Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 17, 2016

CLAIM NO. 201301225

FORD MOTOR COMPANY (LAP) PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

ERIC L. TURNER
HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

ERIC L. TURNER PETITIONER

VS.

FORD MOTOR COMPANY
HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Ford Motor Company (LAP) ("Ford") seeks review of the Opinion and Award rendered January 11, 2016 by Hon. Thomas G. Polites, Administrative Law Judge ("ALJ") awarding Eric L. Turner ("Turner") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for work-related right upper extremity injures caused by repetitive work activities on September 27, 2012. Ford additionally appeals from the February 23, 2016 order denying its petition for reconsideration.

Turner also seeks review of the ALJ's determination regarding the period of TTD benefits awarded in the January 11, 2016 Opinion and Award, and from the order on reconsideration issued February 23, 2016.

On appeal, Ford argues the ALJ erred in finding Turner's cubital tunnel syndrome is work-related. Ford also argues the ALJ erred in awarding TTD benefits in addition to those previously paid. Finally, Ford argues the ALJ erred in awarding PPD benefits based upon a 7% impairment rating. Turner argues the ALJ erred in failing to award TTD benefits for all periods of time which he worked light duty. Because the ALJ's decision is supported by substantial evidence, is in accordance with existing law, and a contrary result is not compelled, we affirm.

Turner filed a Form 101 on August 9, 2013, alleging injuries to both upper extremities due to repetitive job activities in Ford's assembly department. Turner, a resident of Louisville, Kentucky, began working for Ford in its Norfolk, Virginia facility in 1996. He transferred to the Kansas City facility in 2008, and in February 2012 was moved to the Louisville assembly plant, where he continues to work. Turner obtained a bachelor's degree in Journalism at Norfolk State University. He has completed additional coursework toward obtaining a master's degree in management. Turner served as a food service specialist for three years in the Army prior to attending college. While in college, he worked for QVC and Sears.

Turner testified by deposition on October 28, 2013, and again on July 23, 2015. He also testified at the hearing held November 24, 2015. Turner is right hand dominant. After moving to Louisville, Turner was assigned to a paint repair job. He was later transferred to a forklift operator position. After he was involved in a forklift accident, he was moved to a position installing wiring harnesses in the frames of vehicles. This involved separating wires, taping, and pushing eight to ten push pins per vehicle, with his thumbs, into approximately six hundred and fifty vehicles per day. This job caused him to

develop upper extremity problems which became so severe on September 27, 2012 he reported them to the Ford medical department. He continued to work on his regular job until January 2013 when he was moved to a lighter position. Turner denied previous problems with his upper extremities, but at the hearing he admitted he had injections in both wrists while working in Kansas City. Turner stated this resolved his difficulty and he had no additional problems until he performed the wiring job in September 2012.

Turner stated the pain began in his right wrist and thumb, and eventually began shooting up his arm from the elbow. He was given aspirin at the Ford medical department, but was eventually referred to Dr. Tsu-Min Tsai, a hand surgeon with Kleinert Kutz. Dr. Tsai performed surgery on the right wrist, and the pronator teres at the right elbow on March 8, 2013, which provided some relief, but he continued to experience problems. After the surgery, Dr. Tsai administered an injection in the right elbow. He released Turner to work with weight restrictions and limitations regarding the repetitive nature of his work. Subsequent to the surgery, he was moved to an inspector position. At his October 28, 2013 deposition, Turner stated he continued to have pain in his right hand, but had no symptoms in his neck or left upper

extremity. At the hearing, he testified he reported problems with both wrists when he initially saw Dr. Tsai.

Turner was eventually assigned to light duty as what he described as a floater for approximately six months, where he helped out as he could performing various tasks for which he received regular pay. He classified that job as doing “busy work”. He was placed on a regular job involving modification of shocks and struts prior to right cubital tunnel surgery which was performed on March 5, 2015. He missed two weeks of work for that surgery, during which time he received short-term disability benefits. Dr. Tsai released him without restrictions on March 22, 2015, and he has not had any treatment since. He stated all of his treatment has been for the right upper extremity, and he has had no treatment for the left. He stated the March 2015 surgery alleviated most, but not all of his symptoms. He still experiences occasional tingling and numbness. Turner does not believe he can return to the wiring job. He earns the same wages now as he did at the time of his accident, and continues to work full time for Ford.

In support of the Form 101, Turner attached Dr. Tsai’s records from office visits on December 4, 2012; December 18, 2012; January 15, 2013 and the operative note

from March 8, 2013. He also attached off-work slips from December 2012 and January 2013. In his initial office note, Dr. Tsai stated Turner was doing regular work despite EMG test results showing he had carpal tunnel compression. An injection was administered. On December 18, 2012, Dr. Tsai noted the injection only helped for one week. He also noted Turner had pronator teres compression for which he recommended surgery. On January 15, 2013, Dr. Tsai noted surgery was scheduled. The operative note from March 8, 2013 outlines the procedures performed included a right carpal tunnel release, and a right pronator teres release.

Turner later filed the report of Dr. Robert Byrd who evaluated him on December 16, 2013. Turner complained of right hand numbness and tingling secondary to repetitive use while working at Ford. Dr. Byrd specifically stated, "The examinee is a 41-year-old right-handed male who developed problems associated with progressive right hand numbness and tingling sensation secondary to repetitive use working at Ford Motor Plant." Dr. Byrd noted Turner had three healed incisional scars, one on the right wrist, one on the right forearm over the pronator teres, and one superior to the right antecubital fossa located medially. Dr. Byrd noted Turner's history of diabetes and thyroid disease. He diagnosed Turner with a history of pronator

teres syndrome, probable ulnar neuropathy at the elbow, and a history of carpal tunnel syndrome. He recommended a work-up for ulnar neuropathy. He deferred assessing an impairment rating until Turner reached maximum medical improvement ("MMI").

Turner later filed Dr. Byrd's supplemental report dated July 29, 2015. Dr. Byrd noted Turner underwent ulnar surgery on March 15, 2015. In addition to his previous diagnoses, Dr. Byrd noted Turner was status post ulnar transposition. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assessed a 7% rating.

Ford filed a claim denial on September 17, 2013, accepting and denying the claim. Ford noted wage records would be supplied. The parties eventually stipulated Turner's average weekly wage was $1,337.20. Ford admitted no TTD benefits had been paid, but medical benefits had been paid in excess of $15,000.00.

Ford filed multiple reports from Dr. Richard Dubou during the course of the claim. Dr. Dubou examined Turner at Ford's request on October 29, 2013, and noted his work history. He specifically noted Turner had treated in 2010 for bilateral wrist tendonitis while working at the

Kansas City plant. On the date of the examination, Dr. Dubou diagnosed Turner as status post right carpal tunnel and right pronator teres releases. He stated Turner had a relatively newly developed right cubital tunnel syndrome. He also noted Turner complained of minimal discomfort with both the left and right upper extremities. Dr. Dubou stated the cubital tunnel condition was unrelated to Turner's work. He opined Turner has an excellent prognosis for his work-related conditions. Dr. Dubou stated a left carpal tunnel release was not required, and he assessed no impairment rating for the left upper extremity.

Dr. Dubou assessed a 2% impairment rating pursuant to the AMA Guides for the right upper extremity surgeries. He stated Turner should not use vibratory tools, impact hammers or air guns. He also stated Turner should avoid repetitive lifting requiring flexion/extension of the wrist, and should lift no more than twenty pounds on a maximum occasional basis, or more than fifteen pounds frequently. Finally, Dr. Dubou stated Turner could return to the job he performed at the time of the injury.

In a subsequent note dated December 26, 2013, Dr. Dubou stated the proposed right cubital tunnel release is not related to any work activity. In a note dated January 21, 2014, Dr. Dubou reiterated the cubital tunnel condition

is not related to the work at Ford. He additionally stated Turner reached MMI on August 8, 2013 following his March 8, 2013 surgery. In a note dated March 19, 2014, Dr. Dubou again stated there was no connection between Turner's work and the development of his cubital tunnel syndrome.

In a report dated August 6, 2015, Dr. Dubou stated Turner had done well since his March 2015 cubital tunnel surgery. He noted Turner reported he no longer has tingling or numbness, but still experienced pain after vigorous activity. He again stated the right carpal tunnel release is work-related, but the right cubital tunnel release is not. In a note dated September 22, 2015, Dr. Dubou stated he had reviewed Dr. Byrd's report, and agreed with him regarding the carpal tunnel surgery, but disagreed regarding the cubital tunnel.

Ford filed a utilization report from Corvel dated December 10, 2013 approving the cubital tunnel surgery. The surgery was denied by Ford based upon Dr. Dubou's opinions.

Ford filed the return to work slip from Dr. Tsai dated March 22, 2014 allowing Turner to return to work with restrictions. It also filed Dr. Tsai's March 20, 2015 return to work slip allowing him to work without using the right arm.

Ford also filed records from Dr. Tsai for treatment administered between December 4, 2012 and October 10, 2013. The record from December 4, 2012 indicates Turner complained of problems with both upper extremities. The note from March 7, 2013 indicates Turner could work regular duty. The March 21, 2013 note states Turner had multiple nerve compression and carpal tunnel syndrome. Turner was also limited at that time to lifting less than five pounds with the right upper extremity, and to avoid repetitive use of the right hand including pushing, pulling, pinching or gripping. On May 16, 2013, Turner was allowed to perform medium level duty. By October 10, 2013, he was again limited to light duty.

A Benefit Review Conference ("BRC") was held on September 18, 2015. The contested issues listed in the BRC order and memorandum include whether Turner retains the capacity to return to the job performed on the date of injury, benefits per KRS 342.730, work-relatedness/ causation, average weekly wage, unpaid or contested medical expenses, injury as defined by the Act, TTD, and a medical fee dispute regarding treatment for the right cubital tunnel.

The ALJ rendered a decision on January 11, 2016. He dismissed Turner's claim for the left upper extremity

complaints. He awarded TTD benefits from March 8, 2013 through July 15, 2013, and again from March 15, 2015 through April 1, 2015. The ALJ awarded PPD benefits based upon the 7% impairment rating assessed by Dr. Byrd. He declined to enhance the benefits pursuant to KRS 342.730(1)(c)1, but found KRS 342.730(1)(c)2 is applicable for any period of cessation of Turner's employment at the same or greater wage. The ALJ also awarded medical benefits pursuant to KRS 342.020.

The ALJ found the cubital tunnel condition was caused by Turner's work. He specifically found as follows:

> It is the position of the Plaintiff in this claim that he suffered compensable injuries including an injury to the ulnar nerve and he should be awarded permanent partial disability benefits based upon the 7% impairment rating of Dr. Byrd with enhancement by the three factor given his testimony that he is precluded from performing his preinjury work. Plaintiff also argues for additional TTD during the time he returned to work on light duty as Plaintiff argues the light duty work was not similar to his preinjury work but was minimal in nature thereby qualifying him for the additional TTD benefits. The Defendant argues to the contrary that Plaintiff has failed to submit medical evidence supporting his argument that the ulnar condition is work-related and that Plaintiff should be awarded PPD benefits based upon Dr. Dubou's 2% rating with no multipliers given Plaintiff's full release to return to work by Dr. Tsai. The

Defendant further argues that Plaintiff's light-duty work was legitimate work such that an award of additional TTD benefits is inappropriate.

COMPENSABILITY OF ULNAR NERVE ALLEGATION/EXTENT OF BENEFITS PER KRS 342.730

Having reviewed and considered the entirety of the testimony the ALJ concludes that Plaintiff's ulnar nerve condition is causally related to his work activities for the Defendant and as such, Plaintiff is entitled to permanent partial disability benefits based upon the 7% rating of Dr. Byrd with enhancement by the two factor contained in KRS 342.730(1)(c)2.

In support of this determination, the ALJ notes that both Plaintiff's expert, Dr. Byrd, and the Defendants[sic] expert, Dr. Dubou, agreed that Plaintiff's carpal tunnel syndrome and pronator teres condition were work-related but that only the carpal tunnel condition resulted in residual impairment with Dr. Byrd assessing 3% and Dr. Dubou 2%. As to the ulnar condition, Dr. Dubou felt strongly that the condition was not causally related to Plaintiff’s employment citing to the fact the Plaintiff was on light duty when the condition arose as well as to extensive medical research documenting the lack of evidence of a causal connection between work activities and cubital tunnel syndrome. Conversely, Dr. Byrd stated in his December 5, 2013 report that Plaintiff suffered from probable ulnar neuropathy at the elbow and he deferred assessing an impairment for the ulnar condition until Plaintiff had undergone treatment for same. He otherwise did not comment on causation

other than to state “he described symptoms that are consistent with an ulnar nerve neuropathy as well”. In his supplemental report of July 9, 2015, he stated that “I was concerned about him having problems associated with an ulnar neuropathy of his right elbow from repetitive work. He was frequently flexing and extending his elbow, and I did not believe him to be at MMI”. Dr. Byrd went on to confirm the Plaintiff had undergone ulnar nerve transposition surgery and he concluded his report by assessing an impairment rating for the ulnar nerve condition of 4%.

While the Defendant argues that a careful reading of Dr. Byrd’s report reveals that he did not give an opinion as to causation of the ulnar condition, the ALJ infers from the statements of Dr. Byrd cited above that Dr. Byrd causally related Plaintiff’s ulnar condition to his work and based on his testimony, the ALJ concludes that Plaintiff's ulnar condition is work-related. Dr. Byrd clearly cited to Plaintiff’s history of repetitive work including flexion and extension of the elbow which he suspected was causing ulnar neuropathy and the fact the Plaintiff underwent ulnar transposition surgery confirmed Dr. Byrd’s diagnoses of probable ulnar neuropathy. Dr. Byrd went on to assess a permanent impairment rating for the ulnar condition and his testimony is sufficient for the ALJ to conclude that Plaintiff has met his burden of demonstrating a causal relationship between his work and the ulnar condition. Further, the ALJ would note that Dr. Tsai’s medical records document the development of the ulnar condition following the March 2, 2013 carpal tunnel/pronator teres surgery and that the symptoms of ulnar

> neuropathy arose coincidental to Plaintiff's performance of work activities. Dr. Tsai's July 18, 2013 report states that Plaintiff[sic] work activities requiring twisting/grabbing were aggravating his wrist and that he was having symptoms of numbness and tingling in the ulnar digits, and his August 15, 2013 report states that Plaintiff was complaining of tingling and numbness in the fourth and fifth fingers after "job activity with vibration machine". The ALJ infers from Dr. Tsai's treatment notes that Plaintiff[sic] symptoms of ulnar neuropathy arose in the context of his work activities for the Defendant and are supportive of Dr. Byrd's opinion that the ulnar condition is causally related to his repetitive work activities. As such, the ALJ concluded that the ulnar condition was causally related to Plaintiff's employment and therefore Dr. Byrd's 7% impairment rating for the carpal tunnel syndrome and ulnar nerve condition was the most persuasive evidence in the record and Plaintiff's permanent partial disability benefits shall be based upon a 7% impairment.

Ford filed a petition for reconsideration arguing, as it does on appeal, Turner is not entitled to TTD benefits from March 8, 2013 through July 15, 2013. It also argued the ALJ erred in finding the ulnar condition is compensable. Finally, it argued the impairment rating assessed by Dr. Byrd is invalid. Turner also filed a petition for reconsideration arguing the ALJ erred in not awarding TTD benefits for the entire time he worked light

duty for Ford prior to reaching MMI. In an order issued February 17, 2016, the ALJ denied both petitions for reconsideration.

We first note, as the claimant in a workers' compensation proceeding, Turner 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 Turner was successful in his burden regarding all aspects except the additional period of TTD benefits, the question on appeal is whether substantial evidence supports 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).

Regarding Turner's argument of entitlement to additional TTD benefits, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, supra. "Compelling evidence" is defined as evidence 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).

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 discretion to determine 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). Although a party may note evidence supporting 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).

The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made 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). 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). 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, 708 S.W.2d 641, 643 (Ky. 1986).

Here, the ALJ provided a sufficient explanation for his determination the cubital tunnel condition is causally related to Turner's work activities at Ford. His determination is supported by the record, therefore the finding the right cubital tunnel condition, along with all treatment rendered thereto, are work-related and compensable will not be disturbed. Likewise, we find the ALJ did not err in awarding benefits based upon the 7% impairment rating assessed by Dr. Byrd.

Regarding the award of TTD benefits which was appealed by both Turner and Ford, we also affirm. TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, "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." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

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

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
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> . . .
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> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), regarding the standard for awarding TTD, the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
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> . . .
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> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

In Livingood v. Transfreight, LLC, et al., 467 S.W.3d 249 (Ky. 2015), the Kentucky Supreme Court addressed the ALJ's denial of Livingood's request for additional TTD

benefits during the period he had returned to light duty work by stating, “Except for bathroom monitoring, Livingood had performed the other activities before the injury; further they were not a make-work project.” Id. at 253. The Court specifically stated as follows:

> As the Court explained in *Advance Auto Parts v. Mathis*, No. 2004-SC-0146-WC, 2005 WL 119750, at (Ky. Jan. 20, 2005), and we reiterate today, **Wise does not "stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.**" Livingood had the burden of proof on the issue. Where the ALJ finds against the party with the burden of proof, the standard of review on appeal is whether the evidence compelled a contrary finding. *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). The Board and the Court of Appeals were not convinced that it did. Nor are we. "The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Western Baptist v. Kelly*, 827 S.W.2d 685, 688, 39 4 Ky. L. Summary 54 (Ky. 1992). (Emphasis added).
> Id. at 254-255.

More recently, in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Kentucky Supreme Court again addressed whether an employee was entitled to TTD benefits upon returning to light duty work prior to reaching MMI. The Court noted:

> "'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Or, to put it positively, an employee is entitled to receive TTD benefits until such time as she reaches maximum medical improvement (MMI) or has improved to the point that she can return to employment. There is no dispute that Tipton reached MMI on July 7, 2011. However, the parties dispute whether Tipton reached the point that she could "return to employment" when she returned to work for Trane assembling circuit boards. The ALJ and the Board concluded that her return to work and return to employment occurred at the same time. As noted above, the Court of Appeals disagreed. For the reasons set forth below, we disagree with the Court of Appeals.
> Id. at 803.

The Court additionally stated the following:

> We take this opportunity to further delineate our holding in *Livingood,* and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.,* 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD

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

Again, the ALJ appropriately addressed the time periods to which, based upon the evidence, he believed

Turner was entitled to TTD benefits. Regarding the award of TTD benefits, the ALJ specifically found as follows:

> As to Plaintiff's claim for additional TTD benefits during the periods that he performed light duty work, the ALJ concludes that Plaintiff is entitled to payment of temporary total disability benefits from March 8, 2013 through July 15, 2013 during which time he performed light duty work of a minimal nature. However, following that period of time, Plaintiff's light duty work for the Defendant constituted regular employment and work performed in the furtherance of the Defendant's business of manufacturing automobiles which was sufficiently similar to the Plaintiff's preinjury work of automotive assembly and not minimal, such that a further award of TTD benefits is not warranted.
>
> In support of this determination, the ALJ notes that Plaintiff's entitlement to TTD is controlled by KRS 342.0011(11)(a) which defines TTD as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment". In *Central Kentucky Steel vs. Wise*, 19 S.W.3d 657 (Ky. 2000), the Supreme Court further explained, "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." The Court of Appeals further instructed in *Magellan Behavioral Health vs. Helms*, 140 S.W.3d 570 (Ky. App. 2004) that an employee is entitled to TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of his injury. More recently,

the Supreme Court in *Livingood vs. Transfreight, LLC., supra* clarified that "*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".

As applied to the facts of [sic] instant claim, Plaintiff testified that following the onset of symptoms in September, 2012, he performed his regular job for the Defendant until approximately January, 2013, at which time he transferred to a day shift job called a hub knuckle job and throughout this time he worked without restrictions from Dr. Tsai. He underwent carpal tunnel/pronator teres surgery on March 8, 2013 and was placed on restrictions by Dr. Tsai at that time. However, he immediately returned to work on light duty in an inspector job with his arm in a sling and he was also taking pain medicine. He performed this job from the day of surgery, March 8, 2013 through vacation shutdown the first two weeks in July, 2013. Following the July shutdown he began performing what he described as a floater job in which he would double up with another worker performing whatever job the Defendant determined and he would move from job to job depending on the circumstances. He performed the floater job for approximately six months until taking a job called a strut/shock job which he performed until he was taken off work by Dr. Tsai in March, 2015, for the cubital tunnel surgery. He testified that the strut/ shock job is now a regular job and he continues to perform it at the current time. He missed two weeks following the March, 2015 cubital tunnel surgery and then returned to work on the strut/ shock job. Throughout his light duty work he earned his regular pay.

Given the type of work Plaintiff returned to following the onset of his work-related injury symptoms in September, 2012, the ALJ concludes that Plaintiff is entitled to payment of temporary total disability benefits from the date of his carpal tunnel/ pronator teres surgery on March 2, 2013 through July 15, 2013 during which time he performed inspection work. There is no testimony that Plaintiff had ever performed the inspector job before, and given that it was a non-manual labor type job and Plaintiff's pre-injury work for the Defendant was as an automotive assembly line worker which Plaintiff testified required constant performance of manual labor type work, the ALJ concludes that inspection work was insufficiently similar to Plaintiff's preinjury work activities such that payment of TTD benefits pursuant to the above cited standards is warranted. However, when Plaintiff returned from the July shutdown in the third week of July, 2013, he returned to regular assembly work as a floater in which he performed regular assembly type jobs and the ALJ concludes that this type of assembly work is sufficiently similar to Plaintiff's pre-injury assembly line work such that Plaintiff is not entitled to payment of TTD during the time that he performed this work. Similarly, when Plaintiff began the strut/shop job in March, 2014, this type of work was a regular assembly job which was also sufficiently similar to Plaintiff's preinjury work as an assembler such that Plaintiff does not qualify for payment of TTD benefits during the time that he performed the strut/shock job, especially given the fact that he continues to perform this job at the current time despite having been

> released by Dr. Tsai with no restrictions.
>
> Lastly, Plaintiff testified that he was off work completely for two weeks following his cubital tunnel surgery and given the finding above that the cubital tunnel condition is compensable, Plaintiff shall be entitled to payment of TTD benefits for this two-week period.
>
> In summary, Plaintiff is entitled to the payment of TTD benefits from March 8, 2013 through July 15, 2013 and from March 15, 2015 through April 1, 2015.

The ALJ thoroughly analyzed all elements required in determining Turner's entitlement to TTD benefits based upon the current case law. We believe the analysis is sufficient, and the ALJ gave proper deference to all the required facts. Therefore, his determination regarding the time periods to which Turner is entitled to TTD benefits will not be disturbed.

Accordingly, the opinion and award rendered January 11, 2016 and the February 23, 2016 order on reconsideration by Hon. Thomas G. Polites, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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