Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 23, 2014

CLAIM NO. 200983582

HUSSEY COOPER, LTD. PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

ROGER FOX
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Hussey Copper, Ltd. ("Hussey") appeals from the August 15, 2013, Opinion, Order, and Award and the September 18, 2013, Order ruling on Hussey's petition for reconsideration of Hon. R. Scott Borders, Administrative Law Judge ("ALJ"). In the August 15, 2013, Opinion, Order, and Award, the ALJ determined Roger Fox ("Fox") sustained a work injury on July 7, 2009, and awarded temporary total

disability ("TTD") benefits at the rate of $449.23 per week from July 8, 2009, through February 1, 2010, and again from June 3, 2011, through September 26, 2012; permanent total disability ("PTD") benefits commencing on July 7, 2009; and medical benefits. On appeal, Hussey argues the ALJ erred by awarding PTD benefits "during periods of gainful employment."

A Form 112 Medical Fee Dispute was filed by Hussey on November 23, 2010. The "Opinion, Order and Award of Interlocutory Relief" dated March 22, 2011 determined as follows: Fox's left hand injury claim is dismissed; Hussey shall pre-certify and pay for the right shoulder surgery proposed by Dr. Scott Kuiper; Fox shall recover TTD benefits from Hussey at the rate of $449.23 per week from the date of the right shoulder surgery until Fox reaches maximum medical improvement; and placing the claim in abeyance.

The Form 101 alleges Fox injured his left and right shoulders and his left hand in the following manner: "I was working on [sic] bed of truck/dock plate and the truck pulled away and I fell to the ground injuring my left shoulder, right shoulder and left hand." The Form 101 states Fox completed the 10th grade and has a GED. It also states Fox was working as a "material handler" at the time

of the injury and the physical requirements of the job were described as follows: "at times heavy work."

There are several medical records and reports from Dr. Kuiper filed in the record. Additionally, Dr. Kuiper testified via deposition on January 20, 2011. His report dated February 2, 2010, states as follows:

> This patient was seen and evaluated today. He was treated for left shoulder SLAP tear and rotator cuff tear with a left shoulder arthroscopy, SLAP repair, and arthroscopy rotator cuff repair, large, including subscapularis. This was on 9/10/09. I am placing him at MMI as of 2/2/10. I have taken him off work restrictions, but have yet to see if he is able to perform his job duties as [sic] describes. His permanent partial impairment is 8% of the upper extremity, 5% body as a whole based on 5th Edition AMA Guidelines, shoulder section, based on range of motion deficit. These tears are considered to be from the injury described 7/7/09 and not to a pre-existing condition.

Fox testified by depositions dated July 29, 2010, and March 4, 2013, and at the June 26, 2013, hearing. Fox has had no vocational training, no licenses and certification, and did not attend college. At the time of the injury, Fox was a "materials handler." At the hearing, Fox described his duties as a materials handler as follows:

> A: You would operate the overhead crane to load boxes or skids of long bar on the trucks.

> Q: And, physically, what was involved in that?
>
> A: You would have to handle straps and reach up and grab the overhead crane cord and operate your box and feed it through the boxes- walk it to the truck, get on the truck, strap it, and make sure it was pushed tightly together- to the next box.
>
> Q: Okay...
>
> A: Before you lowered it.
>
> Q: Was it physically demanding in your...
>
> A: Yes.
>
> Q: Opinion?
>
> A: Yes.

Fox returned to work in February 2010 explaining as follows:

> Q: You went back to work in February of 2010, after you had had your left shoulder surgery?
>
> A: Yes.
>
> Q: Did you go back to that same job?
>
> A: Yes.
>
> Q: And then, I think, probably it was set out in one of your depositions. Fairly shortly after that you changed jobs, is that correct?
>
> A: Yes.
>
> Q: What job did you change to?
>
> A: Scale man.

Q: And what does the scale man job involve?

A: You load boxes and skids onto the scale with a tow motor.

Q: Okay.

A: And you strap it, band it, and weigh it.

Q: Was that as physically demanding as the job you had before?

A: No.

Q: Was it still heavy?

A: Not really heavy, no.

Q: Okay- what- how would you describe it in a light, medium, or heavy category?

A: It was light.

Q: What was the heaviest thing you'd have to lift?

A: A hand bander.

Q: And how heavy is that?

A: There was [sic] two of them. One was maybe ten pounds, and the other one was about twenty- twenty-five.

Q: And was it required to use both of those?

A: Yes.

Q: Was that the job you were on at the time the Administrative Law Judge rendered his decision, in March of 2011?

A: Yes.

At the hearing, Fox testified he obtained the job of scale man by bidding on it. During his July 29, 2010, deposition, Fox testified as follows regarding this job:

> Q: Okay. When you went back to work on February 2nd, 2010, did you go back to the material handler job?
>
> A: Yes.
>
> Q: Did you subsequently leave that job?
>
> A: Yes.
>
> Q: What job did you go to?
>
> A: I went to scale man.
>
> Q: And why did you go the scale man?
>
> A: So I wouldn't be able to be forced to pack on the inspector packer, which is a real difficult- one of the hardest jobs in there.
>
> Q: Okay. And why did you- why did you make that decision?
>
> A: Because I can't do it anymore. It hurts me.
>
> Q: Okay. And is that because of the left shoulder, the right shoulder, both the shoulders, or--
>
> A: Both.

At the time of his July 29, 2010, deposition, Fox was still working as a scale man. He testified as follows regarding his wages and work hours:

> Q: Is your cur- current wage rate $14.88 an hour?

> A: Yes.
>
> Q: And do you work 40 hours a week at least?
>
> A: That and more.
>
> Q: When you work more than 40 hours a week, do you get overtime pay?
>
> A: Yes.
>
> Q: Is that time and a half?
>
> A: Time and a half and double time.

Fox testified he continued to work up until surgery was performed in June 2011. He has not returned to work, explaining as follows:

> Q: Now according to your deposition and, obviously, the records that have been filed, you worked up until the time of the surgery that was performed in June of 2011?
>
> A: Yes.
>
> Q: And Dr. Kuiper did a second surgery on your right shoulder in October of 2011?
>
> A: Yes.
>
> Q: Now according to your deposition, he released you to return to restricted work in September of 2012, is that your understanding?
>
> A: Yes.
>
> Q: According to his report, he placed restrictions on you of no lifting in excess of ten pounds or overhead work, and then he rated your impairment at

> that point in time. Have those restrictions ever been changed?
>
> A: No.
>
> Q: When he gave you those restrictions, did you contact the people at Hussey about returning to work?
>
> A: Yes.
>
> Q: And did they have any work within those restrictions?
>
> A: No.

Fox had two surgeries on the right shoulder and one surgery on the left. Concerning the diminished use of both shoulders, Fox testified as follows:

> A: Well, the left was worse than the right, but the right I can barely get it up to my shoulder length. I can't get upward of the shoulder.
>
> Q: What about the left?
>
> A: The left I can get it slightly higher, but it- it's just- they both hurt.

When asked if he could return to either of his previous jobs at Hussey, Fox stated he could not because "[t]hey're just physical...."

Fox did not believe he could perform any type of work explaining as follows:

> Q: Now when you applied for Social Security, you told them that you couldn't do any type of work at all, I assume...

> A: Yes.
>
> Q: Why is that? Why don't you feel like you're capable of working at all?
>
> A: My shoulders hurt all the time and I'm just not able to.

The June 11, 2013, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the ACT, credit for subrogation lien, and TTD. Under "other matters" is the following: "Proof extended for both parties through 6-26-13 on use of hydrocodone." Under stipulations, the BRC order also indicates Fox was earning equal or greater wages than his average weekly wage ("AWW") at the time of the injury during his return to work from February 2, 2010, through June 2, 2011.[1]

In the August 15, 2013, Opinion, Order, and Award, the ALJ made the following findings of fact and conclusions of law regarding permanent total disability:

> The next issue for determination [sic] entitlement to benefits pursuant KRS 342.730. This issue encompasses the issue of the extent and duration of disability, whether the Plaintiff is

[1] While the wording of the BRC order is wholly unclear on this issue, the August 15, 2010, Opinion, Order, and Award confirms that at the BRC, the parties stipulated that Fox was earning equal or greater wages from February 2, 2010, through June 2, 2011, than his wages at the time of the injury.

entitled to application of any multipliers, and whether the Plaintiff is partially or totally disabled.

Mr. Fox has been assessed a functional impairment rating by Dr. Kuiper, his treating physician. Dr. Kuiper assessed a 5% functional impairment rating for his left shoulder condition, and a 5% functional impairment rating for his right shoulder condition, both according to the Fifth Edition of the AMA guides [sic], for a combined 10% functional impairment rating. Dr. Kuiper also assesses the Plaintiff restrictions of no lifting over 10 pounds and no overhead work.

Dr. Gladstein opined that the Plaintiff did not have a work-related condition and therefore did not assess the functional impairment rating.

Dr. Bilkey assess [sic] the Plaintiff a 5% functional impairment rating for the right shoulder condition, and a 11% functional impairment rating for the left shoulder condition, pursuant to the Fifth Edition of the AMA guides [sic].

Dr. Fadel assessed the Plaintiff and [sic] 8% functional impairment rating for his right arm condition, pursuant to the Fifth Edition of the AMA guides [sic].

In a [sic] specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds persuasive and relies upon the opinion of Dr. Kuiper, the Plaintiff's treating surgeon, and finds that the Plaintiff retains a 10% functional impairment rating, for his bilateral shoulder conditions.

The Plaintiff argues that as a result of his injuries that he is permanently and totally occupationally disabled. The Defendant Employer argues that Plaintiff has not met his burden of proving he is permanently and totally disabled and any award of benefits should be limited to a permanent partial disability award with application of the three-time multiplier.

KRS 342.0011(11)(c) defines permanent total disability as meaning, "the condition of an employee who, due to any 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."

In the case of *Ira Watson Department Stores vs. Hamilton*, 34 SW 3d 48 (KY 2000), the Supreme Court stated the [sic] some of the principles set forth in the case of *Osborne vs. Johnson*, 432 SW 2d 800 (KY 1968) must be considered when determining whether or not an individual is permanently and totally disabled. The Court stated in total disability claims when determining whether or not an individual is incapable [sic] performing any work, medical assessments remains only one of the many elements to be considered along with such things as individuals own testimony, vocational testimony, and physiological testimony.

In addition, an individualized determination must be made of what a worker is and is not able to do after recovering from a work injury; such a determination necessarily includes consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact and also includes consideration of the

likelihood that the particular worker will be able to find work consistently under normal employment conditions. *McNutt Construction vs. Scott*, KY 40 SW 3d 854 (Ky. 2001).

The Plaintiff made a very credible witness. There is no doubt that the Plaintiff suffered a dramatic injury to both shoulders as a result of the July 7, 2009, work-related incident. The Plaintiff has attempted to return to work and in fact did so, from September [sic] of 2010, through June of 2011, when he was taken off work again to undergo additional surgery. As a result of that additional surgery he was assessed work restrictions of no lifting over 10 pounds and no overhead work. He contacted the Defendant Employer in an attempt to return to work within these restrictions and was advised there was no work available for him.

The Plaintiff testified, quite credibly, that he continues to have chronic pain in both of his shoulders and has difficulty in raising his arms above the shoulder level. He testified that he is required to lay down on a daily basis and rest. Mr. Fox also testified that he would not be capable of returning to any of his prior jobs as they required the ability to perform physical activities that are in excess of his restrictions.

The Defendant Employer argues that the Plaintiff is not totally disabled. They [sic] point to Dr. Conte's vocational report which indicates that the Plaintiff could return to work in the sedentary to light category with little difficulty. However, even in a light or sedentary position the Plaintiff would be required to use his arms. This, in the undersigned opinion,

> would cause pain and difficulty to the Plaintiff.
>
> Therefore, when you compare the Plaintiffs [sic] present situation to the situation set forth in the case of *Osborne v Johnson, supra,* the Administrative Law Judge finds that Plaintiff has met his burden of proving that he is permanently and totally occupationally disabled. In so finding, the Administrative Law Judge acknowledges that Plaintiff is 58 years of age and has a prior work history consisting of physical labor. The Administrative Law Judge believes that the likelihood of the Plaintiff returning to the workforce is nonexistent in his present condition.

In its August 29, 2013, petition for reconsideration, Hussey argued as follows:

> The unrefuted evidence demonstrates that after the July 7, 2009 event, Plaintiff sought treatment with Dr. Kuiper for left shoulder pain. Following left shoulder surgery, Plaintiff was assessed 5% PIR and released to resume full duty work on February 1, 2010. The unrefuted evidence further demonstrates that Plaintiff did, in fact, return to work for this Defendant-Employer on February 1, 2010, at which time Plaintiff did not have any limitations or restrictions on his abilities to work. Plaintiff resumed his pre-injury position as a material handler, and later accepted a job as a scalesman. Plaintiff continued working the full duty and full time job of a scalesman until June 2, 2011.
>
> ...

> While the Defendant-Employer recognizes that a claimant may be awarded PTD despite a return to work if the evidence establishes that the claimant has returned to a make-shift job. [sic]Even so, in the instant action, Plaintiff did not return to a make-shift position. The unequivocal evidence illustrates that Plaintiff actually returned to work on February 1, 2010 without any limitations, at which time he resumed his pre-accident job as a material handler. He then bid on and obtained the job assignment of scaleman, which Plaintiff performed without any limitations through June 2, 2011.

In the September 18, 2013, order, the ALJ overruled the above-cited portion of Hussey's petition for reconsideration.

On appeal, Hussey argues the award of PTD benefits during periods of "gainful employment," specifically the period between February 1, 2010, through June 2, 2011, was an abuse of discretion. We vacate the ALJ's award of PTD benefits from February 1, 2010, through June 2, 2011, and remand for additional findings.

Gunderson v. City of Ashland, 701 S.W.2d 135, 136-137 (Ky. 1985), stands for the proposition that when regular employment is not available in the kind of work a claimant is customarily able to perform, he may be found totally disabled despite the fact that limited work was

made available due to the generosity of the employer. Our courts have repeatedly held that a return to employment following an injury, whether full-time or part-time, does not necessarily constitute a return to "work" for purposes of KRS Chapter 342 and, under certain circumstances, an employee can be permanently totally disabled and immediately entitled to indemnity benefits even though he or she continues to be gainfully employed. *Cf.* Gunderson v. City of Ashland, supra; R.C. Durr Co., Inc. v. Chapman, 563 S.W.2d 743 (Ky. App. 1978); Yocom v. Yates, 566 S.W.2d 796, 797 (Ky. App. 1978). The measure in such circumstances is the claimant's post-injury earning capacity based on normal employment conditions, as opposed to actual wages received, and whether the claimant's work was "undistorted by such factors as business boom, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his [or her] handicaps." Gunderson v. City of Ashland, supra, at 136.

The August 15, 2013, Opinion, Order, and Award and the September 18, 2013, Order ruling on Hussey's petition for reconsideration lack the necessary findings concerning Fox's entitlement to PTD benefits during the contested time period. Thus, we are unable to determine the

basis of the ALJ’s award of PTD benefits from February 2, 2010, through June 2, 2011.

It is important to note that Hussey does not take issue with the ALJ's determination of permanent total disability. It is evident the ALJ took into consideration the factors enunciated in Osborne v Johnson, 432 S.W.2d 800 (Ky. 1968), and set forth an appropriate analysis regarding Fox’s entitlement to PTD benefits. However, the ALJ’s award of PTD benefits from February 2, 2010, through June 2, 2011, requires further explanation. During this period of time, Fox had been released by Dr. Kuiper to work without restrictions, and was working full-time in his pre-injury position and then moved to a position he intentionally bid on, and was earning a wage equal to or greater than his AWW at the time of the injury. Consequently, the ALJ must set forth an analysis consistent with the pertinent case law explaining why PTD benefits were awarded during this time period. In other words, the ALJ's analysis must go beyond the standard analysis required for an award of PTD benefits when a claimant has not returned to employment following an injury. This necessarily encompasses an analysis of whether the claimant's employer made special accommodations or whether Fox made a Herculean effort to work during the period in question. *See* Gunderson v. City of Ashland,

supra. On remand, the ALJ must support the award of PTD benefits during the period in question with sufficient findings of fact and conclusions of law. If he cannot, the ALJ must suspend the award of PTD benefits from February 2, 2010, and June 2, 2011. PTD benefits are to recommence on June 3, 2011, and continue thereafter, suspended by any overlapping periods of TTD benefits awarded.

We add, Fox did not specifically request additional findings on this issue in his petition for reconsideration. However, this is irrelevant, as the Board has the authority to step outside the arguments made by parties and *sua sponte* order an ALJ to render additional findings. KRS 342.285(2)(c); KRS 342.285(3); *See* George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

Accordingly, the award of PTD benefits from February 2, 2010, through June 2, 2011, in the August 15, 2013, Opinion, Order, and Award and the portion of the September 18, 2013, Order ruling on Hussey's petition for reconsideration reaffirming this award are **VACATED**. This claim is **REMANDED** to the ALJ for additional findings and entry of an amended opinion and award consistent with the views expressed herein.

ALL CONCUR.

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