Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 14, 2015

CLAIM NO. 201275606

FORD MOTOR COMPANY PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

GLENN CARR
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Ford Motor Company ("Ford") seeks review of the March 26, 2015, Opinion, Award, and Order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") finding Glenn Carr ("Carr") sustained injuries to his right shoulder and left shoulder, and awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. Ford also appeals

from the April 28, 2015, Order denying its petition for reconsideration.

On appeal, Ford challenges the award on three grounds. First, it asserts the ALJ erred in relying upon the impairment rating assessed by Dr. Robert Byrd as it was assessed prior to the last surgery performed on Carr's left shoulder by Dr. Gregory Rennirt. Therefore, the impairment rating assessed by Dr. Byrd was prior to Carr reaching "maximum medical improvement" ("MMI").

Next, Ford asserts the ALJ erroneously awarded multiple periods of TTD benefits despite a lack of evidence Carr was not at MMI from April 2012 to June 2012 and again from August 2012 to May 2013. It also argues the second prong of KRS 342.0011(11)(a) was not met as Carr was able to return to his customary work or the work he was performing at the time of the injury. Ford argues a return to employment as defined in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee was performing at the time of the injury. It asserts the ALJ's award of TTD benefits would create an incredible windfall by penalizing Ford for accommodating Carr's restrictions and allowing him to continue receiving his wages and income benefits. Ford

maintains Carr was not performing makeshift light-duty work during much of the award of TTD benefits and in fact was performing his regular job at his regular hourly rate along with overtime.

Ford argues Carr was returned to light-duty work in August 2011 continued to perform light duty until January 2012, and there were also significant periods he was awarded TTD benefits during which he testified he was doing his regular job on the assembly line. In addition, it argues the evidence does not establish Carr was not performing "customary" work from August 8, 2012, to May 30, 2013.

Alternatively, Ford argues even if Carr was minimally employed, the wages he received were in lieu of TTD benefits and therefore it is entitled to a credit for those wages. It concludes with the following:

> The Petitioner herein is aware that similar arguments have been rejected in recent unpublished decisions, but this case is an example of an Employer's efforts to keep an injured worker paid in some capacity and the Petitioner should not be penalized for making large payments to an injured worker while he is on light duty and awaits work to become available. Ford employs 5,000 people in Louisville and jobs are changing and people are transferred from one job to another every day. It is not inconceivable that a number of jobs

> within Respondent's restrictions could have been made available while he was in the cafeteria and reporting to work and had that happened, he would have seamlessly transitioned to assembly work without having to be called back from TTD, etc. and possibly lost the job. While it did not happen that a job came available, he was still paid his normal wages and Ford's intent was to keep him in the workforce.

Because the award of income benefits is erroneous as a matter of law and the ALJ could not rely upon the 7% impairment rating assessed by Dr. Byrd, we vacate the award of all income benefits and remand.

The January 14, 2015, Benefit Review Conference Order and Memorandum ("BRC") reflects the parties stipulated Carr sustained a work-related right shoulder injury on April 28, 2011, and a left shoulder injury on June 6, 2012. The parties also stipulated Carr's average weekly wage ("AWW") for the right shoulder injury is $1,199.49, and for the left shoulder injury his AWW is $1,042.11. The parties stipulated the TTD benefit rate for the right shoulder injury is $721.97 per week and TTD benefits were paid for one day on July 29, 2011, from August 17, 2011, to August 22, 2011, and again from January 3, 2012, to March 12, 2012. The parties stipulated TTD benefits for the left shoulder injury were paid at the maximum rate for 2012 for the following periods: July 30,

2012, to August 6, 2012, March 8, 2013, to April 22, 2013, and April 24, 2013, to February 16, 2014.[1] The total TTD benefits paid for the right shoulder is $7,941.57 and for the left shoulder is $35,078.73. The contested issues were benefits per KRS 342.730 and TTD.

In determining Carr had a 7% impairment rating for both injuries the ALJ provided the following findings of fact and conclusions of law:

> While all the medical opinions have been considered, as evidenced by the preceding summaries, the opinion of Dr. Byrd is most persuasive and is relied upon herein for the finding Carr's whole person impairment as a result of the work injuries is 7%.
>
> Furthermore, Carr has now, per his own testimony, returned to the type of work he performed prior to the work injury. He testified to some pain but stated he is able to do his job. Thus, it is found Carr retains the physical capacity to return to the work he was doing at the time of the injury. He has also returned to the work at the same or greater wages. Therefore, he is not entitled to the application of the 3 multiplier but, should he cease to earn the same or greater wage in the future due to reasons related to the disabling injury, then he would be entitled to two times the amount otherwise payable.
>
> Regarding the wage to use to calculate PPD, there is no clear distinction in the medical records to

[1] The maximum rate for 2012 is $736.19.

> apportion the impairment. The more severe injury does appear to be to the left shoulder and when Dr. Fadel evaluated Carr on May 2, 2014, he found the result of surgery on the right shoulder was excellent. Therefore, the wage at the time of the left shoulder injury will be used to calculate PPD. As Carr was a maximum wage earner, the 2012 maximum PPD figure, $552.13, applies.

In determining the TTD benefits to which Carr was entitled, the ALJ entered, in relevant part, 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 some overtime) or he was off work receiving TTD benefits. Plaintiff contends, related to the right shoulder injury, he is entitled to TTD benefits from May 11, 2011, the date he was placed on restrictions, until April 2, 2012, the date he was released to regular duty. Related to the left shoulder injury, he claims he is entitled to TTD from July 11, 2012, the date he was placed on restrictions, until February 24, 2014, the date he was released to regular duty. Plaintiff also contends, under this scenario, Ford is entitled to a credit for TTD paid.
>
> This legal issue presented herein is whether Plaintiff is entitled to TTD while working and being paid full wages.
>
> . . .
>
> 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.

While 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, Carr believes the work to which he returned was not his "customary work" per *Central Kentucky Steel, supra.*
>
> Logic might dictate a finding that Carr 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.

Accordingly, the ALJ awarded TTD benefits of $721.97 from May 11, 2011, until April 2, 2012, and $736.19 from July 11, 2012, through February 24, 2014. Ford was to take credit for TTD benefits previously paid. In addition, the ALJ awarded PPD benefits of $32.85 per week beginning June 6, 2012, and continuing for 425 weeks.

Ford timely filed a petition for reconsideration and corrected petition for reconsideration raising the same

errors it raises on appeal. In denying the petition for reconsideration, the ALJ provided the following:

> Defendant Employer, as expected, takes great issue with the award of temporary total disability benefits during a time Plaintiff returned to Ford and was being paid full wages. This subject has been thoroughly discussed in the Opinion and Defendant's request is an impermissible rearguement of the merits of the claim.
>
> Defendant Employer argues the impairment of Dr. Byrd is not credible and should not be applied as his rating was assessed prior to Carr's second left shoulder surgery. After additional review of the conflicting medical evidence, it is found the medical evidence supports a finding of no improvement in impairment following the second surgery. Dr. Fadel did evaluate Carr following the second left shoulder surgery and found he had a fair to poor result. His report supported a finding of no improvement as a result of the second surgery on the left. In fact, Dr. Fadel found 9% whole person impairment with permanent restrictions. He stated:
>
>> This patient has had two operative procedures on his left shoulder for a torn rotator cuff and has had a fair to poor result. He seems to tolerate his impairment as well as one might expect and wishers to continue working in some capacity. Restrictions outlined by Greg Rennirt, M.D., within his medical records should be underscored as being permanent. The

> impairment rating calculated within this report references weaknesses as part of the total impairment because of the atrophy seen on the deltoid and trapezial muscles. This is despite a number of appointments with the physical therapy department over this tenure.
>
> The report of Dr. Loeb is not relied upon as he assessed 0% impairment and the evidence, if nothing more than the 3 surgeries, supports a finding of at least some impairment. Dr. Rennirt is not relied upon for the impairment as it does not appear his assessment matches the complaints of Carr. Dr. Rennirt stated Carr was doing well and Carr states he has problems doing his job. Even though he works without restrictions, he described dealing with pain and having difficulty and pain while trying to keep up on his job. Carr testified he does not have full range of motion.

The award of income benefits is erroneous as a matter of law since the ALJ should have entered separate awards income and medical benefits for each shoulder injury. There is no dispute Carr sustained a right shoulder injury on April 28, 2011, and a left shoulder injury on June 6, 2012. Ford accepted both injuries as compensable.

As we instructed in James J. Garrett v. Miller Pipeline, (Claim No. 200401458), rendered February 9, 2007:

Where various injuries producing different whole body impairment ratings occur as a result of successive and distinct work-related traumatic events, the disability ratings pursuant to KRS 342.730(1)(b) for those injuries must be calculated separately. *See* Moore v. Pontiki Coal Corp., 2001-SC-0089-WC, rendered October 25, 2011, and Designated Not To Be Published. Moore involved successive injuries, first to the claimant's left knee and second to his low back, sustained with a single employer insured by the same carrier for both incidents. There was medical evidence to support the fact-finder's conclusion the claimant had a 4% impairment as a result of the left knee injury, a 10% impairment related to a back injury, and a 10% psychiatric impairment related to the latter. The ALJ awarded benefits on a 24% whole person impairment, multiplied by the factor of 1.75, to yield a disability rating of 42%.

> As measured under the 1996 Act, a worker with an AMA impairment from an injury has a permanent partial disability even though he is able to return to work earning the same or more than he earned at the time of injury. Thus, although we are of the opinion that an ALJ may combine impairments from harmful changes that result from the same traumatic event in order to reach greater disability rating, we are convinced that the ALJ may not combine impairments from harmful changes that are due to successive traumatic events. [citation omitted]

Slip Op. at 21-22.

Thus, even though no impairment rating was assessed for the right shoulder injury, the ALJ should have entered separate awards for each injury. Consequently, for the August 8, 2011, right shoulder injury, the ALJ should have entered an award of TTD benefits and determined the extent of medical benefits to which Carr was entitled. Since the parties agreed the left shoulder injury of June 6, 2012, merited a permanent impairment rating, the ALJ should have also entered a separate award of TTD benefits, PPD benefits, and medical benefits.[2] Although the ALJ entered an award of TTD benefits based on the applicable TTD rate for the April 2011 right shoulder injury, she failed to award any medical benefits for this injury. This was necessary since no impairment rating was assessed by any of the physicians evaluating Carr's right shoulder injury. Consequently, the finding Carr had a 7% whole person impairment as a result of "work injuries" is clearly erroneous.

Dr. Byrd, whose impairment rating was adopted by the ALJ, initially saw Carr on October 25, 2012. He diagnosed a history of right rotator cuff tear status post-

[2] On appeal, Ford argues Dr. Rennirt's 3% impairment rating is the appropriate impairment rating.

surgical repair with mild tendonitis present in the right upper extremity. He opined this injury was directly related to the April 28, 2011, injury. He also diagnosed a left rotator cuff tear status post-surgical repair with persistent left shoulder pain. Dr. Byrd stated Carr was not at MMI for the left shoulder; consequently, an impairment rating could not be provided until he attained MMI which he anticipated would occur within three months. He offered no opinion regarding MMI and an impairment rating for the right shoulder injury.

On April 1, 2013, Dr. Byrd authored an "Impairment Rating Addendum" based on a re-examination on that same date. In discussing Carr's history, Dr. Byrd noted Carr had a gradual progression of lifting restrictions for his left arm and currently is not to lift greater than fifteen pounds. He noted the pain was located in Carr's left shoulder and remains problematic for him. His examination revealed no significant atrophy of the shoulder muscles. He then provided the range of motion measurements for Carr's left shoulder. He noted light touch sensation is intact in the entire left shoulder. Dr. Byrd's assessment was failed shoulder surgery. He opined Carr was currently at MMI and based upon the range of motion in the left shoulder, pursuant to the 5th Edition of

the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Carr had a 12% impairment of the upper extremity which results in an overall 7% impairment rating.

A medical questionnaire attached to his report contains Dr. Byrd's handwritten diagnosis which, except for the word "chronic," is illegible. In answering the medical questionnaire, Dr. Byrd again indicated Carr was at MMI and had a 7% impairment rating none of which is attributable to a pre-existing dormant condition. Dr. Byrd also provided the physical restrictions he would impose at that time.

The May 14, 2013, report of Dr. Thomas Loeb was introduced. After performing a physical examination and reviewing the medical records of Dr. Rennirt, Dr. Loeb noted Carr had bilateral work-related rotator cuff tears. Carr was doing well on the right side and as a result, did not have an impairment rating pursuant to the AMA Guides. Dr. Loeb refused to rate the left shoulder because of pending surgery and Carr was not at MMI.

Ford introduced the July 15, 2014, report of Dr. Loeb based on an examination performed on that same date. Dr. Loeb noted the operative report of May 30, 2013, indicated Dr. Rennirt had performed a recurrent rotator cuff repair with subacromial decompression and debridement

of scar tissue. He disagreed with the impairment rating assessed by Dr. Fadel and indicated Carr had no impairment rating for either shoulder.

Carr introduced the report of Dr. Jeffrey Fadel generated after an examination conducted on May 2, 2014. As a result of his examination, Dr. Fadel's impression was status post-rotator cuff repair to the left shoulder with chronic rotator cuff tendinitis. In calculating the impairment, Dr. Fadel noted the range of motion revealed the "total upper extremity for motion impairment" is 7% which translates to a whole body impairment of 4%. He then provided the manual muscle strength testing for the left shoulder which equates to a 9% upper extremity impairment rating and a 5% impairment rating to the body as a whole. Combining the impairment ratings resulted in a total impairment rating of 9%.

Significantly, Dr. Fadel noted Carr had two operative procedures on the left shoulder for a torn rotator cuff and had a fair to poor result. Restrictions outlined by Dr. Rennirt within the medical records should be underscored as being permanent. Dr. Fadel stated the permanent impairment he calculated references the weaknesses as part of the total impairment because of the atrophy seen on the deltoid and trapezial muscles. Dr.

Fadel did not assess an impairment rating for the right shoulder.

Ford introduced the September 8, 2014, office note of Dr. Rennirt styled “impairment rating.” Dr. Rennirt noted Carr was present for an impairment rating and had rotator cuff repair on the left shoulder in July 2012 and a revision in May 2013. After providing the range of motion for the shoulder, Dr. Rennirt assessed a 3% whole person impairment rating for the left shoulder injury. No impairment rating was offered for the right shoulder injury.

Since no impairment rating was assessed by Dr. Byrd for the right shoulder condition, the ALJ’s reliance upon Dr. Byrd in finding Carr had a 7% impairment rating for both work injuries is erroneous. Furthermore, since no physician assessed an impairment rating for Carr’s right shoulder condition, permanent income benefits cannot be awarded for this condition.

We agree with Ford the ALJ could not rely upon Dr. Byrd’s impairment rating of April 1, 2013, since Dr. Rennirt performed surgery on the left shoulder on May 30, 2013, fifty-nine days later. A review of Dr. Rennirt’s May 30, 2013, operative note reveals, in relevant part, as follows:

> The articular surfaces were intact. There was some fraying still of the labrum. This was debrided using the shaver. The biceps was intact. The rotator cuff was examined from the undersurface. There was a small full-thickness split in the rotator cuff, but the footprint had been reestablished. The arthroscope was introduced into the subacromial space. There was scarring in the bursa which was removed using a shaver. A revision subacromial decompression was performed using a shaver to uncover the acromion and to shave just a little more bone off anteriorly. The rotator cuff was examined from the top down. The sutures were intact. They were clipped and removed, but there was a small full-thickness split. The tissue was then debrided aggressively to remove the old area of repair and a trough was made laterally. There was extending medially the deep split from the recurrent tear. Two arthroscopic anchors were placed at the articular margin and the front anchor had its sutures passed in a mattress fashion around this split to close the side-to-side split and bring it down to the anchor. The back anchor had its suture passed in a mattress fashion posteriorly. The sutures were then crossed and passed through swivel-like anchors laterally. A stable repair was obtained. The portals were closed with 4.0 Vicryl sutures and infiltrated with 0.25% Marcaine with epinephrine. He was sent to the recovery room stable.

Chapter 2 of the AMA Guides, on page 19, states as follows:

> An impairment should not be considered permanent until the clinical findings indicate that the medical condition is

> static and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed.

At the time Dr. Byrd assessed the 7% impairment rating, Carr was clearly not at MMI. Carr's May 12, 2014, deposition testimony demonstrates that sometime after the first surgery on his left shoulder he began to experience more problems. Consequently, he returned to Dr. Rennirt. He testified his left shoulder problem became so bad Dr. Rennirt ordered additional testing. Based on the test results another left shoulder surgery was performed on May 30, 2013. Further, we point out reliance upon Dr. Byrd's impairment rating presupposes a finding that at the time Dr. Byrd examined Carr on April 1, 2013, he was at MMI. If MMI was attained as of April 1, 2013, then by statute Carr was not entitled to any further TTD benefits as he had attained MMI. Notably, in the March 2015 decision determining the extent of Carr's injuries and resolving the issue of entitlement to TTD benefits, the ALJ never made a finding as to when MMI was attained.

As we are vacating the entire award of income benefits, Ford's second argument concerning the award of TTD benefits is now moot. However, because of the ALJ's erroneous analysis pertaining to Carr's entitlement to TTD benefits, we are compelled to address the award of TTD benefits for both shoulder injuries.

In his January 7, 2013, deposition, Carr testified he had been working on the frame line for nine years. In April 2011, Carr was working on the "fast line" of the frame line. Carr testified he was on the slow line when he injured his left shoulder. Carr testified the fast line produces "Super Dutys, Expeditions, and Navigators." The slow line makes big long frames used for ambulances, emergency vehicles, and Ryder rental trucks. Carr could not tell the difference in the speed of the lines. He noted the "slow line and the jobs are set up a little different." At the time of both injuries, Carr was making $28.76 per hour. At the time of both injuries and his deposition, he worked forty hours per week.

After his April 28, 2011, injury, Carr was referred by the medical department to Dr. Rennirt who performed outpatient surgery in August 2011. Carr testified he continued to work until the surgery. He did not go to work on Wednesday, Thursday, the day of the

surgery, and Friday. He was off Monday because of a follow-up appointment.[3] When he called Ford on Monday after his appointment, a cab was sent to his house to transport him to the plant to review the paperwork from Dr. Rennirt. Dr. Rennirt restricted him from using his right arm, even for dressing. On Tuesday, at 5:30 a.m., a cab dispatched by Ford picked him up and took him to the plant where he would sit in a room. Carr guessed this was done to keep down workers' compensation claims. He testified he was moved from night shift to day shift during which he was paid his regular wage. When his arm was no longer in a sling he was told there was nothing for him to do and was sent home. He received TTD benefits from January 3, 2012, until March 13, 2012.

Carr returned to work on March 14, 2012, without any restrictions and worked until he hurt his left shoulder on June 6, 2012. Because he could not work on the fast line of the frame line when he returned to work, Carr moved to the slow line where he injured his left shoulder lifting a brake caliper. Carr explained he had been moved to "drive shaft" because another worker had been hurt and he

[3] Carr was off work from August 17 through August 22, 2011. Surgery on his right shoulder was performed on August 18, 2011. This is consistent with the stipulation regarding TTD benefits paid for the right shoulder injury.

was placed where he was needed. He was paired with somebody in order to learn the job. He was treated by Ford's medical department for a short time and eventually referred to Dr. Rennirt. After obtaining the results of an MRI, Dr. Rennirt performed surgery on his left shoulder on July 31, 2012. Dr. Rennirt informed him his left shoulder injury was the same as the right shoulder injury. Carr testified he received income benefits during the eight days he was off work due to the surgery.[4] Because he could not use his arm, when he returned to work after surgery he again worked on the day shift where he "had to sit." This time Carr drove to work and did not take a cab. Dr. Rennirt restricted him from overhead and repetitive lifting and lifting more than three pounds. Later, the lifting restriction went to five pounds and then to ten pounds because Carr informed Dr. Rennirt Ford did not have a job for him with a five pound lifting restriction. At the time of his January 2013 deposition, Carr had been working regularly on the frame line.

Carr's May 12, 2014, deposition was introduced. He testified that at the time of his January 7, 2013,

[4] The parties stipulated TTD benefits were paid for the eight days. Carr testified Unicare paid the first seven days and he received workers' compensation benefits for one day.

deposition he had been working on a regular basis at Ford. After the January 7, 2013, deposition, Dr. Rennirt allowed him to continue working and treated him conservatively. Because he developed more left shoulder problems, Dr. Rennirt ordered additional testing. Based on the test results, surgery was performed on May 30, 2013. In March 2013, he was "put out on no work available," which meant there was no work available to Carr with his restrictions. As a result, he drew $736.19 weekly from Unicare.[5] In October 2013, he was called back to run a "little safety thing" for three weeks and then was put back on no work available.[6] On more than one occasion during his deposition, Carr testified he worked from the time of his deposition on January 7, 2013, to May 30, 2013, the date of his second surgery.[7] Carr also testified he remained "out on no work available" until called back in February 2014. Because work was available within his restrictions, Ford called him to return to work on February 17, 2014, one week before he was last seen by Dr. Rennirt. A week later when he saw Dr. Rennirt, he informed Dr. Rennirt he had returned

[5] Evidently Unicare was the entity that paid TTD benefits as this amount is the maximum TTD benefit rate for 2012.
[6] Carr placed and set up 19 laptops in the break room for a "MSDS safety course" everyone had to take. Carr manned the sign-in sheet.
[7] Carr was adamant about this even though the parties stipulated TTD benefits were paid from March 8, 2013, to April 22, 2013, and from April 24, 2013, to February 16, 2014.

to work a week earlier and was performing an inspector's job which was within his restrictions. At that time, Dr. Rennirt returned him to work with no restrictions. At the time of Carr's May 12, 2014, deposition, he was still doing inspecting jobs and had not missed any work.

When he returned to work on February 17, 2014, Carr earned $28.75 per hour working at least forty hours and sometimes more per week. Carr estimated he worked between forty-five and forty-eight hours a week. His job entailed inspecting truck frames. He explained he makes sure the truck frames are "plugged in" properly. He works in an inspector station with a repairman. They take care of any problems that can be repaired. In doing this job he will tug and pull. His right shoulder is "okay" but still gets fatigued. However, his right shoulder is a lot better than his left shoulder.

At the hearing, Carr testified that following the August 18, 2011, surgery he returned to light duty. Some days he sat in a room with other injured employees and other times he sold coffee and doughnuts. He also stocked company magazine racks, cleaned equipment in the fitness center, and on one occasion set up nineteen laptops in the plant for a safety course. On August 18, 2011, the date of his first surgery, his job was vehicle assembly technician

which entailed performing assembly on the frame line "putting parts on and using guns." On average, he was scheduled to work ten hours a day five days a week, and he would work between eight to ten hours overtime a week. When he was put on light duty he had no potential for overtime as he could not work more than eight hours a day.

After his right shoulder surgery, Carr performed light duty which required him to move from night shift. He reiterated the day after his post-surgery follow-up with Dr. Rennirt, he was picked up by a cab to report for the day shift beginning at 6:00 a.m. He sat in a room with his arm in a sling. He could only work eight hours while on light duty.

After the left shoulder surgeries were performed, he again returned to light duty doing what he previously did on light duty. He could only work eight hours a day. Carr returned to unrestricted full duty on February 17, 2014. At the time of the hearing, he was installing rear bumpers on pick-ups, and inserting parts on Expeditions working a ten hour day. Carr believes he cannot return to the job he held on April 28, 2011.

Based on the record, we believe the ALJ must revisit Carr's entitlement to TTD benefits for each injury.

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 Construction Company v. Baker, 858 S.W.2d 202 (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.

Id. at 205.

In Central Kentucky Steel v. Wise, supra, the Kentucky 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 he was performing at the time of the traumatic event or to other customary work.

Carr's testimony establishes he worked on the slow line after he injured his right shoulder up until the day before the August 18, 2011, surgery. His testimony reveals he was off work on August 17, 2011, until the following Monday, August 22, 2011. The BRC Order reflects TTD benefits were paid for this period. However, TTD benefits were not paid from the date of injury through August 16, 2011. Likewise, Carr was not paid TTD benefits from August 23, 2011, when he returned to work following surgery through January 2, 2012. The parties stipulated he was last paid TTD benefits from January 3, 2012, through March 13, 2012. Carr testified he returned to work on March 14, 2012, with no restrictions and worked until his left shoulder injury on June 6, 2012. Thus, the ALJ must determine Carr's entitlement to TTD benefits during the periods Carr was not paid TTD benefits. The ALJ awarded TTD benefits from May 11, 2011, to April 2, 2012, for the right shoulder injury without conducting the two prong analysis required by the applicable case law. Thus, we are

unable to determine the basis for the award of TTD benefits for the right shoulder injury.

Concerning his entitlement to TTD benefits for the right shoulder injury, Carr testified he was regularly working, albeit on a different line, during the period from April 28, 2011, through August 16, 2011. The ALJ must determine his entitlement to TTD benefits during all or a portion of this period. The ALJ must then determine whether Carr is entitled to TTD benefits during all or any portion of the period from August 23, 2011, and January 2, 2012, during which Carr stated he sat performing light work. We note Ford does not contest Carr's entitlement to TTD benefits from January 3, 2012, to March 13, 2012. This is consistent with the stipulated payment of TTD benefits. The ALJ must also determine whether Carr is entitled to TTD benefits during all or any portion of the period from March 14, 2012, when he was released to return to work with no restrictions until the second injury of June 6, 2012. Concerning the above periods, utilizing the standard enunciated in Central Kentucky Steel v. Wise, supra, the ALJ must determine whether Carr had reached MMI and a level of improvement which would permit him to return to the type of work he was performing at the time of the injury or to other customary work. The award of TTD benefits must

include the periods the parties agree Carr was entitled to TTD benefits.

Concerning the award of TTD benefits for the June 6, 2012, left shoulder injury, the ALJ must specifically enter findings of fact regarding Carr's entitlement to TTD benefits from June 6, 2012, through July 29, 2012, the day before the initial left shoulder surgery. The BRC Order reflects TTD benefits were paid from July 30, 2012, to August 6, 2012. This period of TTD benefits is not in dispute. The ALJ must then determine the extent to which Carr is entitled to TTD benefits after August 7, 2012, when Carr indicated he began driving to work performing light duty. Even though the parties stipulated TTD benefits were paid from March 8, 2013, through April 22, 2013, and resumed two days later on April 24, 2013, and were paid until February 16, 2014; Ford contests Carr's entitlement to TTD benefits from August 2012 to May 2013.

Finally, the ALJ must determine whether Carr is entitled to TTD benefits from February 17, 2014, through February 23, 2014. Carr testified he returned to work on February 17, 2014, on unrestricted full duty, which was approximately one week before he last saw Dr. Rennirt on February 24, 2014, and was released to full duty. The ALJ awarded TTD benefits from July 11, 2012, to February 24,

2014, for the left shoulder injury without conducting the two prong analysis required by the applicable case law. Thus, we are unable to determine the basis for the award of TTD benefits for the left shoulder injury. Again, the award of TTD benefits for this injury must include the periods the parties agree Carr was entitled to TTD benefits.

Even though the ALJ discussed the cases cited herein, she did not analyze Carr's entitlement to TTD benefits by determining the period or periods during which he was not at MMI and remained disabled from other customary work or the work he was performing at the time of the injury. The ALJ must engage in this two-prong analysis outlined herein in determining the periods during which Carr is entitled to TTD benefits. As noted in Central Kentucky Steel v. Wise, supra, a return to minimal work but not the type that is customary or that he was performing at the time of the injury would not foreclose Carr's entitlement to TTD benefits during the time he had returned to work.

We decline Ford's request that we hold the wages paid Carr be deemed payments made in lieu of TTD benefits. This issue was specifically addressed in Millersburg

Military Institute v. Puckett, 260 S.W.3d 339, 342 (Ky. 2008) wherein the Supreme Court stated:

> An employer seeking credit against its workers' compensation liability has the burden to show a proper legal basis for the request. The ALJ failed to state a reason for granting the credit, and the employer has failed to show a proper legal basis. The evidence indicates that the employer paid the claimant to perform light-duty work after his injury and surgery but eventually reduced his hours to the point that he quit. The employer's position before the ALJ was that the injury was only partially disabling. We note that had the ALJ agreed, KRS 342.730 (1) would have entitled the claimant to receive partial disability benefits in addition to his wage. Having failed to convince the ALJ that the claimant was only partially disabled or to appeal the finding of permanent total disability, the employer now relies on KRS 342.0011(11)(c) and *Gunderson v. City of Ashland*, 701 S.W.2d 135 (Ky. 1985), to argue that it actually considered the claimant to be totally disabled from the outset and intended to pay the post-injury wages in lieu of compensation.
>
> *Special Fund v. Francis*, Ky., 708 S.W.2d 641, 643 (1986), explains that a finding of fact that favors the party with the burden of proof must be reasonable under the evidence. Nothing in the record supports the employer's argument. Thus, the ALJ erred by granting a credit.
>
> The employer's argument that the claimant would receive more “benefits” for the two-year period after the

> injury confuses wages and benefits. Wages are paid for performing labor; income benefits are paid for work-related disability. The claimant's wages were "bona fide" because they were paid ostensibly for labor and because the evidence did not permit a reasonable finding that the employer intended to pay them in lieu of workers' compensation benefits.

In the event the ALJ awards TTD benefits during any period Carr received wages from Ford, it is not entitled to a credit for the wages paid during any such period as Ford failed to establish the wages paid for chores Carr performed during these periods were in lieu of TTD benefits. As noted by Millersburg Military Institute v. Puckett, supra, the employer bears the burden of showing the proper legal basis for a credit for the wages it paid during any period TTD benefits are awarded. Here, the record is devoid of any proof establishing the wages Ford paid Carr, regardless of the job he performed, were in lieu of TTD benefits. Significantly, a representative from Ford did not testify the post-injury wages paid Carr were in lieu of TTD benefits. Therefore, an award of TTD benefits during any period Carr was actually working for Ford may not be offset by the wages paid Carr for his work, however menial, as Ford had not demonstrated those wages were in lieu of TTD benefits.

Accordingly, the portions of the March 26, 2015, Opinion, Award, and Order and the April 28, 2015, Order ruling on the petition for reconsideration finding Carr has a 7% impairment rating as a result of injuries to both shoulders and the award of TTD benefits and PPD benefits are **VACATED**. This claim is **REMANDED** to the ALJ for entry of separate awards for the April 28, 2011, injury and the June 6, 2012, injury. For the April 28, 2011, injury, the ALJ shall determine the TTD benefits and medical benefits to which Carr is entitled. The ALJ may not award PPD benefits as there was no testimony Carr has a permanent impairment rating for the right shoulder injury. The award for the June 6, 2012, injury shall include a determination of the permanent impairment rating attributable to the left shoulder injury without consideration of the impairment rating assessed by Dr. Byrd and an award of PPD benefits. The ALJ shall also determine the periods during which Carr is entitled to TTD benefits and award medical benefits in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON PHILIP REVERMAN JR
400 W MARKET ST STE 2300
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON SCOTT JUSTICE
455 S FOURTH ST STE 1250
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON JANE RICE WILLIAMS
217 S MAIN ST STE 10
LONDON KY 40741