Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 20, 2015

CLAIM NO. 201001064

KOCH CORPORATION PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

LYNWOOD GASPARD and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING

* * * * * *

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

ALVEY, Chairman. Koch Corporation ("Koch") appeals from the Opinion, Award, and Order on Remand rendered July 6, 2015 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") awarding Lynwood Gaspard ("Gaspard") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the multipliers

contained in KRS 342.730(1)(c)1, and medical benefits for a work-related low back injury he sustained on October 6, 2008. Koch also seeks review of the August 11, 2015 order denying its petition for reconsideration. Because the ALJ's analysis regarding the entitlement to TTD benefits remains deficient, we affirm in part, vacate in part and remand for further determination as set forth below.

The ALJ rendered her original opinion on May 27, 2014, and on July 1, 2014 denied Koch's petition for reconsideration. Koch appealed, and this Board affirmed in part and vacated in part in an opinion entered December 12, 2014. Koch appealed a portion of the Board's decision which the Kentucky Court of Appeals reversed in part, and remanded for the ALJ to enter an amended opinion.

Gaspard filed a Form 101 on September 17, 2010 alleging he injured his low back when carrying a large piece of glass on October 6, 2008 while working for Koch. At the time he filed the claim, Gaspard no longer worked for Koch, but was self-employed. The claim was assigned to Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ Smith"), and later re-assigned to Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ Clark"). The claim was subsequently reassigned to the ALJ on July 18, 2012.

In an interlocutory opinion rendered September 16, 2011, ALJ Smith determined jurisdiction was appropriate. In a subsequent interlocutory decision, ALJ Clark found Gaspard's low back condition was caused by the October 6, 2008 work injury, and a proposed surgery was reasonable and necessary. ALJ Clark placed the claim in abeyance and awarded TTD benefits from June 9, 2010 until Gaspard reached maximum medical improvement ("MMI").

In his brief to the ALJ prior to her initial decision, Gaspard stated he began distributing bread for Flowers Baking after he was terminated from Koch, but was unable to continue to perform the physical duties required by the bread route due to his limitations. He stated he has been unable to return to work since December 2010. In its petition for reconsideration, Koch argued it was entitled to a credit against its obligation for TTD benefits since Gaspard returned to work as a distributor of a bread route, earning lucrative wages before and after December 2010, as reflected in his tax records for 2009 to 2011, which it had filed as evidence. Koch argued his "wages, tips and other comp" from Flowers Baking totaled $71,542.94, $96,914.24, and $101,851.22 respectively.

Gaspard argued there is a difference between earned and unearned income, and he was unable to perform

the physical activities of the bread route. In an order issued September 7, 2012, the ALJ denied Koch's arguments on reconsideration, but ordered TTD benefits beginning in December 2010.

On May 6, 2013, Koch filed a motion to add fraud as an issue, which the ALJ sustained. Koch also filed a document from October 2009 indicating Flowers Baking sold Gaspard distribution rights to a bread route.

The facts pertinent to this appeal have previously been outlined by the ALJ, this Board, and the Court of Appeals, and will not be reviewed again.

In the May 27, 2014 Opinion, Award, and Order, the ALJ determined Gaspard had not made fraudulent statements leading to payments to which he was not lawfully entitled. The ALJ found Gaspard did not have a pre-existing, action condition at the time of the October 6, 2008 work injury. The ALJ awarded PPD benefits based upon a 20% impairment rating for Gaspard's work-related injury which she enhanced pursuant to the multipliers contained in KRS 342.730(1)(c)1. Because she determined it was inapplicable, the ALJ did not perform an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (2003). The ALJ found Gaspard entitled to TTD benefits from December 14, 2010, the approximate date his treating physician restricted him

from work, to July 23, 2013, the day he reached MMI. The ALJ rejected Koch's argument Gaspard is not entitled to TTD benefits during this time period since he had greater earnings post-injury through his subsequent self-employment than he received prior to his work injury. The ALJ declined to assess sanctions against Koch pursuant to KRS 342.310. After the ALJ issued rulings on the petitions for reconsideration, Koch appealed alleging the ALJ had committed numerous errors.

In a decision entered December 12, 2014, this Board first found the ALJ erroneously concluded the amount of Gaspard's post-injury earnings was irrelevant, but determined the error was harmless. Financial documents filed as evidence regarding the bread route, as well as sections of the federal statute and Revenue Rules were reviewed. This Board found Gaspard was a statutory employee. Therefore, he was permitted to deduct his business expenses as reflected in the Schedule Cs, in arriving at his net income derived from the bread route for purposes of determining the application of KRS 342.730(1)(c)2.

The Board held, "The amount of income Gaspard earned from the distributorship as reflected in the Schedule Cs and the tax returns is the determinative figure

in resolving the application of KRS 342.730(1)(c)2. This Board determined Gaspard did not have greater post-injury earnings in 2010, 2011 and 2012 based upon a review of his tax records. This Board concluded the ALJ correctly determined Gaspard had not returned to work earning a wage equal to or exceeding his pre-injury AWW, therefore an analysis pursuant to Fawbush was unnecessary.

This Board next determined the ALJ utilized the incorrect standard in analyzing Gaspard's entitlement to TTD benefits. Since Gaspard was not concurrently employed at the time of his injury, the standard for determining his entitlement to TTD benefits are outlined in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), and Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004). The Board noted the ALJ discussed the holdings in Double L. Const., Inc. v. Mitchell, 182 S.W.3d 509 (Ky. 2005), and the Board's opinion in J.C. Penney Co., Inc. v. Newsome, 2007-01034, rendered June 30, 2010, which dealt with entitlement to TTD benefits when there is concurrent employment.

The ALJ concluded Gaspard was entitled to TTD benefits until he reached MMI on July 23, 2013, and his income from the bread route did not preclude such award. The ALJ also found although Gaspard was able to do some

work, he did not return to employment which was customary, and operating a bread route for Flowers Baking was not a return to employment. This Board held the ALJ did not provide any findings supporting her conclusions, and the determination Gaspard could not return to the type of job performed when injured was insufficient under the statutory and case law criteria. Therefore, the Board vacated the award of TTD benefits, and remanded for a determination in accordance with Central Kentucky Steel v. Wise, supra, and Magellan Behavioral Health v. Helms, supra.

With regard to the ALJ's analysis of fraud, the Board determined pleadings filed by Gaspard in February and May 2013 could not represent false and material representations resulting in wrongful payments of TTD benefits since they were filed over two years after those benefits commenced in December 2010. However, the Board found the ALJ failed to provide the necessary explanation for her finding, "Gaspard has not made fraudulent statements that have led to payments to which [he] was not lawfully entitled." Specifically, the Board stated the ALJ did not explain the basis for her finding Gaspar's statements in his tax filings did not result in payments of TTD benefits to which he was not entitled. The claim was

remanded for additional findings on the six elements necessary for a determination of fraud.

The ALJ's determination Koch failed to prove Gaspard had a pre-existing active condition meriting a carve out in the award of PPD benefits; he was entitled to the three multiplier; and did not return to work at equal or greater wages, noting her failure to make a determination regarding his post-injury AWW was a harmless error, was affirmed. The award of TTD benefits and the finding Gaspard did not engage in fraud were vacated and remanded to the ALJ for additional determination.

Koch appealed the Board's decision to the Kentucky Court of Appeals for review solely on the issue of the application of the three multiplier and the related arguments about Gaspard's AWW. In a decision rendered April 27, 2015, after reviewing KRS 342.730(1)(c) and Fawbush v. Gwinn, supra, the Court of Appeals stated as follows:

> In the present case, we must agree with Koch that the Board far exceeded its scope of appellate review when it deemed harmless the ALJ's failure to make any findings related to Gaspard's post-injury AWW and proceeded to make its own factual findings and apply federal tax laws. Rather, the Board should have remanded the issue to the ALJ as it did with the fraud and TTD

> issues. Therefore, we must reverse the Board's opinion on this issue.
>
> On remand, in addition to the issues that have already been remanded, the ALJ shall also be directed to make findings related to Gaspard's post-injury earnings, calculate his post injury AWW pursuant to KRS 342.140 keeping in mind the Supreme Court's opinion in *Marsh v. Mercer Transp.,* 77 S.W.3d 592 (Ky. 2002), and determine whether a *Fawbush v. Gwinn* analysis is necessary related to the application of KRS 342.730(1)(c). The ALJ should not rely upon federal income tax statutes, but should rather rely upon Kentucky's relevant statutes as set forth in the Worker's Compensation Act.
>
> For the foregoing reasons, the opinion of the Workers' Compensation Board is reversed, and this matter is remanded to the [ALJ] for further proceedings in accordance with this opinion.

In the Opinion, Award, and Order on Remand rendered July 6, 2015, the ALJ made the following analysis regarding fraud:

> The elements of fraud are a) material representation, b) which is false, c) known to be false or made recklessly, d) made with inducement to be acted upon, e) acted in reliance thereon, and f) causing injury. *United Parcel Service v. Rickert*, 996 S.W.2d 464 (Ky. 1999):
>
> a) material representation – Defendant Employer believes Plaintiff represented he had not returned to work in order to obtain benefits.

> b) which is false – Even though Defendant Employer argues the statement was false, the facts are clear that he had not been returned to work and although he engaged in a his own side business, the statement he had not returned to work was not a false statement.
>
> At that point, the fraud argument fails as it is found herein he did not make a false statement.

With regard to Gaspard's post-injury AWW and the potential need for an analysis pursuant to Fawbush, the ALJ stated as follows:

> To qualify for an award of permanent partial benefits under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, he is also required to prove the harmful change resulted in a permanent disability as measured by an AMA impairment. KRS 342.0011(11), (35), and (36). Furthermore, if, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined. KRS 342.730 (1)(c)(1).
>
> KRS 342.730(1) (c) (1) reads as follows:
>
>> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for

> permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments.

KRS 342.730(1) (c) (2) states, in relevant part, as follows:

> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

Pursuant to *Fawbush vs. Gwinn*, 107 SW 3d 5 (Ky. 2003) the pertinent determinations for the ALJ when considering the appropriate multiplier are:

1. That a claimant cannot return to the “type of work” performed at the time of the injury in accordance with KRS 342.730(1)(c)1;

2. The claimant has returned to work at an average weekly wage equal to or greater than his pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2.

   Then, when both KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 apply, the ALJ must decide whether the claimant can continue to earn that level of wages into the indefinite future.

2. <u>Findings of fact and conclusions of law.</u>

Gaspard's impairment as a result of the work injury is 20% and he qualifies for the 3 multiplier as he did not return to work earning the same or greater wages. His AWW at the time of injury was $1,006.23 and his post injury earnings were: 2010 - $839.75; 2011 - $768.17; and, 2012 - $875.13.

3. <u>Evidentiary basis and analysis</u>.

Significantly, in its brief, Koch concedes Gaspard's AWW was $1,006.23 yielding a yearly income of $52,323.96. The tax returns and the Schedule Cs reflect in 2010, 2011 and 2012, Gaspard did not have yearly earnings in excess of his pre-injury AWW of $1,006.23.

The varying opinions on this issue have been carefully reviewed. Dr. Morris' opinion, though well presented, fails to make any mention of Gaspard's prior surgeries. He does address the issue of a pre-existing carve out, and does not find a carve out applicable but, because he makes no mention at all of the past surgery, it would be nothing more than speculation to state his opinion on the matter.

> The opinion of Dr. Huhn assessing 20% is most persuasive. His follow up letter removes any question of doubt on his opinion regarding a carve out, as noted in the section above.
>
> Regarding the multiplier, however, the opinion of Dr. Morris is relied upon as being most in line with Gaspard's testimony. Following a third back surgery, lifting restrictions are not unreasonable and seem only appropriate. Gaspard's work at the time of the injury involved heavy lifting, much bending and twisting and the opinion that he should avoid such activities is adopted herein.
>
> In determining whether a *Fawbush* analysis is necessary, the following questions are relevant:
>
> *1. Does Gaspard retain the physical capacity to return to the work he was doing at the time of the injury?* As explained above, no he does not.
>
> *2. Has Gaspard returned to work at the same or greater wages?* No he has not.
>
> Therefore, the 3x multiplier is applicable.
> **Calculation: 502.51 x .20 x 1.00 x 3.2 = $321.61**
>
> Finally, with regard to Gaspard's entitlement to

TTD benefits, the ALJ stated as follows:

> **1. <u>Principle of law.</u>**
> Kentucky Revised Statute 342.0011(11)(a) states that: "'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." A claimant is entitled to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability.

2. <u>Findings of fact and conclusions of law.</u>

Plaintiff was entitled to TTD from the date Dr. Ramos took him off work, December 14, 2010 until he reached MMI on July 23, 2013.

3. <u>Evidentiary basis and analysis</u>.

TTD was ordered from the date Dr. Ramos took Gaspard off work sometime in December 2010 although the exact date could not be ascertained from the records. Defendant Employer began payments on December 14, 2010 which is the date Gaspard testified he stopped working pursuant to the instructions from Dr. Ramos. Dr. Ramos' November 22, 2011 letter confirms Gaspard had been under his care since 2009 for a work-related injury. Dr. Ramos states he recommended surgery on numerous visits which the insurance carrier did not approve. Dr. Ramos believed Gaspard had been unable to work since December 2010 and was in no condition to return to work without surgical intervention.

Koch argues in accordance with the guidelines of *Central Kentucky Steel v. Wise, supra,* and *Magellan Behavioral Health v. Helms, supra*, Gaspard did not return to minimal work. It cites to Gaspard's description of the work involved in the distributorship set

forth in his December 15, 2010, deposition. In addition to Gaspard's W-2s, Koch cites Gaspard's representations in his tax returns that he "materially participated" in the business and drove various company vehicles substantial miles for business purposes in 2010 through 2012.

Conversely, Gaspard provided extensive testimony that after he was taken off work in December 2010, he was physically unable to perform this work and he had an employee or a helper who performed almost all of the work involved in the operation of his distributorship. Although not reflected in the tax returns and his revenue and expense statements, Gaspard testified he paid his employee/helper almost $1,000.00 a week in cash. In checking "yes" on the Schedule C regarding his material participation in the business, Gaspard explained his material participation was taking care of the payroll and speaking with his independent contractor on a daily basis.

Gaspard was entitled to TTD benefits as he underwent surgery either in October or August 2012, and for a period of time was unable to perform any type of work.

Post-surgery information from Gaspard's treating physician regarding MMI is addressed in a letter sent via facsimile on July 31, 2013. The letter itself is not dated. Plaintiff indicated in his testimony Dr. Ramos placed him at MMI on July 23, 2013. TTD was paid through that date. It appears this period is appropriate and TTD has not been underpaid or over paid. Defendant Employer argues a much earlier date of MMI which would not be

appropriate while Gaspard was waiting for approval for surgery.

Gaspard contends he is entitled to TTD benefits during the same period of time he had income from his bread route. Koch argues the opposite noting income tax records reflect more earnings post injury than Gaspard received prior to the injury and, therefore, he is entitled to no TTD benefits.

KRS 342.0011(a) has been interpreted by our courts as establishing a two-pronged test for the determination of the duration of an award of TTD. *Double L Const., Inc. v. Mitchell*, 182 S.W.3d 509 (Ky. 2005). TTD benefits are payable so long as: (1) MMI has not been reached, and (2) the injury has not reached a level of improvement that would permit a return to employment. *Magellan Behavioral Health v. Helms*, 140 S.W.2d 579 (Ky. App. 2004).

In *Magellan Behavioral Health v. Helms*, *supra*, the Court of Appeals 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 of TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In *Central Kentucky Steel v. Wise*, 19 S.W. 3d 657 (Ky. 2000) 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. The "or" implies that the employee does not have to have returned to the same job but may be working at one that is considered customary work for the injured worker.

Entitlement to TTD does not require a temporary inability to perform any type of work, and a finding that claimant is able to perform minimal work does not preclude an award of TTD, *Double L Construction, Inc. v. Mitchell, supra*. The evidence establishes that Plaintiff has never been able to return to the type of job he performed at the time of the injury.

The more contentious part of the dispute centers on the earnings from the bread route and whether the earnings should preclude Gaspard's entitlement to TTD. On this very issue, the Supreme Court stated in *Central Kentucky Steel, supra,* as follows:

> CKS would interpret the statute so as to require a termination of TTD benefits as soon as the worker is released to perform any type of work. We cannot agree with that interpretation. It 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.

This same scenario is addressed by the Workers' Compensation Board in *J. C. Penny Co., Inc. vs. Newsom*, Claim number 07-01034, June 30, 2010, a case

addressing Newsom's ability to continue her sedentary job as a self-employed editor one week after her fall at work. Board Member Stivers pointed out (as noted above) that in *Double L Construction, Inc. v. Mitchell, supra,* the Supreme Court concluded the *employment in which the injury occurred* is the claimant's "customary" type of work for analyzing the second prong of KRS 342.011(11)(a) stating as follows:

> 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 342.011(11)(a). [citations omitted]. The case did not involve concurrent employments and referred only to Wise's job as a steelworker. *We have concluded, therefore, that when the decision is applied to a case in which a worker is injured in one concurrent employment but is unable temporarily to perform another, both the customary type of work and the work the individual was performing at the time of the injury refer to the work performed in the employment in which the injury occurred. We reach this conclusion, in part, because we are convinced that a worker whose injury renders him temporarily unable to perform the work in which the injury occurred should not be penalized for performing what work he is*

> *able to do. Nor are we convinced that his employer should be absolved from liability for TTD benefits. The claimant's injury occurred in his employment as a construction carpenter; therefore, his customary work for the purposes of KRS 342.011(11)(a) was construction carpentry, including the duties that he was performing at the time he was injured. It is undisputed that the injury rendered him unable temporarily to perform his customary work until August 18, 2003; therefore, he did not reach a level of improvement that would permit a return to employment until August 18, 2003.*

Double L. Construction at 514. (emphasis added).

As with *Newsom*, there is the appearance of a distinction at first glance between *Double L. Construction* and the case under submission. In *Double L. Construction,* the claimant was injured at his full-time carpentry job but was able to continue working his part-time janitorial job. In contrast, Gaspard was injured in a job working for Koch as a glass setter, a job involving heavy and strenuous labor on a regular basis. He testified he purchased a bread route from Flowers Bakery in March 2009 to support his family. This is the source of his self-employment income. It is his testimony he has been able to continue the route only because he pays an independent contractor and the independent contractor pays an assistant. In *Newsom*, the Board explained:

> While these distinctions are notable, they do not render inapplicable the above-cited language in Double L. Construction, supra, concluding that a "worker whose injury renders him temporarily unable to perform *the work in which the injury occurred* should not be penalized for performing what work he is able to do." Id. (emphasis added). Additionally, and critical to the case *sub judice* is that in Double L. Construction, the Supreme Court never proclaimed that which J.C. Penney asserts on appeal- that is, in cases of concurrent employment, a claimant's "customary" type of work for purposes of meeting the second prong of KRS 342.0011(11)(a) is the job in which the claimant works the longest hours. Instead, the Supreme Court defines "customary" work as the work in which the injury occurred, "including the duties that he was performing at the time he was injured." Id. Thus, under Double L. Construction, supra, Newsom's "customary" type of work for purposes of satisfying the second prong under KRS 342.011(11)(a) is her work at J.C. Penney, the job wherein she was injured, regardless of her ability to continue working as a self-employed editor.

The Board addressed another related point worthy of noting herein, "…entitlement to TTD, in the context of concurrent employment, is not contingent upon whether wages from a concurrent job are included in AWW,

again repeating language from *Double L. Construction*:

> Having considered the relevant statutes, we conclude that a worker is entitled to TTD benefits if a work-related injury results in a temporary inability to perform the job in which it occurred. If the injury also causes an inability to perform a concurrent job of which the employer has knowledge, income benefits are based on the wages from both employments by operation of KRS 342.140(5). *If the injury does not cause an inability to perform a concurrent job, KRS 342.140(5) is inapplicable and income benefits are based solely on the wages from the job in which the injury occurred.* In contrast, if a work-related injury does not prevent the worker from performing the job in which it occurred, the worker is not entitled to TTD despite an inability to perform a concurrent job.

Double L. Construction at 515. (emphasis added).

Case law on this issue is clear. Gaspard was entitled to TTD benefits from Koch until he reached MMI and his income from the bread route does not preclude his entitlement to TTD.

In a nutshell, Koch argues the amount of income reflected on tax returns precludes TTD. Gaspard says the tax returns are wrong and do not reflect expenses he paid. This is not relevant. No case law stands for the

> proposition if your earnings from another source are a certain amount, then no TTD.

The ALJ awarded Gaspard TTD benefits, PPD benefits, and medical benefits. Koch filed a petition for reconsideration raising the same arguments it now makes on appeal. The ALJ summarily denied its petition on August 11, 2015.

On appeal, Koch argues the ALJ did not explain how she calculated Gaspard's post-injury earnings for 2010, 2011 and 2012, and she failed to use the standard set forth in Marsh v. Mercer Transportation, 77 S.W.3d 592 (Ky. 2002), as directed by the Court of Appeals. Koch argues the tax returns show Gaspard's post-injury AWW was greater than his pre-injury AWW. Koch next argues the ALJ erred in finding a Fawbush analysis unnecessary since Gaspard in fact returned to work earning equal or greater wages. Koch also argues the ALJ failed to follow the directives of the Board regarding his entitlement to TTD benefits. Koch asserts the ALJ's explanation remains insufficient, and the evidence shows he was working and earning equal or greater wages during the period of time he was receiving TTD benefits. Koch next argues the ALJ's analysis on Gaspard's alleged fraud is insufficient since she did not discuss all

of the elements and the evidence does not support her ultimate determination. Finally, Koch argues the ALJ did not determine whether Gaspard had reached a level of improvement allowing a return to work that was customary for him or which he was performing prior to being injured pursuant to Central Kentucky Steel v. Wise, supra, and Magellan Behavioral Health v. Helms, supra. Koch asserts on remand the ALJ did not discuss whether Gaspard's work with the bread route was customary, and merely reiterated her conclusions in the original opinion.

Regarding the ALJ's analysis of TTD benefits from December 14, 2010 (the approximate date he was restricted from work by his treating physician) through July 23, 2013 (the day he attained MMI), as noted above, in our opinion rendered December 12, 2014, this Board held the ALJ did not provide findings supporting her conclusions, and her determination Gaspard could not return to the type of job performed when injured was insufficient. Therefore, the award of TTD benefits was vacated, and remanded for a determination in accordance with Central Kentucky Steel v. Wise, supra, and Magellan Behavioral Health v. Helms, supra.

In the opinion on remand, the ALJ noted Gaspard was restricted from working in December 2010 until he was

placed at MMI on July 23, 2013. She noted Koch paid TTD benefits from December 14, 2010 through July 23, 2013. The ALJ also summarized the arguments by Koch and Gaspard. However, the ALJ provided the same analysis verbatim on remand regarding Gaspard's entitlement to TTD benefits on pages 23 through 27 in her opinion on remand as she did in the original opinion on pages 20 through 24. Therefore, we again find the analysis deficient, and vacate and remand for the ALJ to provide an analysis in accordance with Central Kentucky Steel v. Wise, supra, and Magellan Behavioral Health v. Helms, supra.

We again note Gaspard was not concurrently working at the time of the October 6, 2008 injury. Therefore, insofar as the ALJ addressed concurrent employment, her analysis is incorrect. The standard for determining Gaspard's entitlement to TTD benefits is outlined in Central Kentucky Steel v. Wise, supra, and Magellan Behavioral Health v. Helms, supra. Since the ALJ provided the same analysis as in her original decision, her findings remain deficient, and she must provide findings of fact to support her determination.

In determining Gaspard did not perpetrate a fraud, the ALJ sufficiently followed the directives of this Board in the opinion on remand, and substantial evidence of

record supports her determination. KRS 342.335 states as follows:

> No person shall knowingly file, or permit to be filed, any false or fraudulent claim on his or her behalf to compensation or other benefits under this chapter, or by fraud, deceit, or misrepresentation procure or cause to be made or receive any payments of compensation or other benefits under this chapter to which the recipient is not lawfully entitled, or conspire with, aid, or abet another so to do.

The elements of fraud are a) material representation, b) which is false, c) known to be false or made recklessly, d) made with inducement to be acted upon, e) acted in reliance thereon, **and** f) causing injury. United Parcel Service v. Rickert, 996 S.W.2d 464 (Ky. 1999). (Emphasis added). The party alleging fraud must establish the six elements by clear and convincing evidence. United Parcel Service v. Rickert, supra.

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). The 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, this 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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).

The ALJ reviewed the entirety of the record and addressed the issue of whether Gaspard falsely stated he had not returned to work despite operating the bread route since 2009. Gaspard clearly acknowledged his distributorship of the bread route since the inception of

this claim. In fact, in the Form 101, Gaspard alleged he was currently self-employed earning a lesser weekly wage. As noted by the ALJ, Gaspard testified at his December 15, 2010 deposition he owned a business as an independent distributor for Flowers Baking beginning in either 2008 or 2009. Gaspard similarly discussed the bread route he owned at his March 2013 deposition. The ALJ also noted Gaspard provided his year-to-date revenue and expenses and tax returns for 2010, 2011, and 2012 which Koch introduced.

The ALJ found Koch could not rely upon Gaspard's pleadings filed in February and May 2013 since they were filed over two years after payment of TTD benefits commenced, and could not be considered false and material representations resulting in the wrongful payment of TTD benefits. The ALJ also found Gaspard's assertions and responses in the pleadings do not constitute false material representations, but rather state his position relative to the assertion made in Koch's pleadings. Ultimately, the ALJ was not persuaded Gaspard's statement was made with the intent to obtain TTD benefits which had been paid since December 2010, over two years before he filed the first response about which Koch complained.

Based upon the above, the ALJ specifically found the second element of fraud, a false material

representation, had not been established. Since all elements are necessary in establishing fraud, the ALJ was not required to address the remaining elements. The ALJ performed the correct analysis in determining no fraud had been perpetrated, and cited to various portions of the record supporting her decision. Since the directives of this Board were followed on remand, and her determination is supported by substantial evidence, it will not be disturbed on appeal.

Finally, we find the ALJ followed the directives of the Court of Appeals in the opinion on remand regarding Gaspard's post-injury AWW, and substantial evidence supports her determination. As noted above, the Court of Appeals directed the ALJ to make findings related to Gaspard's post-injury earnings, calculate his post injury AWW pursuant to KRS 342.140 keeping in mind the Supreme Court's opinion in Marsh v. Mercer Transp., supra, and determine whether a Fawbush analysis is necessary related to the application of KRS 342.730(1)(c). It is undisputed Gaspard's pre-injury AWW was $1,006.23. In the opinion on remand, the ALJ specifically found "his post injury earnings were: 2010 - $839.75; 2011 - $768.17; and, 2012 - $875.13." The ALJ also stated, "Koch concedes Gaspard's AWW was $1,006.23 yielding a yearly income of $52,323.96.

The tax returns and the Schedule Cs reflect in 2010, 2011 and 2012, Gaspard did not have yearly earnings in excess of his pre-injury AWW of $1,006.23."

Although the ALJ did not provide a step-by-step calculation of the post-injury earnings for 2010, 2011 and 2012, it is clear she divided by 52 the yearly business income amount indicated on Gaspard's Schedule C's for each year ($43.667.00, $39,945.00, and $45,507.00 respectively). The tax records entered into evidence regarding the income derived by Gaspard from the distributorship constitutes substantial evidence supporting the ALJ's findings of his post-injury AWW. The ALJ correctly outlined when a Fawbush analysis is necessary. Since the ALJ determined Gaspard did not return to work at an AWW equal to or greater than his pre-injury AWW, a Fawbush analysis was not required. Therefore, since the ALJ sufficiently followed the directions of the Court of Appeals, and her determinations regarding Gaspard's post-injury AWW and the application of the three multiplier pursuant to KRS 342.730(1)(c)1 are supported by substantial evidence, we affirm.

Accordingly, the Opinion, Award, and Order on Remand rendered July 6, 2015 and the August 11, 2015 order on petition for reconsideration are hereby **AFFIRMED IN PART, VACATED IN PART, AND REMANDED** for entry of an amended

opinion and award in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

RECHTER, Member. I respectfully dissent from that part of the majority's opinion remanding this claim to the ALJ for further consideration of the issue of TTD benefits. I believe the ALJ analyzed this issue sufficiently, and articulated her decision, which rested on the conclusion that Gaspard is physically unable to return to his position at Koch. That conclusion is well-supported by the evidence, and the ALJ explained her interpretation of the applicable law. The question of whether Gaspard is precluded from receiving TTD benefits by virtue of his income from the delivery route is one of law, not fact. Remand to the ALJ for further fact-finding is unnecessary under these circumstances.

COUNSEL FOR PETITIONER:

HON EMILY WETMORE
300 EAST MAIN ST, STE 400
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON CHED JENNINGS
455 SOUTH FOURTH ST, STE 1450
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON JANE RICE WILLIAMS
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601