# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: June 3, 2016**

CLAIM NO. 201378332

FORD MOTOR CO (LAP) PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

SHAWN MILLIRON
HON. OTTO D. WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

SHAWN MILLIRON PETITIONER

VS.

FORD MOTOR CO
HON. OTTO D. WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING IN PART**
**VACATING IN PART**
**AND REMANDING**
* * * * * *

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

**RECHTER, Member.** Ford Motor Company ("Ford") appeals, and Shawn Milliron ("Milliron") cross-appeals, from the April 27, 2015 Opinion, Order and Award and the June 18, 2015 Order on Petition for Reconsideration entered by Hon. Otto D. Wolff, IV, Administrative Law Judge ("ALJ"). The ALJ awarded Milliron temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a work-related cervical spine injury. On appeal, Ford challenges the impairment rating assigned to Milliron's injury and argues the medical opinion relied upon by the ALJ does not constitute substantial evidence. It furthers argues the evidence does not support an award of TTD benefits. On cross-appeal, Milliron argues the evidence compels the imposition of a safety penalty and an award of permanent total disability ("PTD") benefits. For the reasons set forth herein, we affirm in part, vacate in part and remand.

Milliron began working for Ford on the assembly line in 1992 at a production plant in Minnesota. He sustained a work-related neck injury in 1997. As a result of this injury, he underwent a laminectomy in 1999 and a cervical fusion in 2001. Following the second surgery, Milliron's treating surgeon, Dr. Sunny Kim, assigned an

impairment rating of 23.5%, though this rating was not based on the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Milliron filed a workers' compensation claim in Minnesota, which was settled based on a 24% impairment rating.

Milliron was able to return to full-duty work with no restrictions after the second surgery. However, he testified he continued to experience mild pain in his neck. By 2012, he had completely weaned from any narcotic pain medication and treated his pain only with Ibuprofen and Tylenol, which was effective. Between 2002 and 2012, he also received regular chiropractic treatment and injections.

When the Minnesota plant closed in 2011, Milliron transferred to Kentucky. On May 7, 2013, he was attempting to release a part off the rack. The pins were stuck, so he yanked harder on the cable. He felt a popping sensation and immediate pain in his neck.

Milliron first treated at Ford's in-house medical facility with physical therapy, and was placed on light duty. He was referred to Dr. Matthew Phillips, an orthopedic surgeon. Dr. Phillips treated Milliron on

twelve occasions, then referred him to Dr. Gary Reasor, an anesthesiologist and pain management specialist.

Dr. Reasor ordered a cervical MRI which was conducted on March 21, 2014. His impression was multiple level degenerative changes with worsening of stenotic lesions at the C3-4 level. The reviewing radiologist compared the study to an MRI conducted on May 9, 2013, just after Milliron's injury. He recommended referral to a neurosurgeon. If surgery was not recommended, then Dr. Reasor would place Milliron at maximum medical improvement ("MMI") as of April 24, 2014.

Milliron then visited Dr. Kimathi Doss, a neurosurgeon who ordered a myelogram. Dr. Doss recommended against surgical intervention. Milliron returned to Dr. Reasor and attempted a spinal cord stimulator trial, which was unsuccessful. In a July 24, 2014 letter, Dr. Reasor listed Milliron's current diagnosis as cervical spinal stenosis, cerclagia, and cervical radiculopathy. He currently prescribes oral pain medications to control Milliron's symptoms.

Following the May 7, 2013 injury, Milliron was placed on light duty. He testified that he simply sat at a table during this period of light duty from May 7, 2012 to

June 19, 2013. He was then taken off work and was paid TTD benefits from June 20, 2013 through April 20, 2014. On April 21, 2014, he returned to a temporary position looking for chips and scratches on finished vehicles. After several additional days of being off work, Milliron returned to work from July 1, 2014 through December 6, 2014. He was then put off work due to a lack of positions within his restrictions.

Milliron testified he currently experiences significant pain in his cervical spine on a daily basis along with frequent, intense headaches. It interferes with his sleep and his ability to perform tasks around the home. He takes four prescription medications a day to control the pain. He is currently restricted from overhead work, vibratory tools, repetitive movement of the neck, bending, and lifting over ten pounds. Milliron testified his restrictions effectively preclude any work on Ford's assembly line.

Milliron filed an independent medical evaluation ("IME") report by Dr. Warren Bilkey. Dr. Bilkey evaluated Milliron on December 1, 2014 and reviewed his medical records. He diagnosed a cervical strain on May 7, 2013 superimposed on a prior history of C4-5 decompression and

fusion surgery. He noted Milliron's chronic neck pain and headaches. He attributed all of these diagnoses to the 2013 work injury.

Dr. Bilkey assigned a 28% impairment rating for Milliron's cervical condition pursuant to the AMA Guides. He acknowledged a portion of the current impairment is attributable to Milliron's 1997 injury, but expressed difficulty in determining the exact percentage because Dr. Kim's impairment rating was not assessed pursuant to the AMA Guides. Noting the AMA Guides do not dictate a particular result under these circumstances, Dr. Bilkey concluded the "most reasonable medically common sense method" is to apportion a third of the current impairment to the 2013 work injury. As such, he assigned a 9% impairment rating to Milliron's 2013 cervical injury.

Dr. John Guarnashelli also conducted an IME on August 22, 2013. Dr. Guarnaschelli concluded Milliron's 2013 injury is primarily a soft tissue injury superimposed on his previous cervical condition. As of August 22, 2013, he did not believe Milliron was at MMI.

Dr. Timir Banerjee conducted an IME on January 7, 2015. Dr. Banerjee concluded Milliron's 2013 injury was merely a temporary aggravation of a pre-existing active

condition. As such, he assigned no impairment rating for the 2013 injury. In addition, Dr. Banerjee considered Dr. Bilkey's report and found insufficient reasoning to apportion a third of the current impairment to the 2013 injury.

Because Milliron alleged a workplace safety violation, additional proof was admitted concerning the rack he was working with when he was injured in 2013. Milliron testified he had complained several times to his supervisors that the rack was sticking, and it required forceful yanking to remove items. Lisa Odom, a team manager at Milliron's workplace, confirmed the rack was sticking but had no knowledge of other injuries caused by this problem. She was aware complaints had been made about the rack, but did not know whether Milliron had made any of the complaints.

The ALJ concluded the 2013 injury aggravated Milliron's cervical condition, resulting in a permanent injury. He then considered the impairment ratings presented by Drs. Banerjee and Bilkey, noting the difficulty presented by the fact Milliron's prior impairment was not assessed pursuant to the AMA Guides. The ALJ aptly characterized Dr. Banerjee as "throw[ing] up

his arms in bafflement when attempting" to make an apportionment determination. Being more persuaded by Dr. Bilkey's rationale, the ALJ adopted a 9% impairment rating.

The ALJ awarded TTD benefits from June 20, 2013 through December 1, 2014, the date Dr. Bilkey concluded Miliron was at MMI. Additionally, the ALJ rejected Milliron's claim of a safety violation. Acknowledging Milliron may have complained about the sticking problem prior to his accident, the ALJ characterized the issue as a "production nuisance" rather than a safety hazard. The ALJ did not believe the condition of the rack would be reasonably likely to cause serious physical harm.

Both parties petitioned for reconsideration. Ford challenged the ALJ's method of apportionment and the determined date of MMI. Milliron requested an analysis as to whether he is permanently totally disabled, and a revision of the award of TTD and PPD benefits to commence on the date of injury. Milliron requested reconsideration of an award of a safety penalty.

In the Order on Reconsideration, the ALJ acknowledged the original opinion failed to address the issue of PTD. Relying on the factors enunciated in Ira A. Watson Department Store v. Hamilton, 34 S.W.2d 48 (Ky.

2000), the ALJ concluded Milliron is not permanently totally disabled. He next revised the award of TTD benefits, noting the evidence established Milliron simply sat in a break room from the date of injury to June 20, 2013. Citing Magellan Behavioral Health v. Helm, 140 S.W.3d 357 (Ky. 2004), the ALJ concluded this activity does not constitute a return to work. Thus, the award of TTD and PPD benefits was amended to commence on May 7, 2013. Finally, the ALJ declined to revise his opinion as to the issues of apportionment or the safety penalty.

Both Ford and Milliron appealed. This Board placed the appeal in abeyance pending a decision by the Kentucky Supreme Court in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). After rendition of the Tipton case, the parties submitted supplemental briefs and this appeal is now ripe for review.

On appeal, Ford first challenges the ALJ's adoption of Dr. Bilkey's impairment rating, arguing the rating was not assessed in conformity with the AMA Guides. Dr. Bilkey assessed a 28% current impairment rating, but expressed difficulty in determining what percentage should be apportioned to Milliron's prior condition. The AMA Guides require that the pre-existing impairment rating be

subtracted from the present impairment rating. However, the only impairment rating for Milliron's pre-existing condition was assessed by Dr. Kim, and was not done in conformity with the AMA Guides.

We find no error in the ALJ's reliance on Dr. Bilkey's opinion. Contrary to Ford's assertions, the AMA Guides do not specifically address how to apportion a pre-existing condition when the prior impairment rating was not assessed in conformity with the Guides. The proper interpretation of the AMA Guides is a medical question left to medical experts. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). Dr. Bilkey acknowledged the AMA Guides do not provide guidance in this situation and assigned an impairment rating for Milliron's prior condition, which he subtracted from the current impairment rating. He offered a reasonable explanation for the basis of his ultimate conclusion. Accordingly, his opinion constitutes substantial evidence upon which the ALJ was free to rely. Tokico (USA), Inc. v. Kelly, 281 S.W.3d 771 (Ky. 2009).

Ford next argues the award of TTD benefits is unsupported by substantial evidence. Milliron was injured on May 7, 2013. He was taken off work on June 20, 2013

through April 20, 2014. He then returned to work at light duty from April 21, 2014 through June 9, 2014 in the "chip and scratch" department.

From June 10, 2014 through July 1, 2014, Milliron received periods of TTD benefits, though some were interrupted. Ford's Louisville facility shut down for vacation for one week in July, 2014. Between July 1, 2014 and December 6, 2014, Milliron worked approximately one and a half months "coning stock." Dr. Bilkey placed Milliron at MMI as of December 1, 2014, which the ALJ accepted. The ALJ awarded TTD benefits from May 7, 2013 through December 1, 2014.

On appeal, Ford challenges the award of TTD benefits during the periods Milliron was in the "chip and scratch department" and when he worked one and a half months "coning stock." 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. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), 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." To be entitled to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury.

In Tipton, the Supreme Court recently clarified when TTD is appropriate in cases where the employee returns to modified duty. The Court stated:

> As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take

> into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

The ALJ did not undertake an analysis of Milliron's light duty work during the two contested time periods. As such, we must remand this claim to the ALJ to determine whether Milliron's light duty work constituted a return to customary employment, as described by the Supreme Court in Tipton.

Ford also challenges the ALJ's adoption of Dr. Bilkey's date of MMI, December 1, 2014. In his report, Dr. Bilkey stated Milliron had reached MMI as of his evaluation, but offered no exact date MMI was initially attained. Ford argues December 1, 2014 is simply "an arbitrary date on which Milliron was scheduled to see Dr. Bilkey and not a reflection of when he truly reached MMI."

We find no error in the ALJ's reliance upon Dr. Bilkey's date of MMI. Determining the date upon which a patient's condition has stabilized is not an exact science, and will necessarily depend, to a certain extent, on the date the patient is actually seen by the physician to make this determination. Dr. Bilkey, relying upon his expertise and experience as a physician, determined Milliron was at

MMI as of the date of his examination. If Ford wished to undermine the reliability of this opinion, it might have deposed Dr. Bilkey. The determination of the date of MMI is a factual issue for the ALJ, and Dr. Bilkey's opinion constitutes substantial evidence upon which the ALJ was free to rely. W.L. Harper Construction Co., Inc. v. Baker, 858 S.W.2d 202 (Ky. 1993).

In his cross-appeal, Milliron argues the evidence compelled imposition of a safety penalty. KRS 342.165(1) allows an ALJ to increase the income benefits of a claimant if the accident was caused "in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to the installation or maintenance of safety appliances or methods."

Milliron testified some of the racks worked improperly, and it was difficult to pull the release cable to access the racks. He also stated he notified foremen and supervisors about the bad racks, which he encountered on a weekly basis. Ms. Odom acknowledged there had been some issues with the racks not opening easily, a problem which was resolved after Milliron's injury. She also

stated workers were told to notify a supervisor if the rack was sticking, and refrain from attempting to open the rack alone. In such instances, the supervisor would coat the rack with a lubricant.

Milliron bore the burden of proving Ford intentionally violated a specific safety statute or regulation which contributed to his injury. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997). Here, because Milliron did not identify a specific safety statute or regulation pertaining to the racks, he relied upon the general safety statute found at KRS 338.031(1)(a). That statute requires the employer to furnish every employee a workplace "free from recognized hazards that are causing or likely to cause death or serious physical harm."

The ALJ determined the problem with the racks sticking constituted a "production nuisance" rather than a safety hazard. He noted the type of injury sustained by Milliron could have been caused by any piece of equipment that required pulling or tugging, and is not reasonably foreseeable that it would result in serious physical harm. As such, he declined to impose a safety penalty.

Upon review of the totality of the relevant proof, the ALJ's conclusion is reasonable. The problem identified by Milliron does not rise to the level of egregious disregard for safety concepts identified in Apex Mining v. Blakenship, 918 S.W.2d 225 (Ky. 1996). The ALJ's conclusion is affirmed.

Milliron next argues the evidence compelled a finding he is permanently totally disabled. Permanent total disability is the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. KRS 342.0011(11)(c). In considering whether a worker is permanently totally disabled, the ALJ must make an individualized determination based on the worker's age, education level, vocational skills, post-injury medical restrictions and the likelihood the worker can return to work under normal employment conditions. Ira A. Watson Dep't Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Milliron bore the burden of proving he is permanently totally disabled. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unable to establish PTD, the question on appeal is whether the

evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

In considering the severity of Milliron's disability, the ALJ noted his relatively young age of 41 as of the date of the final hearing and his 12th grade education. The ALJ also emphasized Milliron's vocational experience, which included three years as a union committeeman and four years as a union representative, in addition to physical labor with Ford. His experience as a union committeeman and representative included the use of a computer, participating in negotiations, and managing other employees. Milliron's physical restrictions were considered as well, which restrict him from overhead work, use of vibratory tools, and lifting over five to ten pounds. The ALJ ultimately determined Milliron's relatively young age, transferable vocational skills and education would permit a return to work.

We do not believe the evidence compels a different result. While Milliron has identified certain factors which would indicate he is permanently totally disabled, other factors indicate a different result. The ALJ, in his discretion, weighed these factors and reached a reasonable conclusion under the circumstances, based on

substantial evidence in the record. We are without authority to direct a contrary result. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

Finally, Milliron asserts his award of PPD benefits should commence on the date of his injury. Milliron is correct that the date of commencement of PPD benefits begins on the date of injury. Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009). Therefore, it is erroneous to commence Milliron's award of PPD benefits on June 20, 2013, and this error should be corrected on remand.

Accordingly, the April 27, 2015 Opinion, Order and Award and the June 18, 2015 Order on Petition for Reconsideration entered by Hon. Otto D. Wolfe, Administrative Law Judge, are hereby **AFFIRMED IN PART**, **VACATED IN PART**, and **REMANDED**. The award of TTD benefits is vacated and this claim is remanded for further analysis of Milliron's entitlement to TTD benefits. That portion of the Order commencing PPD benefits on June 20, 2013 is also vacated and remanded for entry of a new award commencing on the date of Milliron's injury.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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