Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 24, 2016

CLAIM NO. 201599600

FORD MOTOR COMPANY PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

REBECCA FIGG
and HON. CHRIS DAVIS,
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 September 28, 2015, Opinion, Award, and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") finding Rebecca Figg ("Figg") sustained a work-related right shoulder injury and awarding 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 October 29, 2015, Order overruling its petition for reconsideration.

On appeal, Ford challenges the award of TTD benefits and enhancement of Figg's PPD benefits by the three multiplier.

Figg alleged an injury to her right arm and shoulder occurring on September 20, 2014. On March 6, 2015, Figg underwent surgery on her right shoulder performed by Dr. Edward Tillett.

The July 14, 2015, Benefit Review Conference & Memorandum Order reflects the parties stipulated Figg sustained a work-related injury on September 20, 2014, and notice was timely given. TTD benefits were not paid. The contested issues were: "benefits per KRS 342.730; average weekly wage; unpaid or contested medical expenses; exclusion for pre-existing disability/impairment; and TTD."

In the September 2015, decision, the ALJ determined Figg sustained a right shoulder injury and her surgery was compensable. The ALJ found the September 20, 2014, work-related injury aroused a dormant pre-existing condition in the right shoulder causing a right rotator cuff injury resulting in 7% permanent impairment rating.

Consequently, none of the 7% impairment rating was attributable to a pre-existing active condition.

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

> The Plaintiff was either off work or working light duty from September 21, 2014 until July 9, 2015. Dr. Loeb stated, on June 16, 2015, that he expected her to reach MMI within approximately one month, which agrees with her return to work on July 9, 2015.
>
> Pursuant to KRS 342.001(11)(a) and *Bowerman v. Black Equipment*, 297 S.W.3d 858 (Ky. App. 2009) the plaintiff is entitled to TTD from September 21, 2014 until July 9, 2015 even though she was working light duty and paid her full wages. Her TTD is [sic] rate is $769.06. Her wages are sufficient for maximum.

As to Figg's entitlement to enhanced benefits, the ALJ entered the following findings of fact and conclusions of law:

> I believe the 7% assigned by Dr. Byrd is more logical and more accurately reflects the Plaintiff's condition. I believe her when she says she [sic] difficulty with all overhead reaching and that she continues to have other limitations and pain. As such her rating is 7%.
>
> I also adopt the restrictions as assigned by Dr. Byrd. This is consistent with my adoption of his

> report in other matters and consistent with my opinion of the Plaintiff's credibility. As such she cannot return to the type of work done on the date of injury.
>
> There is no evidence that the Plaintiff ever returned to work at equal or greater wages than on the date of injury. Regardless, given the severity of her restrictions, the very real prospect of her employer no longer being able to accommodate her and her lost earning potential I find KRS 342.730(1)(c)1 more appropriate.

The ALJ awarded $102.96 per week from the date of the injury and TTD benefits of $769.06 a week from September 21, 2014, through July 9, 2015.

Ford filed a petition for reconsideration requesting reconsideration of the award of TTD benefits. It conceded Figg was off work from March 6, 2015, through July 6, 2015, and her entitlement to TTD benefits during this period.[1] However, Ford argued the ALJ should reconsider the award of TTD benefits during the period Figg continued to work full-time on light duty. It also requested entry of additional findings of fact concerning the different jobs Figg performed when she was on light duty and whether those jobs benefited Ford.

[1] On March 6, 2015, Figg underwent surgery and was released to return to work by Dr. Tillett on July 9, 2015. Ford's reference to July 6, 2015, as the end date appears to be a typographical error.

Regarding enhancement of Figg's PPD benefits by the three multiplier, Ford requested reconsideration of the ALJ's finding Figg did not return to work earning the same or greater wages. Ford requested the ALJ provide "additional findings with regards [sic] to the basis of this opinion."

In the October 29, 2015, Order overruling the petition for reconsideration, regarding Figg's entitlement to TTD benefits, the ALJ stated:

> 1. During all periods that TTD was awarded the Plaintiff was either off work and not at MMI, or working light duty and not at MMI. The analysis already provided should be sufficient to demonstrate that I did not award TTD during any periods she was working her regular job and/or at MMI. Pursuant to KRS 342.0011(11)(a) and *Bowerman v. Black Equipment*, 297 S.W.3d 858 (Ky. App. 2009) the Plaintiff is entitled to the TTD as awarded.

Concerning Ford's argument regarding the three multiplier, the ALJ stated the analysis provided and the evidence of record sufficiently supported an award of the three multiplier pursuant to KRS 342.730(1)(c)1.

On appeal, Ford challenges the award of TTD benefits during the time Figg performed restricted work. Ford cites appellate decisions upholding an award of TTD benefits in cases where the employee had returned to work

but was not performing legitimate work that truly benefited the employer. Ford contends the case *sub judice* is different from those cases as Figg returned to legitimate work which constituted a normal part of her pre-injury job even though she did not return to all aspects of that job.

Ford also cites the unpublished opinion of the Court of Appeals in Livingood v. Transfreight, LLC, 2013-CA-000349-WC, rendered January 31 2014, Designated Not To Be Published, and the Supreme Court's decision in Zappos.com v. Mull, 2014-SC-000462-WC, rendered October 29, 2015, Designated Not To Be Published.

Ford contends the statute mandates once the employee has reached a level of improvement permitting a return to employment, the employee is no longer entitled to TTD benefits. It argues Figg will receive a windfall if permitted to receive TTD benefits while working various light duty jobs it provided. It contends Figg performed several different legitimate light duty jobs on the assembly line for which she received full pay along with occasional overtime compensation. Ford contends none of these jobs were significant diversions from her prior employment. In addition, none of these jobs were minimal or menial and provided direct benefit to Ford. It posits if Figg was not available another employee would have to do

these jobs. Since Figg was engaged in legitimate work, Ford argues she was not entitled to receive TTD benefits during the period in question.

Alternatively, Ford contends the ALJ failed to make specific findings supporting the award of TTD benefits during the period in question. It asserts the ALJ provided no findings of fact regarding the specific jobs Figg was performing while on light duty. In addition, there was no analysis applying the facts "to the recently established law." Therefore, the claim should be remanded for entry of findings of fact addressing the types of jobs Figg performed while on light duty assignment and an analysis based on the applicable law.

Concerning enhancement of the PPD benefits by the three multiplier, Ford concedes the doctors agree Figg lacks the physical capacity to return to the job performed at the time of the work injury. However, Ford contends Figg failed to prove she is currently earning less money. Consequently, in order to complete the analysis, Ford argues the ALJ should have determined whether the evidence indicates she is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future. *See* Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Ford argues there is no evidence

demonstrating Figg will not be able to continue earning the same or greater wages for the indefinite future as it has shown a willingness to accommodate any restrictions. Ford also relies upon Figg's testimony she believed Ford could create jobs for her to finish out her career. It contends the ALJ's finding was mere speculation and not supported by substantial evidence.

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 she remains disabled from her customary work or the work she was performing 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 with regard to 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). 19 S.W.3d at 659.

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, supra, specifically rejecting the Court of Appeals' interpretation of "a return to employment" as set forth in KRS 342.0011(11)(a).[2] There, the ALJ awarded TTD benefits during a period Mull had not returned to her regular employment but worked light duty. TTD benefits

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

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, 2016WL671170, rendered February 18, 2016, Designated To Be Published, the Supreme Court reinforced its decision in Zappos.com v. Mull, supra, and again

rejected 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.

Slip Op. at 9-10.

The Supreme Court also delved into the Court of Appeals' holding in Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009), relied upon by the ALJ in this case, explaining as follows:

> However, as noted above, the Court of Appeals only held that Bowerman was entitled to additional TTD for part of the period his claim was in abeyance, a period when he was not working. It did not hold that he was entitled to TTD for the period before his claim was placed in abeyance and during which he had worked.

Slip Op. at 10.

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 that would permit "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.

Slip Op. at 11-12.

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

> Applying the preceding to this case, we must agree with the ALA 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.

Slip Op. at 12-13.

We decline to reverse the award of TTD benefits and remand with directions to find Figg is not entitled to TTD benefits during the period in question. However, we agree with Ford's alternative argument the ALJ's analysis on this issue is deficient as it does not comport with the law regarding entitlement to TTD benefits. The ALJ merely found Figg was either off work or working light duty from September 21, 2014, to July 9, 2015, in support of the award of TTD benefits. The fact Figg was working light duty from September 21, 2014, to March 5, 2015, does not mandate she is entitled to an award of TTD benefits. To be entitled to TTD benefits, Figg must not have been at MMI and must not have improved enough to return to the type of employment "that was customary or that she was performing at the time of [her] injury." Central Kentucky Steel v. Wise, at 657.

During the August 19, 2015, hearing, Figg testified that from September 21, 2014, up until July 9, 2015, she did not return to any of her pre-injury work duties. Thus, the case *sub judice* does not involve a return to work but merely a change in the work Figg performed through March 5, 2015, the day before she underwent surgery. Consequently, the analysis should have

entailed a determination of whether the work Figg was performing on light duty was customary as defined by Trane Commercial Systems v. Tipton, supra. Here, there was no finding Figg's light duty work was not customary as defined in Trane Commercial Systems v. Tipton, supra. Thus, the award of TTD benefits from September 21, 2014, to March 6, 2015, must be vacated.

During the period from September 21, 2014, through March 6, 2015, the day before her surgery, the light duty work Figg was performing could have been customary work, thereby disqualifying her from receiving TTD benefits during this period. The ALJ failed to analyze whether the type of work performed between September 21, 2014, and March 5, 2015, was customary. During this period Figg was not performing the work she performed at the time of her injury. However, pursuant to Trane Commercial Systems v. Tipton, supra, if she was performing work which was customary from September 21, 2014, through March 5, 2015, Figg is not entitled to TTD benefits.

During her May 4, 2015, deposition, Figg provided the following description of the work she was performing as a torque inspector at the time of her injury:

> Q: Describe for me what that job required physically.

A: You have torque wrenches. They range from like an A3 is like Newton meters wide, it’s like under five, which is — it’s hard to really explain. You have five wrenches.

These wrenches range pound wise from five pounds to twenty-five pounds to fifty pounds. I would have to go in a tow-in pit, which is actually a pit inside the plant, and the trucks actually come over top of your head. And I’m having [sic] to tighten down tie rods, the bolts.

People in the pit tighten them down. I go behind them, and I check to make sure Newton meter wise it’s all right to send out. This is just – like the torque job is to make sure all of the safety features are backing up the guns like they’re supposed to be.

Each nut, bolt, and screw in there has to be torqued a certain torque, and that’s why you have torque inspectors.

Q: Are you actually handling the wrenches yourself?

A: Yes.

Q: Does that require you to hold each of those? Are they free, or are they attached to anything hanging down?

A: You actually – you have to hold them yourself. And you’ve got a Datamite connected to it. Your Datamite actually catches the pull that you pull.

Q: Got it. And then are you maneuvering those wrenches overhead?

A: Yes.

Q: Because the trucks are coming at you overhead, so you’re going behind

everybody who tightens the bots and screws and making sure that the torque is accurate?

A: Yes.

Q: You use a wrench, which then reads the torque on the screw?

A: Yes.

Q: About how many of the bolts do you have to test as the truck – per truck as it goes over?

A: Two in the front, five trucks total, and five bolts in the back.

Q: Two in the front, five in the back, and what did you say in the middle?

A: You've got five trucks total. You pull the first two bolts in the front and in the back, you have two bolts, and the torque, you know, the way it's set up, you only pull five of the bolts in the back.

So it's like one truck, you've got two front and two back. The next truck, you pull the two front and the two back, and then the next truck, you pull the two front and one in the back, and then you do the fronts on the next truck.

Q: Got it.

A: It's sort of crazy the way they do it, but that's just the way it's done. That's in tow-in pit. Then body shop is totally different.

Q: It's called tow-in pit?

A: Yes.

Q: Were you working the tow-in pit for the two and half years that you were

the torque inspector, or did you switch back and forth?

A: Actually, there’s three other routes that I knew. And if somebody didn’t show up, they would call us in, and we would have to cover those routes.

Q: The tow-in pit was your primary assignment?

A: Tow-in pit and body shop.

Q: If you weren’t doing tow-in pit, how did the other torque inspector jobs differ physically? Did they at all?

A: Well, like, on the trim route, you have to check seat belts, you have to check bumpers, the air bag bolts. I mean, there’s just any kind of safety bolt there is. If it’s a delta item, it has to be checked.

Q: For tow-in pit, it sounds like you were mostly working overhead?

A: Yes.

Q: For those other jobs, was that also overhead work, or did you actually crawl into the vehicles or have them come down a –

A: If I was in somebody else’s torque route, I had to climb in some of the trucks. On my regular torque route, I only di the tow-in pit, part of flat top, which I checked the battery cables, the grounds on the front of the battery cable box, the rungs on the wheels, and then I did – I think that was on all on flat top.

Then in body shop, I did the liftgates, the hoods, and the doors.

> Q: So for body shop doing liftgates, hoods, and doors, are you walking around a vehicle that is at the chest height?
>
> A: No, they – well, some of them are, and some of them's [sic] not. I usually did mine – there's one spot on the floor that I would do the doors on, because you've to doo five trucks on each door, and you've got to do the back bolts, the front bolts, and the middle bolts.
>
> Then on the - I would have to go over there were they have – they call it the scrub line. And I would actually have to do the liftgate, and I did the hoods right before they went up in the stacker.
>
> Q: So physically, when you were doing those things, were you working in front of you or overhead or crawling into something?
>
> A: I was walking backwards checking the hoods, and also, I had to – well, I walked frontwards with the liftgate, because I couldn't do it any other way. And I tried to do the liftgates when they were done, because they're heavier, and it's harder to get the pull.
>
> Q: But you could test some of them if they were down?
>
> A: Yes.

During the deposition, Figg also provided a description of the one-armed duty she performed after her injury.

> Q: Did you go back to your job on one-armed duty?

> A: Yes, but I went to a different part of my job. One of the utilities actually did my job, because I wasn't able to do the pulls like I should have. So then I sort of like picked up. Like if a gun went down, you had to check the torque like on the gun with the engineers.
>
> So I was doing those. If somebody had a torque concern or something like that, I was helping them with those.
>
> Q: So rather than actually doing the testing with the torque guns, you were making sure that the torque guns were working properly?
>
> A: Yes.
>
> Q: Is that part of what you would normally do anyway?
>
> A: No.
>
> Q: That was a different job?
>
> A: Yes.
>
> Q: Was that a different regular job that somebody else had normally?
>
> A: Yes.
>
> Q: You were paid the same as you had been paid as a torque inspector?
>
> A: Yes.
>
> Q: How long did you do that job?
>
> A: Until I went out for surgery in March.

Figg elaborated further regarding her post-injury duties at the August 19, 2015, hearing:

Q: I just want a little bit of an idea of what you physically had to do on those jobs on a day-to-day basis.

A: Okay. On day shift, on the A crew, they have like a study team that goes around and studies the torques on the jobs, on the guns, because they're all electric guns, most of them are now, and they have a condenser and they have a reducer, and they actually fit into the guns.

I would actually – the guy, Bill, would actually fix the jobs and add these parts to the guns, and I would just sit down and write down everything that – you know, all the pulls and all the turns and everything that were coming. I just wrote stuff down on a piece of paper for him.

Q: Did you call it a study team that Bill headed?

A: Yes, it's on A crew.

Q: Is that study team something that's a permanent group or that still has a job or is still injured or is that kind of a special thing that only you were doing?

A: It's a special job set up on A crew because there were so many guns being moved around, and since this is model change time, even though it's – everybody knows how Ford works. Everybody's done in August and September on moving jobs around. And with the guns being moved around and everything, they all have to be reset, recalibrated, and go through the same procedure that they do when they first hang them.

Q: How many people are on this crew?

> A: There's actually two on day shift that's supposed to be doing this, and it's only supposed to have been done on day shift. So they move so many guns and all the jobs got moved around that they had extra work that had to be done, and that's why I was helping Bill with what he was doing.
>
> Q: So I know you said before this you didn't assume that this was bona fide work, but was this a position that somebody would have done if you weren't doing it?
>
> A: I imagine they – it would have [sic] harder for Bill to do it by himself, because I don't think they're able to do it by their self, but it's not something done every day.

In its petition for reconsideration, Ford requested additional findings of fact in accordance with the applicable case law which the ALJ declined to provide. On remand, the ALJ must analyze Figg's entitlement to TTD benefits during the period from September 21, 2014, through March 5, 2015, pursuant to the standard recited herein. Figg is only entitled to TTD benefits during the period she had not reached MMI and was not performing customary employment as defined in Trane Commercial Systems v. Tipton, supra. We express no opinion as to the result to be reached on remand.

Finally, we find no merit in Ford's argument the ALJ erred in enhancing Figg's PPD benefits by the three

multiplier. Ford concedes Figg cannot return to the job she was performing at the time of the injury. However, Ford argues Figg failed to establish she is earning less. That is not Figg's burden. Further, Figg was not required to prove a negative, i.e., that she did not return to work at a weekly wage greater or equal to her AWW at the time of injury. Figg established the three multiplier was applicable. If Ford desired an analysis pursuant to Fawbush v. Gwinn, supra, it had the burden of proving Figg had returned to work earning weekly wages equal to or greater than the average weekly wage ("AWW") she was earning at the time of the injury.

In the case *sub judice*, even though AWW was identified as a contested issue, neither party detected the ALJ's failure to calculate Figg's AWW in the September 28, 2015, Opinion, Award, and Order. The ALJ did not provide any finding as to the amount of Figg's AWW.[3] Ford did not address the ALJ's failure to determine Figg's AWW in its petition for reconsideration and Figg did not file a petition for reconsideration. In its petition for

[3] Instead of calculating Figg's AWW, the ALJ utilized the maximum amount for an award of PPD benefits for 2014 of $769.06 as set forth in the statute.

reconsideration concerning enhancement of the PPD benefits by the three multiplier, Ford merely stated the following:

> With regards [sic] to the 3 multiplier, the defendant would request reconsideration of this ALJ's finding that claimant has never returned to work earning the same or greater wages. In addition, the defendant would request that this ALJ provide additional findings with regards to the basis of this opinion.

A determination of whether KRS 342.730(1)(c)2 is applicable required an initial finding of Figg's AWW at the time of injury. Since the ALJ made no such finding and neither party brought this failure to the ALJ's attention, there could be no further analysis concerning the applicability of KRS 342.730(1)(c)2. Stated another way, since Figg's AWW was not determined, there could be no finding as to whether she returned to work at weekly wages greater than her AWW at the time of injury.

On April 30, 2015, Ford filed a "Notice to file a Wage Record" which included a printout of Figg's pre-injury wages spanning the period from September 26, 2013, through September 14, 2014. The filing also included a printout entitled "post-injury wage response report," spanning the period from September 14, 2014, through March 18, 2015. On August 25, 2015, Ford filed a Notice to File AWW-1 Pre-Injury Wage Certification. Consistent with its

calculations set forth in the AWW-1 attached to the pleading, Ford represented it gave "notice of stipulating to a pre-injury (AWW) of $1,508.52, sufficient for the maximum benefit for a 2014 injury." The two filings by Ford relating to Figg's wages do not on their face establish, as required by KRS 342.730(1)(c)1, that Figg "returned to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury."

To the extent Ford's petition for reconsideration could be deemed a request for additional findings as to whether Figg returned to work at a weekly wage greater than her AWW at the time of the injury, that determination could not be made because the ALJ failed to determine Figg's AWW. In Ford's brief to the ALJ regarding applicability of the two multiplier, it did not argue the record establishes Figg returned to work at a weekly wage equal to or greater than her AWW at the time of the injury. Rather, Ford's brief appears to mirror its brief on appeal. In its brief to the ALJ, Ford merely stated Figg had failed to meet her burden of proof that she is currently earning less. It went on to state that in order to complete the analysis of the three multiplier, the ALJ was to determine if the evidence indicates the claimant was unable to be able to continue earning a wage that equals or exceeds the wage at

the time of the injury for the indefinite future. Ford went on to address the third prong of the Fawbush analysis arguing there was no real evidence Figg was unable to continue earning the same or greater wages for the indefinite future. More importantly, Ford did not cite to Figg's post-injury wages, as reflected in its exhibit, in support of an argument that the two multiplier was applicable.

Since it was not established Figg returned to work earning a weekly wage equal to or greater than the AWW at the time of the injury, the ALJ was not required to conduct an analysis pursuant to Fawbush v. Gwinn, supra, as Ford suggests. The ALJ touched on this in his decision wherein he noted there was no evidence Figg had ever returned to work at equal or greater wages than on the date of the injury. That finding by the ALJ is supported by the record. Consequently, his further analysis implicating the third prong of the Fawbush inquiry was superfluous.

In summary, the parties agreed Figg did not retain the capacity to perform the job she was performing at the time of the injury; thus, the three multiplier was applicable. Since the ALJ failed to determine Figg's AWW and the printout of Figg's post-injury earning does not establish Figg returned to work at a weekly wage equal to

or greater than the AWW at the time of injury there is no proof in the record supporting a finding the two multiplier is applicable. Therefore, the ALJ was not required to engage in further analysis. Consequently, that portion of the ALJ's decision enhancing Figg's benefits pursuant to KRS 342.730(1)(c)1 must be affirmed.

Accordingly, that portion of the September 28, 2015, Opinion, Award, and Order awarding TTD benefits from September 21, 2014, to March 5, 2015, and the October 29, 2015, Order affirming the award are **VACATED**. The award of TTD benefits from March 6, 2015, through July 9, 2015, is **AFFIRMED** as there is no dispute regarding Figg's entitlement to the TTD benefits. Those portions of the September 28, 2015, Opinion, Award, and Order and the October 29, 2015, Order relating to enhancement of the PPD benefits pursuant to KRS 342.730(1)(c)1 are **AFFIRMED**. This claim is **REMANDED** for entry of an amended opinion and award determining Figg's entitlement to TTD benefits during the period from September 21, 2014, to March 5, 2015, in conformity with the views expressed herein.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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