

OPINION ENTERED: June 21, 2013

CLAIM NO. 200778410

HEATHER KENNEDY

PETITIONER

VS.

APPEAL FROM HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

RGIS INVENTORY
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART
AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. RGIS Inventory ("RGIS") seeks review of the opinion, award and order rendered December 17, 2012 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), awarding Heather Kennedy ("Kennedy") temporary total disability ("TTD") benefits from August 25, 2007 through

January 7, 2011, permanent partial disability ("PPD") benefits increased by the three multiplier and medical expenses for neck and bilateral shoulder injuries sustained in a work-related motor vehicle accident ("MVA") on August 24, 2007. RGIS also appeals from the order overruling and denying its petition for reconsideration entered February 8, 2013.

On appeal, RGIS argues the ALJ erred in awarding TTD benefits through January 7, 2011 since the "uncontradicted" medical evidence establishes Kennedy reached maximum medical improvement ("MMI") on March 15, 2010. RGIS also argues the ALJ erred by enhancing Kennedy's benefits by the three multiplier pursuant to KRS 342.730(1)(c)1. Because substantial evidence exists supporting the ALJ's enhancement of Kennedy's award by the three multiplier, but the ALJ did not perform the proper analysis in determining the appropriate period of TTD benefits, we affirm in part, vacate in part and remand.

Kennedy filed a Form 101 alleging bilateral shoulder and neck injuries caused by a work-related MVA on August 24, 2007. Kennedy indicated she was employed as a counter and team leader for RGIS at the time the MVA.

Kennedy testified by deposition on January 4, 2012 and at the final hearing held October 17, 2012. Kennedy, a

resident of Somerset, Kentucky, was born on September 22, 1971 and has an Associate's degree in art. Her work history includes work as a sorter, research analysis, tax preparer, receptionist, staff aide and health aide. Kennedy began working for RGIS in September 2006. RGIS contracts with various stores to perform external inventory counts. On August 24, 2007, Kennedy was traveling from the Lexington office when she was struck by another vehicle, and has not returned to work since.

Following the MVA, Kennedy was taken to the Rockcastle County Hospital emergency room. Kennedy has also treated with Drs. Patrick Jenkins, Magdy El-Kalliny, Harold Rutledge, Cole, and Ben Kibler for her injuries. Kennedy testified Dr. Kibler performed a scapular muscle reattachment procedure and released her to return to work with restrictions in February 2011. Kennedy continues to treat on a monthly basis with Dr. Rickey Kinzey who prescribes Soma, Oxycodone, Phenergan, Neurontin, Ambien, and Ibuprofen to manage her pain. Kennedy testified she received approximately \$21,000.00 in a third-party civil action stemming from the August 2007 MVA.

Kennedy testified regarding the requirements of her job as a counter. She and her team would go into various stores and scan the barcode on each product with a

laser weighing two to three pounds which was connected to a machine hanging on her right hip. Kennedy testified she was required to reach products on low shelves. She used stepladders to reach products on higher shelves, and was required to do a lot of overhead work. She occasionally moved heavy merchandise and reached overhead to pull products forward to scan barcodes. Some merchandise weighed fifty pounds or greater. She moved building materials at Lowes, including wood, tile pieces and molding. She lifted boxes of clothes, pots, and pans. She was also a team leader which required her to monitor and direct approximately six other employees. Kennedy stated she was also required to input data into the machines. She also loaded and unloaded equipment from a van. Kennedy testified she cannot return to her job at RGIS due to pain in her neck and shoulders, and cannot handle the weight of the laser and machine.

She agreed it was the responsibility of the contracting stores to ensure products were readily accessible and RGIS's compensation depended upon how quickly the inventory counts were completed. Kennedy neither recalled being offered a job by RGIS in August 2010, nor responding she wanted to stay within a certain distance from

home. Kennedy insists light duty work was unavailable at RGIS.

Melinda Cuevas ("Cuevas"), the district manager for RGIS since 2001, testified by deposition on March 13, 2012. Cuevas testified RGIS is an inventory service performing physical inventory primarily to retail customers. RGIS is compensated based on speed, and it is the customer's responsibility to expose the barcodes. She stated RGIS uses a handheld machine to count products. Barcodes can either be scanned or the product information can be keyed in. Cuevas stated the handheld machine resembles the size of a television remote control, but is slightly heavier.

Cuevas testified she did not work with Kennedy who she confirmed was employed by RGIS as a counter and team leader. Cuevas stated inventory can be completed with one arm. Cuevas testified when she performed inventory, she rarely performed overhead work or was required to lift anything weighing in excess of thirty pounds. Assuming Kennedy was restricted from overhead work and lifting over twenty pounds, Cuevas testified she would be able to perform the job held prior to the MVA. Cuevas also stated RGIS could accommodate Kennedy's restrictions with the assistance of other employees. Cuevas testified Kennedy told her she

wanted to stay closer to home when she was offered a job in August 2010.

RGIS attached a job description to its Form 111 denying Kennedy's claim which states team members are required to physically count inventory and enter information into RGIS equipment for various retailers. The description further indicates items to be counted may be "located on the floor, tables, or shelves at various heights. Items are generally counted on the shelves, but may be moved if required." The document listed in part the following physical requirements: prolonged standing with occasional walking; repetitive motions requiring use of wrist, hands and fingers; low level positions: squatting, kneeling and crouching; use of ladders and step stools up to eight steps high; balancing when counting stock from ladder; and able to lift and carry items up to twenty pounds.

In support of her claim, Kennedy attached Dr. Harold Rutledge's June 25, 2008 treatment note. He diagnosed severe pain in the neck consistent with that arising at the C4-5, C5-6 and C6-7 facet, from the myofacial structures, or from an annular tear at C4-5 and/or C5-6. He recommended referral to a pain psychologist and prescribed medication.

RGIS filed the treatment records of Drs. Patrick Jenkins and Kibler. On October 15, 2007, Dr. Jenkins noted an MRI demonstrated a protruding disc at C4-5 with an annular tear, some cord flattening and lateral recess narrowing. He referred Kennedy to Dr. El-Kalliny and released her to use a laptop, but restricted her from lifting and tugging.

Dr. Kibler treated Kennedy from January 19, 2009 through March 15, 2010 for her shoulder injury stemming from the MVA. On January 19, 2009, Dr. Kibler diagnosed a scapular muscle injury to the left shoulder. After conservative treatment failed to improve Kennedy's condition, Dr. Kibler diagnosed scapular muscle detachment of the left shoulder, and performed a scapular muscle reattachment on April 28, 2009. Dr. Kibler noted improvement in the left shoulder, but increased symptoms in her right shoulder. On October 29, 2009, Dr. Kibler noted Kennedy complained of tenderness along the scapular border of the right shoulder, and in the posterior deltoid area. On January 14, 2010, Dr. Kibler noted improvement in Kennedy's left arm and her primary problems were in "her neck and her right medial scapular border." He noted nerve blocks would be appropriate for her neck and recommended

patches, massage and therapy for her right shoulder. On March 15, 2010, Dr. Kibler stated as follows:

HISTORY: The patient returns today. She is doing well. I think she has reached MMI as far as the left shoulder is concerned. She still has a little bit of soreness around the scapular area, but I think this will continue to improve as she gets the series of injections for the C4-5 area.

ASSESSMENT/RECOMMENDATIONS: I would recommend that she have these done. I think this would give her the best chance of improving, as far as the left shoulder. I would put her on specific limitations of no repetitive overhead lifting and no lifting more than 25 pounds. Hopefully this would be improved as she would get better from the neck problems. She will return to see me on an as-needed basis.

Kennedy submitted Dr. Gregory Snider's August 19, 2011 report. Dr. Snider noted the MVA, and diagnosed chronic cervical strain and status post left scapular muscle reattachment. He stated Kennedy reached MMI on March 15, 2010. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, ("AMA Guides"), Dr. Snider assessed a 5% impairment rating for Kennedy's cervical condition and a 4% impairment rating for her shoulder condition, yielding a combined 9% impairment rating. Dr. Snider opined Kennedy could return to work as an on-site inventory team leader only with

accommodations. He agreed with restrictions of no lifting over twenty-five pounds and no repetitive overhead lifting. He recommended office visits two to three times per year, and the use of narcotics on an as-needed basis. He stated Ibuprofen, Neurontin, Ambien and TENS unit are reasonable, and he found no indication for any additional surgeries or injections.

Kennedy filed the January 9, 2012 Form 107-I report prepared by Dr. James Owen, who examined her on January 4, 2012. Dr. Owen also testified by deposition on March 22, 2011. He diagnosed persistent neck pain associated with definite dysmetria and muscle spasm; persistent pain in the scapula on the left side at the area of prior scapular reattachment surgery with mild diminished range of motion of the left shoulder; and persistent tenderness and pain of the right shoulder which has not been worked up. He found Kennedy's injuries are the cause of her complaints and stated she had reached MMI. Pursuant to the AMA Guides, Dr. Owen assigned a 7% impairment rating for her neck condition, 1% impairment rating for her upper extremity condition and an additional 2% impairment rating for her pain, yielding a combined value of 10%. Dr. Owen opined Kennedy did not retain the physical capacity to return to the type of work performed at the time of injury. He

restricted Kennedy from lifting over ten pounds, and she should avoid repetitive activity and no over the shoulder activity.

At his deposition, Dr. Owen reviewed his January 9, 2012 report. He confirmed the 7% impairment rating for the neck, and 2% impairment for pain, but corrected the upper extremity impairment rating to 2%. Dr. Owen testified he assigned an additional 2% impairment rating for pain because he understood Kennedy was an auditor or inventory specialist at the time of her injury requiring the ability to lift repetitively stock weighing thirty to forty pounds. He testified Kennedy would be able to perform this job in her current condition if she was not required to lift anything over her shoulders and only had to lift a few light items. Dr. Owen testified Kennedy could return to some type of sedentary position.

RGIS submitted Dr. Ellen Ballard's June 9, 2010 report. Dr. Ballard stated she reviewed several diagnostic studies including an October 11, 2007 cervical spine MRI, as well as a functional capacity evaluation. She also reviewed urine drug screens performed on June 25, 2008 and November 20, 2008, both showing no evidence of opioids present, indicating noncompliance with her medications. Dr. Ballard concluded Kennedy had reached MMI and declined to recommend

further treatment. Pursuant to the AMA Guides, she assigned an 8% impairment rating for Kennedy's cervical condition and restricted her to a twenty pound weight limit, with no overhead lifting.

RGIS also submitted Dr. Daniel Primm's January 13, 2012 report. Dr. Primm diagnosed cervical strain by history; left posterior shoulder girdle strain with trapezius muscle tear; and status post repair of trapezius muscle tear of left shoulder with excellent clinical results, all of which related to the August 2007 MVA. He also diagnosed an unrelated history of cannabis addiction and benzodiazepine abuse. Dr. Primm could not attribute her present subjective complaints to the accident based upon the objective findings. Dr. Primm stated Kennedy had reached MMI and required no further treatment. He assessed a 2% impairment rating pursuant to the AMA Guides. He stated Kennedy could return to work with the following restrictions: avoid frequent/repetitive above-shoulder work with the left arm and agreed with Dr. Kibler that twenty to twenty-five pounds lifting limit above shoulder level with that arm is reasonable.

RIGS filed the May 28, 2010 functional capacity evaluation report prepared by Mr. Rick Pounds, M.S., RCEP, FABDA. Mr. Pounds concluded Kennedy met or exceeded all

maximum requirements for work at the "light PDL," with most of her performances into the "medium and heavy PDL."

Both parties submitted medical evidence regarding Kennedy's alleged psychological condition.¹ However, we will not further summarize this evidence since it does not pertain to this appeal.

In the December 17, 2012 Opinion, Award and Order, the ALJ noted the parties stipulated at the hearing TTD benefits were paid by RGIS at the rate of \$126.02 per week from August 25, 2007 to January 7, 2011. It was also stipulated RGIS paid an additional lump sum for past due TTD benefits and/or interest on March 1, 2012 in the amount of \$5,100.24. The parties further agreed Kennedy's average weekly wage at the time of the injury was \$309.16. The ALJ made the following findings of fact and conclusions of law regarding extent and duration of Kennedy's physical injuries:

The claimant alleges entitlement to permanent disability benefits as a result of physical injuries sustained within the areas of her neck and bilateral shoulders resulting from a work-related automobile collision which occurred on August 24, 2007. Plaintiff

¹ Kennedy filed the March 14, 2012 neurocognitive screening report, the May 15, 2012 addendum and Form 107 report, and an undated addendum by Dr. Christopher Allen. He also testified by deposition on August 29, 2012. RGIS filed the October 10, 2008 psychiatric report by Dr. Douglas Ruth and the May 27, 2012 psychiatric report of Dr. Andrew Cooley. Dr. Cooley also testified by deposition on September 14, 2012.

has further asserted that she is entitled to additional benefits due to the psychological aspect of her claim.

The ALJ does hereby find that claimant received physical injuries of a permanent nature as a result of the automobile accident. It is further found that claimant has a permanent impairment of 9% to the body as a whole based on the AMA Guidelines, Fifth Edition. This finding is supported by the findings and opinions of Dr. Gregory T. Snyder[sic], who examined Ms. Kennedy on August 19, 2011. Dr. Snyder's[sic] opinion of a 9% impairment contrasted very little with Dr. Owen's impairment rating of 10% and Dr. Ellen Ballard's impairment rating of 8%. Dr. Primm's opinion of 2% permanent impairment to the body as a whole was also considered, but is rejected by the ALJ.

The ALJ then found Kennedy did not sustain permanent impairment due to her alleged psychological condition, relying upon the opinions of Drs. Cooley and Ruth. With regard to the application of multipliers, the ALJ found as follows:

The next major question involves plaintiff's entitlement to the statutory multiplier of 3x pursuant to KRS 342.730(1)(c). Pursuant to Subsection 1 of the statute, the claimant is entitled to a multiplier of 3x if she does not retain the physical capacity to return to and perform the requirements of the job which she was doing at the time of her injury. Much testimony, argument and discussion had throughout the record of this claim focus[sic] on the amount of lifting and

the amount of overhead use of her arms required by the job which Ms. Kennedy was performing. Her position as an inventory auditor or counter required her to use a scanner to read the barcodes of every item of inventory located on the shelves of the customers of RGIS, including such places as Lowes, K-mart, Napa, and The Gap. The evidence is not consistent as to the amount of physical force required to perform the work. The Defendant paints a picture of simply directing the scanner at the barcodes of items of inventory, all of which are easy to access and which almost never requires[sic] the employee to handle the items being inventoried. On the other hand, the claimant describes the job position as being one which required her to get down on the floor to inventory items on the bottom shelf, climb ladders to inventory items on higher shelves, to move and lift boxes of inventory and related objects so as to gain access to other items located behind those items located in front. Ms. Kennedy stated that she often had to slide boxes weighing as much as 50 pounds. She generally described the job as "very physical."

As noted in the summary of evidence above, the physical injuries sustained by Ms. Kennedy eventually required surgery by Dr. Ben Kibler who diagnosed a scapular muscle injury. On April 28, 2009, Dr. Kibler performed a scapular muscle reattachment. During the procedure, he noted that the trapezius was completely detached over a large portion of the spine and only very tenuous attachment distally. Dr. Kibler opined Ms. Kennedy should restrict her physical activities to no repetitive overhead lifting and no lifting of more than 25 pounds.

After carefully considering and weighing the testimony of the pertinent witnesses and the arguments of counsel, the ALJ finds that claimant is entitled to the multiplier of 3x. The restrictions against lifting over 25 pounds and against working overhead constitute substantial impediments which preclude her from her previous work. The ALJ finds that the 2x multiplier contained in KRS 342.730(1)(c)2 is not applicable, because the plaintiff did not return to her former work at the same or greater wages.

The ALJ stated as follows regarding TTD benefits:

Arguments persist that claimant was inappropriately paid temporary total disability benefits and that such failure on the part of the defendant-employer warrants sanctions, including 18% interest as a penalty. Based on the stipulated average weekly wage of \$309.16, the correct amount of temporary total disability payment is \$206.11 per week. The ALJ finds no evidence which would cause a finding as to duration any different from the period for which claimant has already been paid, that is, August 25, 2007 to January 7, 2011. However, the amount of weekly benefits paid of just \$126.02 constitutes a considerable under payment[sic]. Even with the additional lump sum paid on March 1, 2012 in the amount of \$5,100.24, an under payment[sic] of TTD benefits has still occurred. However, the ALJ does not find that the under payment[sic] was intentional or without reasonable foundation. The Defendant-Employer exhibited good faith in paying TTD benefits for such a long period of time and also when it came forth with the lump sum payment. The ALJ does not

find that objection was made to the amount of the lump sum payment at the time it was made or that defendant-employer knew or should have known of the remaining under payment. Thus, the plaintiff's claim for sanctions, including interest at the rate of 18%, should be denied and overruled.

The ALJ determined RGIS is not entitled to a credit for Kennedy's recovery from the third party action. The ALJ found as follows regarding total occupational disability and vocational rehabilitation benefits:

The remaining claims to be discussed are plaintiff's claim for total occupational disability, for vocational rehabilitation benefits pursuant to KRS 342.710, and the plaintiff's claim to unpaid and contested medical expenses. First, with respect to plaintiff's claim for total occupational disability benefits, this claim is not supported by substantial evidence. Ms. Kennedy is only 41 years of age and has a college Associates degree. Ms. Kennedy is very intelligent. Her scores on tests administered by Dr. Cooley placed her in the superior and/or outstanding range. Dr. Cooley opined that Ms. Kennedy is very employable. Having reviewed and considered the criteria as set forth in KRS 342.730; Osborne v. Johnson, 432 S.W.2d 800 (Ky. App. 1968); Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (2001); and McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (2001), the ALJ concludes there are a variety of work opportunities available which Ms. Kennedy could perform. Further, the severity of her permanent physical impairment is not so great as

to preclude her from employment. With respect to her claim for vocational rehabilitation, the ALJ notes that she already has a two-year college degree. She was underemployed while working at RGIS, LLC, for just \$309.16 per week. The Plaintiff's education constitutes previous training which would enable her to obtain suitable job placement. Accordingly, her claim for vocational rehabilitation should be and hereby is denied.

The ALJ awarded TTD benefits from August 25, 2007 through January 7, 2011 at the rate of \$206.11 per week and determined RGIS is entitled to a credit for any TTD benefits paid. He awarded PPD benefits based upon a 9% impairment rating increased by the three multiplier. Finally, he awarded medical expenses, but excluded any future treatment or medical expenses relative for the alleged psychological injury.

RGIS filed a petition for reconsideration asserting the same arguments it now makes on appeal. In the February 8, 2013 order overruling and denying its petition, the ALJ stated as follows:

The Defendant employer has raised two primary arguments. First, Defendant employer argues that both Dr. Snider and Dr. Kibler found Plaintiff to have reached [MMI] as of March 25, 2010. The ALJ has awarded [TTD] benefits for the period of time actually paid by the Defendant, from August 25, 2007 through January 7, 2011. As the Plaintiff pointed out in her response to the

Defendant's Petition for Reconsideration, Dr. Kibler found only that the Plaintiff's shoulder was [sic] MMI as of March 15, 2010. However, Dr. Kibler noted that Claimant still had soreness around the scapular area, which he thought would continue to improve with a series of injections in the C4-C5 area. Dr. Kibler recommended such injections be performed. Thus, the Defendant's argument that no contradictory evidence exists is inaccurate.

Secondly, the Defendant argues against the application of the 3X multiplier. However, in reviewing the opinion previously entered herein, the ALJ finds ample consideration and explanation of the finding of the appropriateness of the 3X multiplier.

On appeal, RGIS argues the ALJ erred in awarding TTD benefits through January 7, 2011. Citing to Tokico (USA), Inc. v. Kelly, 281 S.W.3d 771 (Ky. 2009), it asserts Dr. Kibler's recommendations of the need for additional medical treatment does not preclude a finding Kennedy had attained MMI. It asserts "the medical evidence is uncontradicted that the claimant reached [MMI] on March 15, 2010." It states the ALJ's conclusion is not based upon any evidence in the record.

RGIS also argues the ALJ erred in awarding the three multiplier pursuant to KRS 342.730(1)(c)1. RGIS cites Adkins v. Pike County Board of Education, 141 S.W.3d 387

(Ky. App. 2004), in noting situations where a claimant returns to a different position earning the same or greater income. RGIS states the focus is whether the injury has permanently altered the worker's ability to earn an income, not whether the claimant has returned to his or her original position. RGIS asserts the ALJ "clearly thinks that Ms. Kennedy is capable of earning greater income than that which she was earning at the time of her injury" given her education level, intelligence and underemployment while working for RGIS. RGIS also cites to the ALJ's opinion denying Kennedy's request for vocational retraining, indicating she could perform a variety of available work opportunities and her physical impairment is not so great as to preclude her from employment. RGIS states "the question is the extent of her disability- - -her potential for future earnings- - -as calibrated by KRS 342.730(1)c(1)."

It is well established the claimant has the burden of proving each of the essential elements of her claim, including entitlement to TTD benefits and enhancement by statutory multipliers pursuant to KRS 342.730(1)(c). Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Kennedy was successful in her burden, the question on appeal is whether the ALJ's finding is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky.

1986). 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 an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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 (Ky. 1977); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the 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 weight and credibility or by noting other

conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find substantial evidence exists supporting the ALJ's decision to enhance Kennedy's benefits by the three multiplier. It is well-settled a claimant's own testimony as to capabilities and limitations may be relied upon by the fact-finder in determining the physical capacity to return to work following an injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Ruby Construction Company v. Curling, 451 S.W.2d 610 (Ky. 1970).

In the case *sub judice*, the ALJ considered the conflicting testimony of Kennedy and Cuevas regarding the physical demands of her job at the time of her injury. Kennedy testified her job required frequent overhead work, and well as moving products weighing twenty to thirty pounds. She testified she can no longer perform her job as a counter due to pain in her neck and shoulders. Cuevas testified a counter rarely performs overhead work or heavy lifting, and in any event, other employees would be available to assist Kennedy in these tasks. The ALJ also noted the April 28, 2009 scapular muscle reattachment surgery performed by Dr. Kibler, who restricted her physical activities to no repetitive overhead lifting and

no lifting of more than twenty-five pounds. The ALJ then determined Kennedy is entitled to the three multiplier in light of Kennedy's testimony and the restrictions assigned by Dr. Kibler. Kennedy's testimony alone constitutes substantial evidence supporting the ALJ's determination. In addition, the opinions of Drs. Owen, Kibler and Snider support the ALJ's determination the three multiplier is applicable pursuant to KRS 342.730(1)(c)1.

We find RGIS' reliance on Adkins v. Pike County Board of Education, supra, is misplaced. The Court in Adkins clarified the analysis required pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). A Fawbush analysis is necessary when both KRS 342.730(1)(c)1 and (c)2 are potentially applicable and mandates the ALJ make the three essential findings of fact. Here, the ALJ specifically found 342.730(1)(c)2 is inapplicable since Kennedy never returned to work at a weekly wage equal to or greater than the wage at the time of injury. This finding is not disputed by RGIS. Therefore, Fawbush and its progeny, including Adkins v. Pike County Board of Education, supra, do not apply to this claim.

That said, we find the ALJ erred in awarding TTD benefits based upon the period Kennedy has already been paid by RGIS, August 25, 2007 to January 7, 2011. KRS

342.0011(11)(a) defines TTD as the condition of an employee who has not reached MMI from and injury and has not reached a level of improvement that would permit a return to employment. This definition has been determined by our courts 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:

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, 659 (Ky. 2000), the Supreme Court further explained:

"[i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she 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 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.

Id. at 580-581.

TTD is a factual finding in which the ALJ is called upon to analyze the evidence presented and determine the date the injured employee either: 1) reaches MMI; or 2) attains a level of improvement such that he is capable of returning to gainful employment. KRS 342.0011(11); W.L. Harper Const. Co., Inc. v. Baker, supra; Central Kentucky Steel v. Wise, supra. Generally the duration of an award of TTD may be ordered only through the earlier of those two dates. Thus, an award of TTD benefits means the employee has not reached MMI and has not attained a level of improvement which would permit the employee to return to the

type of work that is customary or that she was performing at the time of the injury.

In the case *sub judice*, the ALJ failed to determine the date Kennedy either reached MMI or attained a level of improvement such that she was capable of returning to gainful employment. In the December 17, 2012 decision, the ALJ noted the parties had stipulated RGIS paid TTD benefits at the rate of \$126.02 per week from August 25, 2007 to January 7, 2011, and paid an additional lump sum for past due TTD benefits in the amount of \$5,100.24. The ALJ also determined the correct TTD rate is \$206.11 per week based upon the stipulated average weekly wage of \$309.16, resulting in a substantial underpayment of TTD benefits. The ALJ then stated he found "no evidence which would cause a finding as to duration any different from the period for which claimant has already been paid, that is, August 25, 2007 to January 7, 2011." This falls short of the analysis and findings required by the applicable case law. Likewise, in the February 8, 2013 order overruling and denying the petition for reconsideration, the ALJ failed to determine the date Kennedy either reached MMI or attained a level of improvement which would allow her to return to gainful employment.

We note RGIS' assertion "the medical evidence is uncontradicted that the claimant reached [MMI] on March 15, 2010" is not accurate. Dr. Kibler stated Kennedy had reached MMI on March 15, 2010 with regard to her left shoulder, but recommended a series of injections for the C4-5 area. In his August 19, 2011 report, Dr. Snider stated Kennedy had attained MMI on March 15, 2010. Dr. Owen opined Kennedy was at MMI at the time of his January 9, 2012 evaluation. Dr. Ballard found Kennedy had reached MMI at the time of her June 9, 2010 evaluation. Finally, Dr. Primm found Kennedy to have reached MMI at the time of his January 13, 2012 evaluation. We are not directing a particular result regarding the duration of TTD benefits. The ALJ must make a specific determination from the evidence regarding when Kennedy reached MMI, and the period of TTD benefits she is entitled.

Accordingly, the opinion, award and order rendered December 17, 2012 and the February 8, 2013 order overruling RGIS' petition for reconsideration, by Hon. Edward D. Hays, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART AND REMANDED** for further findings to determine when Kennedy reached MMI, and an award of the appropriate period of TTD benefits, in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

COUNSEL FOR PETITIONER:

HON WALTER E HARDING
400 WEST MARKET ST, STE 2300
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON JACKSON W WATTS
131 MORGAN STREET
VERSAILLES, KY 40383

ADMINISTRATIVE LAW JUDGE:

HON EDWARD D HAYS
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601