

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: August 7, 2015

CLAIM NO. 201289364

HARRY HAUBER, III

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

THE KROGER COMPANY and  
HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART,  
VACATING IN PART & REMANDING

\* \* \* \* \*

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

**ALVEY, Chairman.** Harry Hauber III ("Hauber") appeals from the Opinion and Award rendered March 30, 2015 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits from March 31, 2012 through July 31, 2012, permanent partial disability ("PPD") benefits, and medical benefits for a

lumbar injury occurring on March 31, 2012 while working at The Kroger Company ("Kroger"). Hauber also seeks review of the May 3, 2015 order denying his petition for reconsideration.

On appeal, Hauber argues he is entitled to an additional period of TTD benefits from August 1, 2012, the date he returned to light duty work, through the day his treating physician found he attained maximum medical improvement ("MMI") on May 13, 2014. Because substantial evidence supports the ALJ's determination regarding entitlement to TTD benefits, and a contrary result is not compelled, we affirm in part. However, we vacate and remand to correct the commencement date of the PPD benefits in accordance with Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009).

Hauber filed a Form 101 alleging he injured his back when lifting stock on March 31, 2012 while he was working as a stock clerk for Kroger. The Form 104 Employment History indicates Hauber has worked for Kroger since June 1975.

A benefit review conference ("BRC") was held January 15, 2015. The January 15, 2015 BRC order reflects the parties stipulated Hauber sustained an alleged injury on March 31, 2012, and Kroger paid TTD benefits from April 1,

2012 through July 31, 2012, as well as medical expenses. The parties also stipulated Hauber returned to work on August 1, 2012. The parties identified the following as contested issues: average weekly wage, physical capacity to return to work, benefits per KRS 342.730, credit for wages earned, exclusion for pre-existing disability/impairment and TTD (rate and duration).

Hauber testified by deposition on October 21, 2014 and at the final hearing held January 27, 2015. Hauber was born September 27, 1955, and resides in Louisville, Kentucky. He has worked for Kroger for approximately thirty-nine years. At the time of the accident, he was working approximately sixty hours a week.

Hauber worked the evening shift at the time of his injury. He unloaded pallets of product from trailers using a power jack and moved them to the floor. Hauber separated items for stocking at various locations in the store. Prior to his injury, the heaviest product Hauber lifted was bleach weighing approximately sixty pounds. Hauber also stocked groceries which required bending, kneeling, reaching, and awkward body positioning. Hauber was considered a "fast stocker," and was placed in the more difficult aisles since he could stock approximately seventy-seven cases per hour. Hauber also performed general cleaning tasks.

On March 31, 2012, Hauber testified he was unloading a truck. He picked up a case, carried it to a cart, and then bent over. When he did this, he experienced sharp pain in his lower back and his left leg "went totally numb." Hauber went to the emergency room at Baptist East Hospital the same day, and learned he had a herniated disc. Subsequently, he visited his family physician, who referred him to Dr. Joseph Werner of Louisville Bone and Joint Specialists. Hauber stated he had previously treated with physicians at Louisville Bone and Joint Specialists for unrelated conditions. Hauber was prescribed medication, received three injections and had three sessions of physical therapy. Hauber was off work until August 1, 2012, when he returned to light duty. Dr. Werner restricted Hauber from lifting over ten pounds, working over twenty-five to thirty hours a week, and from repetitive overhead or below the waist work.

At his deposition, Hauber stated he is not lifting over ten pounds, and avoids overhead work by either using a stepladder or not doing the task at all. He "very seldom" engages in work below waist level. He continues to use the power jack, green u-boats, brown trucks, hand jacks and bass carts. Hauber stated he works six days a week. Hauber

provided similar testimony at the hearing, stating as follows:

Q: So, what are you doing now?

A: Now, they - - I'm on light duty, less than ten pounds. So, they gave me chips. So, I'm putting up bags of chips. But, I also come in at ten-thirty because I have experience. They let me use the power jack on the concrete floor to pull product out, which I couldn't - - which I wouldn't be able to do - - some of it I couldn't do now.

Q: Does the power jack involve any heavy lifting on your part?

A: No, a power jack - - you turn the handle and it will go - - it goes by itself.

Q: All right - - so what is the heaviest thing you lift now?

A: Possibly a half a flat that weighs maybe a - - maybe, at the most, maybe, fifteen pounds.

Q: All right - - do you have to do the same kind of reaching and crawling and that kind of thing?

A: Seldom - - seldom - - I do have to get on the top shelf, but I have to step on a stepladder to reach the top shelf. There's only - - roughly, in chips, between attrition and that, I only get - -like, maybe ten cases a night I have to do on the bottom. So, I'm on knees - - where I have to block the bottom, I'm probably only on them - - doing it about, maybe, fifteen minutes a night where before I was doing hours.

. . .

Q: How - - what changed when you went back, after you were off for your injury?

A: Well, first of all, I was told I couldn't come in at eight o'clock anymore because I couldn't do my normal jobs that I worked before. Secondly, I was - - I had to watch my - - watch my restrictions. They wouldn't tell me to do things that were against it, but they would tell me that I would have to figure out how to get it done.

Q: Did you take more breaks?

A: Yes, I took - - I take -- I take a break about every hour and fifteen minutes, for ten to fifteen minutes at a time.

Q: And has that changed your work at all?

A: Probably I achieve less than what I did before. Before I was over in vegetables or paper or whatever, and I would do it myself. I would have three hundred - - two hundred to three hundred and fifty cases, myself, to work. Of course, I was a processor. So, I would process a thousand - - two thousand cases, off and on, and then I would go out and stock three - - two hundred or three hundred cases also.

On cross-examination, Hauber confirmed he is still able to transport material with the power jack and agreed he is doing light stocking. When asked what types of things he was doing when he returned to work, Hauber stated, "Well, I was still what they consider light duty. I was filling

displays and fixing them, at first. And they would find something, such as, paper or bags and wraps, which way (sic) less than ten pounds, and have me do them." Hauber agreed his job duties upon return were "[a]ll jobs that somebody at the store would have to do." At the deposition and hearing, Hauber stated he now works fifty to over sixty hours per week despite the twenty-five to thirty hour work week limitation imposed by Dr. Werner. Hauber explained he was told he would be considered a part-time employee, and therefore would lose his health insurance offered by Kroger, if he worked twenty-five to thirty hours a week. Hauber stated he had to work "whatever Kroger told me I had to work."

Hauber experiences constant low back pain, and numbness and tingling in his legs. He wears a back brace to work, and takes over the counter medication to help manage his symptoms. He has not been prescribed medication for his low back since 2012. Hauber indicated he experiences symptoms after standing for approximately an hour. He occasionally needs assistance, particularly in stocking, and is less productive.

Hauber testified at the time of his March 31, 2012 injury, he also refereed part-time, earning a set fee per game. Hauber testified he continues to referee sporting

events approximately three or four games per week which is less than he did before his injury.

Hauber filed the treatment records of Dr. Werner, which span from November 1998 to May 2014. Hauber was placed on light duty and attended physical therapy for neck pain in late 1998. He returned on three occasions in 2003 complaining of low back pain radiating into his hips following a work accident at Kroger. Hauber was prescribed medication and physical therapy, and restricted to light duty. Hauber returned in July 2006 after falling from a ladder at work injuring his right shoulder. He also complained of right lower extremity radiating pain. Hauber continued to treat afterward with Dr. Werner, primarily his right shoulder, which required surgery. Dr. Werner also diagnosed Hauber with resolving sciatica, ordered a lumbar MRI, and recommended physical therapy. Hauber last treated with Dr. Werner in August 2007 prior to the March 31, 2012 work accident. Hauber returned to Dr. Werner on April 18, 2012 complaining of low back pain radiating into his right leg and foot following a lifting incident at Kroger on March 31, 2012. Dr. Werner diagnosed lumbar radiculopathy and lumbar back pain. He ordered a lumbar MRI, a series of three epidural steroid injections, and physical therapy. Dr. Werner restricted Hauber from work. Pursuant to the

BRC, the parties stipulated Hauber returned to work on August 1, 2012. The records reflect Dr. Werner released Hauber to light duty, restricting him from lifting over ten pounds; no repetitive bending, twisting, or stopping; alternate between sitting and standing; and limiting his work week to thirty-five hours. During the course of treatment through May 2014, Hauber's complaints and light duty restrictions remained unchanged. On the last visit on record, May 13, 2014, Dr. Werner noted the following:

No change. Has good strength on exam, but still having sensations of pain radiating into the leg and a bit of swelling there when he works. I think he is maximally improved. We will come up with some final restrictions. I will see him back as needed. He will continue to work in a light capacity described above.

In support of his claim, Hauber filed the October 21, 2013 report of Dr. Ellen Ballard. She diagnosed Hauber with low back pain with degenerative disc disease, and bilateral leg pain and numbness. Dr. Ballard assessed a 7% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Ballard found no active impairment prior to his work injury, and that he attained MMI on October 21, 2013. Dr. Ballard opined Hauber does not retain the physical capacity to return to his job at Kroger.

She restricted him from lifting no more than twenty-five pounds and no constant, repetitive bending and stooping.

Kroger filed the reports of Dr. Michael Best, who evaluated Hauber on July 18, 2012 and again on August 4, 2014. In the July 18, 2012 report, after reviewing Hauber's medical records and performing an evaluation, Dr. Best agreed he should undergo a third epidural steroid injection recommended by Dr. Werner, as well as physical therapy. Dr. Best re-examined Hauber, and a functional capacity evaluation was done in August 2014. Ultimately, Dr. Best recommended a repeat lumbar MRI to determine if Hauber indeed sustained a L5-S1 disc herniation. In a letter dated October 9, 2014, Dr. Best noted the new September 12, 2014 MRI demonstrated a disc protrusion unchanged from previous exam at L4-5, and a disc protrusion effacing the fat surrounding the existing L5 nerve roots. Dr. Best agreed with Dr. Werner that Hauber attained MMI on May 13, 2014. Dr. Best assessed an 8% impairment rating pursuant to the AMA Guides, apportioning 5% to a prior condition and 3% to the March 31, 2012 work injury. Dr. Best declined to assign permanent restrictions.

In the March 30, 2015 opinion, the ALJ summarized the lay and medical evidence. The ALJ found Hauber's pre-injury average weekly wage was \$1,068.44. The ALJ ultimately

found Hauber did not suffer from an active impairment prior to the March 31, 2012 injury based upon Hauber's testimony, Dr. Ballard's opinion and the break of treatment reflected in the records of Dr. Werner prior to the March 31, 2012 work injury. The ALJ determined Hauber sustained a 7% impairment rating as a result of the March 31, 2012 work injury based upon Dr. Ballard's opinion. After determining both the three and two multipliers pursuant to KRS 342.730(1)(c) 1 and 2 apply, the ALJ engaged in an analysis pursuant to Fawbush v. Gwinn, 107 S.W.3d 5 (2003). The ALJ ultimately found the three multiplier more appropriate, based upon the report of Dr. Ballard, the restrictions imposed by Dr. Werner, and the testimony of Hauber. The ALJ found Hauber entitled to TTD benefits from March 31, 2012 through July 31, 2012, stating as follows:

22. Per the above finding, the Plaintiff's average weekly wage is \$1068.44, which yields a temporary total disability rate of \$712.29.

23. Temporary total disability means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment...KRS 342.0011(11)(a)

24. There are numerous dates upon which the medical providers that have seen this Plaintiff have opined that he reached maximum medical improvement. The ALJ is most persuaded however by the

opinion of Dr. Werner who took the most conservative approach and who saw the Plaintiff more often than any other physician going back to 1998.

25. Dr. Werner has convinced the ALJ that the Plaintiff reached maximum medical improvement on May 13, 2014. The Defendant/Employer argues that the Plaintiff returned to meaningful work as of August 1, 2012, and as such the Plaintiff is not entitled to temporary total disability benefits thereafter. It is undisputed that the Plaintiff returned to light duty work and that rather than stock the heavy items that he was required to lift at the time of his injury, he returned to stocking chips and other items that do not weigh as much. The Plaintiff also testified that he made increased use of the pallet jacks available to him and that he is the only employee that stocks shelves for the Defendant who is considered to be on light duty.

26. The Kentucky Court of Appeals in *Bowerman v. Black Equipment Co.*, 297 SW3d 858, has articulated that an employee who has returned to work but has not reached maximum medical improvement may still receive temporary total disability benefits if it remains true that he could not return to the type of work he performed when injured or to other customary work. The ALJ finds that the Plaintiff returned to work stocking shelves for the Defendant, which is the exact activity that he was performing when injured, albeit with items weighing less. The ALJ therefore finds that the Plaintiff was no longer entitled to temporary total disability benefits as of the date of the return to stocking shelves for the Defendant, July 31, 2012.

The ALJ awarded Hauber TTD benefits from March 31, 2012 through July 31, 2012, "and thereafter the sum of \$111.70 per week commencing on August 1, 2012, and continuing for a period not to exceed 425 weeks together with interest at the rate of 12% per annum on all past due and unpaid installments of such compensation." The ALJ awarded Kroger a credit for any payment of TTD benefits already made. The ALJ also awarded medical benefits.

Hauber filed a petition for reconsideration raising the same argument he now makes on appeal. In denying his petition on May 3, 2015, the ALJ made the following additional finding of fact: "The ALJ finds that the Plaintiff returned to work that was customary on July 31, 2012, and as a result TTD was properly terminated as of that date per the finding in *Bowerman v. Black Equipment Co.*, 297 SW3d 858."

On appeal, Hauber argues he is entitled to additional TTD benefits during the time he was working light duty, but had not reached MMI, from August 1, 2012 through May 13, 2014. He points to his testimony reflecting he unloaded the truck and stocked shelves prior to his injury, and lifted approximately fifty pounds on a nightly basis. He also notes he was assigned to the more difficult aisles, and stocked up to seventy cases an hour. Since his return

to work on light duty, Hauber is limited to lifting ten pounds, can only stock light product, and seldom engages in reaching, crawling, and overhead work like he used to. He continues to work outside the hourly restrictions imposed by Dr. Werner to maintain his full-time employment status.

Hauber argues his situation is more similar to the factual situation in Heaven Hill Distilleries, Inc. v. Lawson, No. 2008-CA-001041 (Ky. App. 2008)(unpublished), arguing he is no longer able to stock heavier groceries, or perform previous duties involving reaching, crawling and overhead work. In a similar vein, Hauber argues the ALJ's finding he returned to the "exact activity" he performed prior to his work injury is erroneous and also inconsistent with his previous finding he does not retain the ability to return to the same type of work at the time he was injured. Hauber also argues his case is similar to the factual scenarios found in the trio of recent Kentucky Court of Appeals cases, all rendered not to be published: Nesco Resource v. Michael Arnold, 2013-CA-001098 (rendered March 13, 2015), Sonia S. Mull v. Zappos.Com, Inc., 2013-CA-001320-WC (rendered July 11, 2014); and Delena Tipton v. Trane Commercial Systems, 2014-CA-00626 (rendered August 22, 2014). Although Hauber can perform some of his pre-injury duties, he is restricted from performing "a great number of

his previous duties." Hauber also argues it is not logical or consistent to find he was able to return to his past work during the pre-MMI period, but was conversely found unable to return to past work after the MMI date, particularly when there was no evidence the work was performed differently during these two periods. Furthermore, Dr. Werner's work restrictions did not change during the two periods in question.

As the claimant in a workers' compensation proceeding, Hauber had the burden of proving each of the essential elements of his cause of action, including entitlement to TTD benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Hauber was unsuccessful in that burden, 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). "Compelling evidence" is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable based on the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the

ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

As both this Board and Kentucky Court of Appeals have noted, "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). This 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,

"[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 notj 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. (Emphasis added)

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.

In Bowerman v. Black Equipment, 297 S.W.3d 858, 874 (Ky. App. 2009), the Court of Appeals stated:

Thus, as defined by the statute, there are two requirements for an award of TTD benefits: first, the worker must not have reached MMI; and, second, the worker must not have reached a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. Absent either

requirement, a worker is not entitled to TTD benefits. Furthermore, pursuant to the construction assigned under *Wise*, KRS 342.0011(11)(a) takes into account two distinct realities: first, even if a worker has not reached MMI, temporary disability can no longer be characterized as total if the worker is able to return to the type of work performed when injured or to other customary work; and, second, where a worker has not reached MMI, a release to perform minimal work does not constitute "a level of improvement that would permit a return to employment" for purposes of KRS 342.0011(11)(a).

Based upon the above standards, we find in the case *sub judice* substantial evidence supports the ALJ's determination Hauber had returned to customary work on August 1, 2012, and was therefore not entitled to TTD benefits during the time he returned to work prior to attaining MMI, and no contrary result is compelled.

The parties stipulated Hauber returned to work on August 1, 2012 and the parties do not dispute May 13, 2014 as the date of MMI. Therefore, the question on appeal is whether the evidence compels a finding Hauber did not return to the type of work performed when injured or to other customary work. See Central Kentucky Steel v. Wise, *supra*, and Bowerman v. Black Equipment, *supra*. We find it does not.

The ALJ relied upon Hauber's testimony in determining he was not entitled to TTD benefits after the August 1, 2012 return to work. The ALJ noted Hauber returned to stocking, but was assigned to lighter products such as chips. The ALJ also noted Hauber uses the power jack. After reviewing the holding of Bowerman v. Black Equipment, supra, the ALJ concluded Hauber returned to stocking shelves, "which is the exact activity that he was performing when injured, albeit with items weighing less," and therefore not entitled to TTD benefits after his return to work. The ALJ reiterated his determination in the Order denying Hauber's petition, finding he "returned to work that was customary on July 31, 2012, and as a result TTD was properly terminated as of that date per the finding in *Bowerman v. Black Equipment Co.*, 297 SW3d 858."

Following a review of testimony by Hauber, we find substantial evidence supports the ALJ's determination, and no contrary result is compelled. The records of Dr. Werner and the testimony of Hauber are consistent regarding the restrictions assigned when he returned to work for Kroger: no lifting over ten pounds; no repetitive bending, twisting, or stopping; alternate between sitting and standing; and limited to a thirty-five hour work week.

Hauber testified he no longer lifts over ten or fifteen pounds, avoids overhead work by either using a stepladder or not doing the task at all, and very seldom performs work below the waist. He is not as productive as he used to be, and has to take more breaks. He also indicated the time he reports to work has changed as well.

However, Hauber stated he continues to use the power jack, green u-boats, brown trucks, hand jacks and bass carts. At the hearing, Hauber indicated he stocks lighter products, such as snack chips. He uses the power jack to pull product out, and stated it does not involve any heavy lifting. Hauber also explained he seldom reaches or crawls on his knees. On cross-examination at the hearing, Hauber confirmed he is still able to transport material with the power jack and agreed he is doing light stocking. Hauber agreed his job duties upon return were "[a]ll jobs that somebody at the store would have to do."

In light of the above testimony, we find substantial evidence supports the ALJ's determination Hauber returned to work that was customary. Although Hauber's testimony establishes he could not return to all his former duties, the ALJ could reasonably conclude from the evidence he had returned to the type of work he was performing when injured or to other customary work. Hauber's ability to

identify portions of his testimony which is contrary to the ALJ's determination is not adequate to require reversal on appeal.

We are cognizant of the three recent decisions of the Kentucky Court of Appeals, Sonia S. Mull v. Zappos.Com, Inc., 2013-CA-001320-WC (rendered July 11, 2014); Delena Tipton v. Trane Commercial Systems, 2014-CA-00626 (rendered August 22, 2014); and Nesco Resource v. Michael Arnold, 2013-CA-001098 (rendered March 13, 2015), all designated not to be published. In each of these cases, the injured worker was awarded TTD benefits during a time period when they were on light duty, and could perform some, but not all of their customary pre-injury job duties. However, none of the above cases are authoritative, and two are pending before the Kentucky Supreme Court.

That said, this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). The award of PPD benefits must begin on March 31, 2012, the date of the injury, to be interrupted by any periods TTD benefits are paid. See Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009). The ALJ began his award of PPD benefits on

August 1, 2012, the day after TTD benefits ended on July 31, 2012. This is incorrect.

Therefore, the March 30, 2015 Opinion and Award and the May 3, 2015 Order on petition for reconsideration by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART** and **REMANDED** to correct the commencement date of the PPD benefits to March 31, 2012 in the award, to be interrupted by any periods TTD benefits are paid.

ALL CONCUR.

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