

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 20, 2014

CLAIM NO. 201283691

FORD MOTOR COMPANY

PETITIONER

VS.

APPEAL FROM HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

ROSSIE J. HEAD
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
VACATING IN PART, AND REMANDING

* * * * *

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

ALVEY, Chairman. Ford Motor Company ("Ford"), appeals from the Opinion, Award and Order rendered February 6, 2014 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), and the order on reconsideration rendered March 4, 2014, awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical

benefits to Rossie J. Head ("Head") for injuries she sustained on February 20, 2012.

On appeal, Ford argues the ALJ erred in awarding TTD benefits at the rate of \$771.61 per week when the maximum TTD rate in effect at the time of injury was \$736.19 per week. Ford also argues the ALJ erred in awarding TTD benefits for the period of May 25, 2012 through July 25, 2012 because Head continued to work as an inspector during that period of time. Ford argues it is entitled to credit for money paid in lieu of TTD benefits. Ford also takes issue with the ALJ's statements concerning Head being required to report to work and sit in an empty room, and also his commentary regarding its business practices. Finally Ford argues there is no evidence establishing TTD benefits were denied without reasonable foundation, and any punitive award pursuant to KRS 342.040(1)(2) must be vacated. We affirm in part, reverse in part, vacate in part, and remand for further determination.

Head filed a Form 101 on June 20, 2013 alleging she injured her neck while manipulating a brake cable on February 20, 2012. At the time of the accident, she worked as an assembler at Ford.

Head testified by deposition on August 28, 2013, and at the hearing held November 20, 2013. She is a

resident of Louisville, and was born on April 8, 1966. She has a master's degree in healthcare administration, and vocational certifications as a CPT/medical coder, and in EKG's. Her work history prior to her employment at Ford consists of work in fast food restaurants, as an inspector in a pillow factory, and as a machine operator in a rubber manufacturing company.

In 1994, Head began working for Ford in Atlanta because it was a better paying job than her previous employment. Her first job with Ford was as a car radio antenna installer. Her next position there involved the installation of radio wiring, and she later installed moon roofs. Her last job in Atlanta was line relief. In 2006 she moved to Louisville when the Atlanta facility closed. She had no ongoing active problems with her neck or shoulder prior to February 20, 2012, and had never previously filed a workers' compensation claim. She stated she had undergone right carpal tunnel surgery in the distant past. Her first job in Louisville was as a mirror installer, and in February 2012, she installed cables for parking brakes. She stated she was working 50-55 hours per week, and earned \$28.70 per hour.

On February 20, 2012, she was pulling a cable and experienced a pop in her shoulder. She reported the

incident then went the Ford medical department. Heat was applied and she returned to her regular job. She initially experienced pain in her shoulder, but it later progressed to her neck. She was eventually referred to Dr. Gregory Rennirt who administered epidural blocks. When these provided no assistance, she was referred to Dr. Thomas Becherer who eventually performed cervical surgery on September 25, 2012. She missed no work after the date of the accident until the date of the surgery. She had a second surgery on April 19, 2013.

After the accident, Head continued to perform her regular job until May 25, 2012 when she was assigned to an inspector position. She continued to perform that job until July 27, 2012 when she was required to sit in a break room near gate six, where she performed no duties. She was paid her regular pay rate for forty hours per week which was fewer hours than she worked prior to the accident. Ford stipulated it paid TTD benefits from May 25, 2012 through July 27, 2012. Head testified she was paid TTD benefits from September 25, 2012, the date of surgery, through June 17, 2013, when she returned to work.

Head returned to light duty work on June 17, 2013 with restrictions of no overhead work, pushing, pulling, bending or twisting. The TTD benefits ended when she

returned to work. After she returned to work, she was paid her regular hourly rate for sitting in the cafeteria; however, she was only paid for a forty hour work week. She stated she has performed some limited clerical tasks while sitting in the cafeteria. At the time of the hearing, she continued her limited activities at her regular hourly pay rate.

She stated she has some limitation of her neck range of motion, more limited some days than others. She also complained of ongoing pain in her shoulders. She stated she has pain with turning her head, or attempting to lift her arms. She stated she could not return to installing brake cables due to her physical limitations. She provided Ford with a copy of the functional capacity evaluation ("FCE") report from Baptistworx. She stated she has been unable to obtain a position due in part to her preference to stay on day shift. She indicated she would be able to perform some inspection jobs, but none had been specifically offered, although she has been assured she will receive such a position. She stated inspector jobs paid a lower hourly rate than she earned at the time of the accident.

Head worked as an inspector from May 2012 until July 2012 when she was taken off that job due to medical

restrictions. She received TTD benefits from July 27, 2012 through September 25, 2012, the date of her first surgery. She continued to work during that period of time, but was paid for forty hours each week while sitting in the break room.

She stated Dr. Becherer advised her on August 12, 2013 she had reached maximum medical improvement ("MMI"). She stated her neck range of motion is limited, and she has pain in her neck and both shoulders. She stated she is unable to return to the job performed at the time of her injury due to her limitations.

In support of her claim, Head filed the May 9, 2013 report of Dr. Robert W. Byrd who examined her at her attorney's request. Dr. Byrd noted the February 20, 2012 date of injury. He stated her treatment consisted of Flexeril, physical therapy, epidural injections, chiropractic care, and anterior cervical discectomies at C4-C5 and C5-C6, with a fusion at C4-C6. At the time of her examination, she complained of left sided neck pain and left sided occipital headaches. He diagnosed her as status post cervical fusion, partial corpectomy from C4-C6, partial left laminectomy at C5-C6, and persistent cervical pain. He assessed a 28% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the

Evaluation of Permanent Impairment due to her work injuries.

He also assessed restrictions including no lifting over twenty-five pounds on a maximum occasional basis, and no lifting over ten pounds on a more frequent basis. He also limited her kneeling and crawling activities.

Head also filed the FCE report performed September 17, 2013 at Baptistworx at Dr. Becherer's request. That report reflects she can work in the light physical demand category with twenty to twenty-five pounds maximum lifting, and ten pounds frequent lifting. She is also limited to lifting no more than ten pounds over her shoulder, and five pounds frequently, with no continuous lifting.

Ford filed records from its Occupational Health and Information Management System for the time period of September 7, 1995 through June 8, 2013. Those notations appear to be a log of Head's medical history throughout her employment with Ford, and are not actual records from any physician. The log reflects previous problems with shoulder and neck pain in 1995, 1997, and 2004, but no difficulty between 2004 and the February 20, 2012 date of injury. The records indicate ongoing treatment for neck and shoulder complaints from the date of injury through June 28, 2013. Ford additionally filed actual medical records from various

providers documenting neck, shoulder and upper back pain from 1997 through 2000.

Regarding the February 20, 2012 injury, the Ford records log reflects the following:

Date	Summary
2/20/12	Dr. Raymond Hart, MD. (Ford medical department). Head complained of neck and right shoulder pain, but it appeared to be more trapezius than a true shoulder problem, due to pushing a parking brake cable through a hole. Heat was ordered, and she continued to work.
2/21/12	Dr. Hart, heat and PT. Head returned to work. Complaints of shoulder/neck pain. A knot is observed.
4/9/12	Dr. Hart saw her and referred her to Dr. Rennirt. Still had knot in trapezius.
4/13/12	Patient saw Dr. Rennirt on 4/13/12. He ordered Medrol dose pack and physical therapy. Dose pack didn't help.
4/18/12	Dr. Rennirt ordered an MRI. She is currently working without restrictions.
4/24/12	Dr. Rennirt diagnosed right shoulder/cervical pain and stated return to regular duty. She was referred to Dr. Becherer.
5/9/12	She saw Dr. Becherer who recommended continued physical therapy, but provided no order. She needs P.T. order. (no mention of work status)
5/17/12	Head has a pain management appointment for 5/21/12. (no mention of work status)
5/21/12	Head saw Dr. Geefarghese who ordered an epidural for 5/25/12. (no mention of work status)
5/30/12	One day medical leave approved for 5/25/12 injection. Employee not present 5/30/12
6/4/12	Head had an epidural then went on vacation. Next epidural 6/29/12.
6/29/12	Epidural injection. Off work until 7/9/12.
7/10/12	Presented paperwork for leave for epidural.
7/10/12	Pain management appointment scheduled for 9/27/2012. One day leave scheduled for 7/27/12

	for epidural.
7/30/12	Submitted paperwork for one day missed for epidural (7/27/12). Returned to work.
8/2/12	Increasing neck pain. Sees Dr. Becherer on Friday. Return to work pending follow up with Dr. Becherer
8/3/12	Continued pain. Given Ultram and Zanaflex. Placed on sit down duty until 8/13/12.
8/6/12	Medications are Tramadol and Zanaflex. Cannot perform the inspection job due to drowsy side effect. "Pt. walked out unhappy upon being informed that she is not to be sent home.
8/13/12	Head presented paperwork from Dr. Becherer appt. Still on sitting work only until surgery can be scheduled.
9/6/12	Head stated her restrictions had ended so her supervisor sent her to see Dr. Hart. Restrictions extended through 9/20 in anticipation of w/c approved surgery. Restricted to sit down duty.
9/17/12	Head checked on her restrictions. Sit down duty only extended.
9/18/12	Head advised of approval of surgery. Scheduled for pre-op on 9/19/12 and surgery 9/25/12
11/13/12	Visit with Dr. Becherer on 11/12/12. Return to work 12/10/12 with no rest.
12/20/12	Leave extended to 3/14/13.
1/17/13	Wants to see Dr. Hart because U/R determined additional surgery unnecessary
3/11/13	U/R approved additional surgery
6/7/13	Came to see Dr. Hart about RTW with restrictions.
6/14/13	Note from Commonwealth Neurosurgical, can RTW 6/17/13 on sit down duty for two months.

Ford also filed the records of Dr. Becherer for treatment provided between April 30, 2012 and July 23, 2013. Dr. Becherer's records are summarized as follows:

Date	Summary
4/30/12	Reported neck and right shoulder pain since 2/20/12. Head stated her life style not limited, but she avoids certain activities. She complained with range of motion of the right shoulder. She uses home traction. Referred her to pain management.
8/10/12	P.T. provided no relief. Medications include Prozac, Nexium, Tylenol, Flexeril and Metformin. Decreased range of motion of neck and right shoulder. Surgery recommended. Risks explained, and she wants to go through with surgery.
9/19/12	Neck and right shoulder symptoms persisted after physical therapy. Surgical options discussed. Will proceed with surgery.
9/26/12	Operative note.
11/8/12	X-rays. Normal appearance of cervical spine status post C4-C6 fusion
12/7/12	Complains of neck stiffness, pain in right shoulder, and tingling in left arm. Normal motor strength and sensation. Approval for MRI requested.
12/13/12	MRI report left-sided foraminal narrowing at C5-C6. Small left posterolateral disc extrusion at C5-C6.
12/20/12	Severe stenosis at C5-C6 contributes to her left side stenosis. It appears she needs a posterior decompression.
1/22/13	Nerve conduction study and EMG. Moderately severe right carpal tunnel syndrome. Mild cubital tunnel syndrome. May be compression at the clavicle or brachial plexus.
3/6/13	Needs surgery. Anticipates return to work in July.
3/29/13	Recommended posterior cervical decompression at C5-C6.
4/9/13	Surgery recommended.
4/9/13	Operative report
4/9/13	Post-op visit. Grip is strong.
4/21/13	Physical therapy three times per week.

6/11/13	Physical therapy recommended for three more weeks.
6/28/13	continue with restrictions of no lifting or carrying greater than 25 lbs.; No repetitive bending/twisting/stooping; No pushing over 25 lbs.; Avoid overhead activity.

On July 23, 2013, Dr. Becherer replied to an inquiry from Ford's attorney that he does not assess permanent functional impairment ratings until one year after surgery, but Head should avoid overhead activity. There was no filing of either the record from Dr. Becherer's June 14, 2013 office visit, or the August 12, 2013 office visit when he reportedly ordered the FCE.

A benefit review conference ("BRC") was held on November 5, 2013. The BRC order and memorandum reflects TTD benefits were paid from May 25, 2012 through July 27, 2012, and again from September 25, 2012 through June 12, 2013 at the rate of \$736.19. The issues preserved were Head's return to work, capacity to return to work, benefits per KRS 342.730, credit for wage, extent and duration and multipliers, and duration of TTD benefits. The Hearing was held on November 20, 2013.

In his decision rendered February 6, 2014, the ALJ found as follows:

**FINDINGS OF FACT,
AND CONCLUSIONS OF LAW**

1. Facts as stipulated by the parties and set out herein above.
2. Facts as set out in my analysis, as set out herein above.
3. I find that the Claimant, **ROSSIE J. HEAD** suffered a work-related injury on February 20, 2012, while in the employ of the Defendant/Employer, **FORD MOTOR COMPANY**. In making this finding, I have relied upon the opinion of Dr. Robert F. Byrd, M.D. to be the most credible and persuasive medical evidence as to the Plaintiff's impairment, and Plaintiff's testimony which, concerning the work causation of Plaintiff's injury, I find to be the most credible and convincing evidence in the record.
4. As a result of her February 20, 2012 work-related injury, the Plaintiff has a whole person impairment rating of 28% according to the *AMA Guides, 5th ed.* In making this finding, I have relied upon the opinion of Dr. Raymond F. Byrd which, concerning Plaintiff's functional impairment rating as a result of the subject injury, I find to be the most credible and convincing evidence in the record.
5. As opined by Dr. Byrd, physical therapist Craig Smith and as testified to by the Plaintiff, the Plaintiff does not retain the physical capacity to return to the type of work performed at the time of the injury. Further, Dr. Byrd and Mr. Smith recommended light-duty work restrictions. Even though Plaintiff is currently earning wages at the same hourly rate equal as she was at the time of the injury, as set out in the analysis herein above, it is my

opinion that likely she will be unable to do so in the long term, based upon the medical evidence in the record taken as a whole and Plaintiff's own testimony, which I find to be credible and persuasive and upon which I rely in making this finding.

6. The Plaintiff is therefore entitled to the statutory enhancement of a multiplier of 3 pursuant to KRS 342.730 (1) (c) 1.
7. Plaintiff entitled to a weekly benefit calculated at $66 \frac{2}{3}\% \times \$1,157.42 = \$771.61$. The maximum PPD Rate for a 2012 Work-Related Injury = \$736.19. Thus, $\$736.19 \times 28\%$ (percentage of impairment) $\times 1.35$ (grid factor) $\times 3.0$ (multiplier) = (max award) \$626.12/per week for 425 weeks.
8. Based upon the record taken as a whole, I find that the Plaintiff reached her level of maximum medical improvement (MMI) on June 17, 2013.
9. The Plaintiff was temporarily, totally disabled due to the effects of her work related injury from on May 25, 2012 until she reached maximum medical improvement and was released to full duty (with restrictions) by her treating physician on June 17, 2013. KRS 342.0011 (11) (a). E. & L. Transport v. Hayes, 341 S.W.2d 240 (Ky., 1906); Williams v. Eastern Coal Corp., 952 S.W.2d 696 (Ky., 1997).
10. The Defendant/Employer is entitled to a credit for any TTD paid to the Plaintiff during that period of time, but is not entitled to credit for wages paid because for the majority of the time Plaintiff did no work, and when she did, it was never her "customary work." KRS 342.730(2); Millersburg Military

Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008). Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000).

11. The denial of TTD to the Plaintiff by the Defendant-Employer was without reasonable foundation. KRS 342.040(2).
12. Based upon the evidence in the record as a whole, the Plaintiff was temporarily totally disabled from May 25, 2012 until she reached her MMI on June 17, 2013. She is entitled to temporary total disability payments for that period of time to be recovered from the Defendant/Employer at the rate of \$771.61 per week from May 25, 2012 through June 17, 2013. The Defendant/Employer is not entitled to credit for wages paid during that period.
13. As to future medical expenses, the Plaintiff should be entitled to the cost of reasonable and necessary treatment for the cure and relief of his work related injury.

Both Head and Ford filed petitions for reconsideration. Ford argued the ALJ erred in determining Head earned the same hourly wage rate as she did prior to the injury, but would be unable to do so into the long term. It next argued the ALJ erred in failing to perform an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Ford next requested the following:

Vacate the following inaccurate and false factual findings related to Ms. Head's testimony regarding job availability. The ALJ's following editorial comments regarding Ms. Head's

job duties during her time she was placed on light duty, paid full wages and benefits from Ford, and work in various assignments are not only false, but inappropriate.

Ford further stated, "the ALJ's derogatory language regarding the perceived business practices of Ford is patently objectionable and Ford requests that the following quotations [sic] retracted from the Opinion and Order." Ford also took offense with the ALJ's characterization Head was placed in a room doing essentially nothing while on light duty. Ford also pointed out the ALJ utilized the wrong TTD rate in awarding benefits which was in excess of the maximum benefit applicable at the time. Finally, Ford argued the ALJ's determination it unreasonably denied TTD benefits per KRS 342.040(2) was in error.

Head argued the ALJ erred in stating she was currently earning the same or greater wages. She noted she was earning the same hourly rate, but her wages were lower because she worked fewer hours. Finally, she argued the ALJ erred in failing to award attorney fees despite finding Ford's denial of TTD benefits was unreasonable pursuant to KRS 342.040(2).

In an order issued March 4, 2014, the ALJ reiterated an analysis pursuant to Fawbush, supra, was

unnecessary because he had determined although Head earned the same hourly rate, she did not work as many hours and was earning less than she did prior to her injury. The ALJ further stated he did not intend to insult Ford, or make inflammatory comments, but his findings were based upon his understanding of the facts. He denied both petitions for reconsideration.

Since Head was successful before the ALJ regarding the award of TTD benefits, the question on appeal is whether his determination is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson

v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We first note MMI is a term which refers to the time at which the worker's medical condition has stabilized so that any remaining physical impairment and occupational disability can be viewed as being permanent. Clemco Fabricators v. Becker, 62 S.W.3d 396, 397-98 (Ky. 2001).

See also Pierson v. Lexington Public Library, 987 S.W.2d 316, 319 (Ky. 1999).

Temporary total disability is defined as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement permitting a return to employment. KRS 342.0011(11)(a). The above definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Both prongs of the test in W.L. Harper Const. Co., Inc. v. Baker, supra, must be satisfied before TTD benefits may be awarded. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Court further explained 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." In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

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

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement **and** not have improved enough to return to work.

. . . .

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

Id. at 580-581.

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

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment.

. . . .

Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

It is undisputed Head was entitled to TTD benefits from September 25, 2012, the date of her surgery, through June 17, 2013 when she returned to light duty work, and we affirm the ALJ's award of TTD benefits during that time period. Likewise, it is undisputed Head continued to work her regular job for a period of time after the date of the accident. At some point afterward, she was moved to an inspector position, and finally, according to Head's

testimony, she was paid her regular hourly rate to sit in a break room prior to her surgery. Ford apparently paid TTD benefits at the maximum rate from May 25, 2012 through July 27, 2012, although there does not appear to be medical evidence of record explaining why these benefits were paid. The ALJ later awarded TTD benefits from May 25, 2012 through June 17, 2013 at the rate of \$771.61 which is in excess of \$736.19 per week which was the maximum TTD benefit rate in effect on the date of the injury.

Because it is unclear why the ALJ awarded TTD benefits for the period of May 25, 2012 through September 24, 2012, and it does not appear this determination was supported by substantial evidence, the award of such benefits during that time period is vacated. On remand, the ALJ must determine the appropriate period(s) of TTD benefits based upon the evidence. He may award benefits during that time period, if it is supported by the evidence. Any determination of TTD benefits must also include a determination of whether Head is entitled to any period of TTD benefits subsequent to June 17, 2013. The ALJ shall provide the basis for his determination. Because we vacate the ALJ's determination regarding this period of TTD benefits, we likewise vacate his determination Ford denied TTD benefits without reasonable foundation pursuant to KRS

342.040(2). We further direct the ALJ to amend his award of TTD benefits to reflect the benefit rate is \$736.19 per week rather than \$771.61 per week.

Next, it is unclear why the ALJ chose June 17, 2013 as the date Head reached MMI. Therefore, we vacate his determination Head reached MMI on that date. It is noted Dr. Byrd assessed his impairment rating on May 9, 2013. It is further noted that although referenced by the parties, Dr. Becherer's office note of June 14, 2013 which allowed Head to return to work with restrictions, is not in evidence. Head returned to light duty work which she testified consisted of primarily sitting in the cafeteria performing some clerical tasks. She testified at her deposition as follows:

Q. Has Doctor Becherer seen you since he released you to go to work on June 17th?

A. Yes.

Q. When's the last time that he saw you?

A. August 12th.

Q. What did he do for you on that day? Did he examine you?

A. Yes.

Q. Did he tell you how you were doing?

A. Yes.

Q. What did he say?

A. I'm at the best that I'm going to be.

Q. He said you're at maximum medical improvement?

A. Yes.

Q. Did he release you from his care at that time?

A. I don't know. I don't think so.

Q. Did he tell you just to come back if you needed to see him?

A. Yes.

Q. There's no scheduled appointment with him in the future?

A. I do go back. That's after I have the F . . .

Q. The FCE?

A. FC - - yes.

Q. Functional capacity evaluation?

A. Yes.

Q. Is Doctor Becherer setting up a functional capacity evaluation?

A. Yes.

Q. When is that going to be done?

A. September 17th.

Unfortunately the evidence does not contain either Dr. Becherer's office note from August 12, 2013, or any subsequent office note. The FCE report dated September 17, 2013 was filed of record. Based upon the foregoing, the ALJ's determination of the date of MMI is vacated. On remand, the ALJ shall determine the date Head reached MMI, and shall provide the basis for his determination.

Regarding Ford's argument it should be afforded credit payments paid in lieu of TTD benefits, we note Head continued to report to work at Ford through September 24, 2012, and subsequent to June 17, 2013. She was paid for her time there, no matter the job performed. There is no evidence Head received any benefits in lieu of TTD benefits. In fact she was required to be at work every day for which she received hourly pay. Ford's argument it should be provided a credit pursuant to Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008) is misplaced.

An employer is entitled to a dollar-for-dollar credit for any voluntary payment of past-due income benefits, so long as the claimant's future benefits are not affected. Triangle Insulation & Sheet Metal Co., Div. of Triangle Enter., Inc. v. Stratemeyer, 782 S.W. 2d 628 (Ky. 1990). In some situations, an employer may choose to continue to pay an employee's regular wages or salary during

a period of TTD when the employee is not reporting to work. Such salary or wage "continuation" can be construed as a voluntary payment of past income benefits if it is determined the payments were made in lieu of income benefits. See e.g. CPC Commodities, LLC v. Poland, WCB 201082823 (February 22, 2013). See also Larson, Larson Workers' Compensation Law, Chapter 82 (2006)(noting an employer may be permitted to receive credit for post-injury wages if the facts indicate that it intended to pay them in lieu of compensation).

In Millersburg Military Institute v. Puckett, supra, the claimant suffered a work-related injury to his back. During a period of TTD, he nonetheless returned to his position as a maintenance worker at light duty. The Kentucky Supreme Court determined the employer was not entitled to a credit for the wages paid during claimant's period of TTD. The Court stated, "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." Id. at 342.

In this instance, Head continued to work, and continued to receive her regular hourly pay. Ford failed to prove these were not *bona fide* wages, and did not produce

any documentation wherein Head agreed she was receiving those payments in lieu of TTD benefits. It is unnecessary to remand this issue to the ALJ because we determine, as a matter of law, the wages paid to Head were *bona fide* wages, for which Ford is not entitled to credit.

Next, the ALJ awarded PPD benefits commencing following the award of TTD benefits. KRS 342.285(2)(c) provides the Board may determine on appeal whether an order, decision, or award is in conformity to the provisions of KRS Chapter 342. KRS 342.285(3) provides, in relevant part, the Board may, "in its discretion," remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." These provisions permit the Board to *sua sponte* reach issues even if unpreserved in order to properly apply the law. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

Although not raised in this appeal, it is clear the ALJ erred in determining the PPD benefits award would commence after the TTD period, despite the injury occurring on February 20, 2013. Pursuant to Sweasy v. Wal-Mart Stores, Inc. #1269, 295 S.W.3d 835 (Ky. 2009), and KRS 342.730(1)(d), PPD benefits are to be paid from the date the impairment rises, which is when the work-related injury produces a harmful change in the human organism.

In Sweasy, the Kentucky Supreme Court held:

This appeal concerns KRS 342.730(1)(d), which provides compensable periods of 425 weeks for disability ratings of 50% or less and of 520 weeks for disability ratings that exceed 50%. KRS 342.730(1)(d)'s failure to specify when the period of a 425-week award begins may be read to imply legislative intent to permit such an award to begin on a date other than when the permanent impairment or disability of 50% or less arises. Yet, mindful of policy and purpose for which KRS 342.730(1)(b)-(e) were enacted, we conclude that the legislature intended no such absurdity. Neither the Court of Appeals nor the employer points to a reasonable basis for an ALJ to commence benefits on a date other than the date that the permanent impairment or disability arises. Perceiving there to be no reasonable basis, we turn to the question of when permanent impairment or disability arises for the purpose of commencing partial disability benefits.

A condition "arises" when it comes into being, begins, or originates. Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's Guides to the Evaluation of Permanent Impairment consider the amount of impairment that remains at MMI to be "permanent." The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. We conclude, therefore, that the

compensable period for partial disability begins on the date that impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration.

The evidence compelled a finding that the claimant's injury produced permanent impairment and disability from the outset. Thus, it also compelled a partial disability award in which the compensable period began on the date of injury. The claim must be remanded for that purpose.

Sweasy, 840, 841 (footnotes omitted).

Based upon the foregoing, it was error for the ALJ to determine the 425 week payment period of PPD benefits began after the termination of TTD benefits. No period of latency as discussed in Sweasy is present here. Head continued to work after the date of injury. There was a delay in the onset of TTD benefits. Although she clearly worked for a period of time after her injury during which she continued to perform her job when no TTD benefits were payable, it cannot be said Head had any delay in the onset of her disability. While we affirm the ALJ's award of PPD benefits based upon a 28% impairment rating enhanced by the three multiplier pursuant to KRS 342.730(1), we reverse his determination of the appropriate PPD onset date. On remand, the ALJ shall order the compensable period began

commensurate with the February 20, 2012 injury, extended by periods of TTD benefits pursuant to KRS 342.730(1).

Finally, Ford argues the ALJ's comments regarding Head's job activities, and Ford's business practices should be vacated. It is noted the ALJ's summary of Head's work activities while in the break room and in the cafeteria are supported by her testimony. Ford did not offer any evidence or witnesses in rebuttal. It is also noted in his order on reconsideration, the ALJ specifically stated he did not intentionally insult Ford, and his comments were based upon the evidence of record. We do not find the ALJ made gratuitous or offending comments directed toward Ford. The ALJ's determinations regarding Head's job activities are supported by Head's testimony and will not be disturbed.

Accordingly, the opinion, award and order rendered February 6, 2014 and the March 4, 2014 order on reconsideration by Hon. Steven G. Bolton, Administrative Law Judge, are **AFFIRMED IN PART, REVERSED IN PART, and VACATED IN PART**. This claim is **REMANDED** for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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