If it was, it was like very short, short, but I don't remember. Man, it's been two years ago.

Q: That's okay. We can probably assume whatever you testified to in the previous deposition is accurate.

A: Right.

Q: And then you did then transfer to a sit-down forklift?

A: Sit-down, right.

Q: Were you performing that sit-down - was it a forklift job? Did you -

A: Yes.

Q: -- sit down?

A: Sit-down forklift.

Q: Were you performing that up until that second in March of last year?

A: Yes.

Q: Then after that surgery in March of last year, did you go back to that -

A: Yes.

Q: -- the sit-down forklift job? Are you still on that job?

A: Yes.

At the hearing, Rogers testified that from November 13, 2012, through January 7, 2013, he was placed on the dock by Ford checking empty dunnage going into the semi-trailers. He estimated he performed this task approximately thirty times a day. He did not consider this *bona fide* work as he, in reality, would primarily sit and do nothing. Rogers testified that when he returned to work on June 24, 2013, through March 17, 2014, the day before his surgery, he did the same thing. He testified this was not a bid job and was not a job Ford normally has someone performing. He further noted this job was not in existence on the date of the hearing.

Rogers acknowledged he returned to work after the second surgery as a sit-down forklift truck driver. He explained when Ford surveyed "senior people," he accepted

the job. Rogers considers this job to be *bona fide* work even though he is not making as much money as he did before the injury. The job allows him to work within his restrictions of no lifting above the shoulder.

Notably, in the April 15, 2015, Opinion, Award, and Order, there is no discussion of the inconsistencies in Rogers' testimony. In its petition for reconsideration, Ford specifically requested the ALJ to reconcile the testimony Rogers provided in his depositions with his hearing testimony. The ALJ inexplicably declined. This was clear error.

On remand, the ALJ must first determine if Rogers is entitled to TTD benefits during the period from September 25, 2012, the date of injury, through November 12, 2012. There is no testimony from Rogers that he did not perform *bona fide* work during this period.⁴ We emphasize Rogers has the burden of proving entitlement to TTD benefits. Thus, the ALJ must determine whether he established entitlement to TTD benefits from September 25, 2012, through November 12, 2012.

⁴ We are unable to locate any testimony from Rogers during his depositions and at the hearing regarding the work he performed during this period.

Rogers testified at the hearing that from November 13, 2012, through January 7, 2013, the day before his first surgery, Ford placed him in what he did not consider *bona fide* work.⁵ The ALJ must first determine whether this uncontradicted testimony is credible. The ALJ must then determine whether at any point during this time period Rogers was at MMI, and based on the criteria set down in Trane Commercial Systems v. Tipton, supra, whether Rogers was performing work between November 13, 2012, and January 7, 2013, which was "customary employment, i.e." within his physical restrictions and for which he has the work experience, training, and education." Trane Commercial Systems at 807.

Next, as there is no dispute regarding Rogers' entitlement to TTD benefits from January 8, 2013, through June 23, 2013, the ALJ must determine Rogers' entitlement to TTD benefits from June 24, 2013, through March 17, 2014, the day before the second surgery, by first determining the nature of the work Rogers performed during this time period. This requires a discussion of Rogers' testimony at his depositions and at the hearing, a determination of

⁵ There appears to be no deposition testimony concerning the nature of the work performed by Rogers prior to the first surgery on January 8, 2013.

which is credible, and a finding regarding the nature of Rogers' work during this time period. Once the ALJ determines the nature of Rogers' work between June 24, 2013, and March 17, 2014, she must then analyze his entitlement to TTD benefits utilizing the two prong analysis as required by the statute and in conformity with applicable case law.

Based on Rogers' testimony, we question whether he is entitled to TTD benefits beyond April 13, 2014, as his hearing testimony appears to indicate Rogers returned to *bona fide* work on April 14, 2014, as a sit-down forklift truck driver following his second surgery. This position allowed him to work within his restrictions. Rogers acknowledged he obtained this position by virtue of his seniority.

Without explanation, the ALJ awarded TTD benefits until June 20, 2014. Rogers' second surgery was performed on March 18, 2014, and he was off work through April 13, 2014. Rogers' hearing testimony appears to reflect he returned to work on April 14, 2014, as a sit-down forklift truck driver which he considered *bona fide* work. If the ALJ finds such to be the case, there can be no award of TTD benefits beyond April 13, 2014, as Rogers' testimony

establishes he is not entitled to TTD benefits after that date.

Concerning Ford's next two arguments, we note Rogers, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Rogers was successful in that burden, the question on appeal is whether there is 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). An 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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). 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).

Based on the above, we find no merit in Ford's second argument asserting the ALJ erred in relying upon Dr. Farrage's impairment rating. The ALJ cannot rely upon the 5% impairment rating assessed by Dr. Sallay prior to the second surgery or the 2% impairment rating he assessed following the second surgery since he did not state in either office note that the impairment rating was assessed pursuant to the AMA Guides. A physician's assessment of an impairment rating must be based on the AMA Guides in order to constitute substantial evidence upon which the ALJ can rely. Thus, the ALJ could only rely upon the impairment rating of Dr. Farrage or Dr. Ballard.

Significantly, Ford does not take issue with the accuracy of Dr. Farrage's impairment rating based on his examination of January 8, 2014. Rather, Ford's sole argument is Dr. Farrage's impairment rating cannot be relied upon since there was a second surgery, Rogers was not at MMI on January 8, 2014, and the evidence unequivocally establishes the second surgery improved Rogers' condition. On its face, Dr. Farrage's report constitutes substantial evidence in support of the ALJ's determination Rogers has a 5% impairment rating. Dr.

Farrage opined Rogers was at MMI on the date of his examination. Rogers' January 2015 deposition testimony establishes that after his second surgery his pain level decreased and his problems are not as great. However, Rogers testified he has difficulty performing work requiring his arm to be above shoulder level. When this occurs, his pain rating will dramatically increase. Significantly, there is no medical testimony establishing the results of the second surgery caused Dr. Farrage's impairment rating to be inaccurate or not to be in conformity with the AMA Guides. Similarly, even though Rogers' shoulder may have improved, there is no medical testimony that this improvement caused Dr. Farrage's findings at the time of his January 8, 2014, examination to be less than reliable.

More importantly, Dr. Ballard's January 7, 2015, IME report provides unequivocal support for Dr. Farrage's impairment rating. As previously noted, Dr. Ballard stated Dr. Sallay had assigned a 5% impairment rating which appeared to be the correct impairment rating. She noted the impairment rating has not changed since the second surgery. Dr. Ballard opined Dr. Sallay's impairment rating is not substantially different from the impairment rating

assigned by Dr. Farrage. She specifically noted although "the motions are slightly different, the total is not."

In her decision, the ALJ did not specifically state she was relying upon Dr. Farrage's impairment rating in finding Rogers has a 5% impairment rating. In discussing the impairment rating, the ALJ noted even though Dr. Ballard assessed a 3% impairment rating, Dr. Ballard had reviewed the other impairment ratings and found them to be accurate. Although the ALJ did not state the physician's opinion upon which she was relying in finding Rogers retains a 5% impairment rating, we believe her finding of a 5% impairment rating is based upon the opinions of Drs. Farrage and Ballard. Thus, we find no error in the ALJ's determination Rogers has a 5% impairment rating as a result of the left shoulder injury.

We find no error in the ALJ's determination Rogers is entitled to PPD benefits enhanced by the three multiplier. When the issue is the claimant's ability to labor and the application of the three multiplier, it is within the province of the ALJ to rely on the claimant's self-assessment of his ability to perform his prior work. See Ira A. Watson Department Store v. Hamilton, supra; Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). We have consistently held that it remains the

ALJ's province to rely on a claimant's self-assessment of her ability to labor based on his or her physical condition. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The ALJ's decision to apply the three multiplier pursuant to KRS 342.730(1)(c)1, is based on a determination that Rogers did not have the capacity to return to the type of work performed at the time of injury and is supported by substantial evidence in the record; therefore, it may be not set aside on appeal. Special Fund v. Francis, supra.

During his deposition of January 7, 2015, and at the hearing, Rogers expressed an unequivocal belief that he is not capable of returning as a standup forklift truck driver, the job he was performing at the time of the injury. Rogers' testimony, standing alone, constitutes substantial evidence in support of the ALJ's finding Rogers does not retain the capacity to perform the work he was performing at the time of the injury. In addition, regardless of how Ford chooses to characterize it, the opinion of Dr. Farrage, expressed in the July 7, 2014, letter, that he did not believe it was medically advisable for Rogers to return to the demands of his previous job also constitutes substantial evidence in support of the ALJ's finding the three multiplier is applicable.

Accordingly, the award of TTD benefits as set forth in the April 15, 2015, Opinion, Award, and Order and affirmed by the May 27, 2015, Order ruling on the petition for reconsideration is **VACATED**. The ALJ's determinations Rogers has a 5% impairment rating as a result of the left shoulder injury, and is entitled to enhanced benefits pursuant to KRS 342.730(1)(c)1 and the award of PPD benefits are **AFFIRMED**. This claim is **REMANDED** for an analysis of Rogers' entitlement to TTD benefits from September 25, 2012, through June 20, 2014, in accordance with the views expressed herein. In conducting that analysis, the ALJ shall provide the appropriate findings of fact.

ALL CONCUR.

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