# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: December 12, 2014**

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, AND REMANDING**
* * * * * *

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

**STIVERS, Member.** Koch Corporation ("Koch") seeks review of the May 27, 2014, Opinion, Award, and Order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") finding Lynwood Gaspard ("Gaspard") sustained a work-related back injury and awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits

enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. Koch also appeals from the July 1, 2014, Order denying its petition for reconsideration.

On appeal, Koch challenges the ALJ's decision on five grounds. First, it asserts the refusal to provide a finding of fact regarding Gaspard's post-injury average weekly wage ("AWW") is patent error. Second, it contends substantial evidence does not support a finding Gaspard did not return to work at equal or greater wages. Third, it argues the finding Gaspard's return to work with Flowers Baking Company ("Flowers") did not preclude entitlement to TTD benefits is clearly erroneous and not supported by substantial evidence. Fourth, Koch maintains the ALJ's finding Gaspard did not engage in fraud is not supported by substantial evidence. Finally, Koch argues the ALJ's failure to carve out any portion of Gaspard's pre-existing impairment rating from his total impairment rating is clearly erroneous.

The procedural history and the evidence introduced during the proceedings are important in the resolution of this appeal. On September 17, 2010, Gaspard filed a Form 101 alleging he injured his low back on October 6, 2008, in Houston, Texas. Gaspard asserted the

injury occurred in the course of “catching a large piece of glass.” After Koch filed a Form 111 denying the claim, it filed a motion to bifurcate asserting the deposition testimony of its employee, Robin Eiden (“Eiden”), established Gaspard’s employment was not principally localized in Kentucky. Thus, the ALJ should bifurcate the proceeding and resolve this issue prior to determining any other issues.

On January 14, 2011, Hon. Lawrence F. Smith, Administrative Law Judge (“ALJ Smith”) entered an order granting the motion and ordering the claim bifurcated on the issue of jurisdiction.

Koch introduced Gaspard’s December 15, 2010, deposition. Gaspard’s deposition reveals he lives in Ringgold, Louisiana, has completed the tenth grade, but has not attained a GED. Gaspard filed a previous workers’ compensation claim due to a low back injury in the early 1990s. He filed another workers’ compensation claim in approximately 2000 as a result of an injury to his foot. Gaspard testified he owns a business which he characterized as an independent distributorship working for Flowers. He estimated he began the business in either October 2008 or 2009. He explained his bread distributorship entails the following:

Q: Can you explain to me what your current employment entails. What’s your regular day like?

A: We check our load, bust it down, distribute it out to our stops, and do our ordering and so on.

Q: When you say that you check your load, is that just kind of receiving the inventory?

A: Yes.

Q: And then breaking it down would be what?

A: Well, we actually put it down per stop, whoever buys what.

Q: And then after that, is the stock loaded onto trucks?

A: It’s loaded on my truck.

Q: Is this the delivery truck that you own?

A: I own it.

Q: About how big is this truck would you say?

A: It’s a twenty foot Isuzu.

Q: And earlier you said that we break it down. Do you have other employees who work for you?

A: Yes, I’ve had to hire help.

Q: So at this point are you doing mostly managerial work, or do you also still help physically break down the product, load it into the truck, things like that?

A: I try to do all the light work.

Q: And by light work do you mean solely supervising or do you do other tasks as well?

A: I run the handheld and drive the truck.

Q: And what is the handheld?

A: It’s a PC.

Q: It’s a computer?

A: Correct.

Q: And then when you arrive at the location to deliver the product, do you unload it there or does someone else do that?

A: We unload it and stock the shelves.

Q: And when you say we, do you have someone who goes with you to make those deliveries, or do you actually do that?

A: I have someone with me full time.

Q: So you don’t actually unload; is that correct? Or do you?

A: We both unload.

Q: How much – is the product on pallets or in boxes?

A: It’s in bread trays.

Q: So how much would you say a bread tray would weigh?

A: A bread tray would probably weigh two or three pounds.

Q: And that is loaded with bread, correct?

A: No. Loaded with bread you’d probably add about seven more pounds or eight

> pounds, depending on what produce is in it.
>
> Q: Do you guys usually just carry one of those at a time, or do you carry multiple bread trays to unload the trucks?
>
> A: We put them on wheels and push them.
>
> Q: And what is the most bread trays that you have pushed at one time?
>
> A: Fifteen.

Gaspard testified his current job is “by far” a lighter duty job. He explained he was injured when he and two other employees were setting a large piece of glass. The employee holding the top of the glass lost control of the glass causing it to lean on Gaspard and the other individual who were on the bottom. Gaspard explained that because of the terrain they were on, the weight of the glass “loaded it down really heavy on us.” On that particular date, Gaspard was the supervisor because his immediate supervisor, Kelly Guailliams (“Guailliams”), was off the job for two or three months. Immediately after this occurred, Gaspard laid in the floor for four or five hours and then finished his shift. After the incident, he did not pick up anything the rest of the day due to lower back pain. The next day he called Eiden at the home office and advised her of the injury to his back. A day or two

after the injury, pain radiated into his left leg. Gaspard did not miss any work.

At the end of the week, Gaspard went home to Louisiana, where he was seen by First Care. Personnel there placed him on work restrictions and referred him to a specialist and for an MRI. He estimated he worked approximately three or four weeks after seeing a doctor. He believes he also worked approximately a week after his supervisor, Guailliams, returned to work. At the end of that week, Guailliams dismissed him.

Gaspard was treated for this injury by Dr. Marco Ramos, a neurosurgeon, who recommended fusion surgery. Gaspard explained his pain had worsened and he could not straighten his back. He acknowledged he had undergone two previous discectomies/laminectomies at L4-5 due to the previous work-related back injury. Gaspard believed the previous back surgery was successful as he had not experienced back problems for at least ten years prior to the subject injury.

Koch also filed the deposition testimony of Eiden and Guailliams.

On July 18, 2011, ALJ Smith entered an order noting a Benefit Review Conference ("BRC") was held, and after discussion with counsel for both parties, the parties

agreed briefs would be submitted by October 12, 2011, regarding the issue of jurisdiction.

In a September 16, 2011, Interlocutory Opinion and Order, ALJ Smith determined Koch's only place of business was located in Louisville, Kentucky, and Gaspard became an employee of Koch when Eiden, located in Kentucky, received the fax of his W-4, I-9, and other essential documents for him to become an employee. The ALJ concluded the contract for hire was completed in Kentucky and Gaspard regularly worked from Koch's place of business in Kentucky; therefore, Kentucky had subject matter jurisdiction.

Koch filed a petition for reconsideration which ALJ Smith denied in a November 9, 2011, Order. By order dated December 15, 2011, the claim was reassigned to Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ Clark").

Thereafter, both parties introduced medical evidence. On April 3, 2012, Koch introduced Gaspard's 2009, 2010, and 2011 W-2s issued by Flowers and the 2009 W-2 issued by AB Janitorial Service of Houston, Texas ("AB Janitorial"). The 2009 W-2 from Flowers reflects wages, tips, and other compensation of $71,542.94 and Social Security and Medicare wages of $53,746.27. The 2009 W-2 from AB Janitorial reflects wages, tips, and other

compensation of $6,700.00 and federal income tax, state income tax, Social Security tax, and Medicare tax were withheld. The 2010 W-2 from Flowers reflects wages, tips, and other compensation of $96,914.24 and Social Security wages and Medicare wages were $67,153.57. The 2011 W-2 reveals wages, tips, and other compensation of $101,851.22 and Social Security wages and Medicare wages were $68,850.64. The W-2s from Flowers reveal no federal or state income tax was withheld from the sums Flowers paid Gaspard in 2009, 2010, and 2011. Further, the W-2s reveal Gaspard was designated a statutory employee.

An April 4, 2012, telephonic status conference order reveals the claim was submitted on the record on the issues of the reasonableness and necessity of the surgery proposed by Dr. Ramos and entitlement to TTD benefits.

On June 20, 2012, ALJ Clark entered an Interlocutory Opinion and Order finding Dr. Richard Mortara and Dr. Ramos rendered the most accurate and authoritative assessments of Gaspard’s condition, its cause, and the need for surgery and adopting their opinions. ALJ Clark determined the transforaminal lumbar interbody fusion with instrumentation at L4-5 was reasonable and necessary for the cure and relief of the work injury. ALJ Clark ordered Koch to immediately pre-authorize payment for the

recommended surgery. ALJ Clark also ordered Gaspard was entitled to TTD benefits beginning June 9, 2010, and continuing until such time as he attained maximum medical improvement ("MMI"). The claim was placed in abeyance pending MMI.

Although it did not discuss the issue of entitlement to TTD benefits in its brief to the ALJ, Koch filed a petition for reconsideration arguing Gaspard's W-2s from Flowers reflect he earned substantial income in 2009 through 2011.[1] Therefore, he should not be awarded TTD benefits beginning June 9, 2010, without it receiving credit for the period of time Gaspard was "lucratively working." Koch argued it was entitled to a credit against its obligation to pay TTD benefits during the time Gaspard reached a level of improvement which allowed him to return to work earning these wages. Gaspard filed a response indicating he had earned Schedule C income and Koch was referring to his gross income, not his net income. Gaspard argued that even though he had this income it did not mean he was able to perform the physical work activities.

Prior to entry of an order ruling on the petitions for reconsideration, by order dated July 18,

[1] Gaspard also filed a petition for reconsideration pointing out the ALJ failed to award interest on the past due TTD benefits.

2012, the above-styled claim was reassigned to the ALJ. In a September 7, 2012, Amended Interlocutory Opinion and Order, the ALJ noted December 2010 is the date Dr. Ramos took Gaspard off work and also the date Gaspard testified he discontinued work. Even though the ALJ was unable to ascertain the exact date in December 2010 Gaspard was taken off work, she amended the June 20, 2012, Interlocutory Opinion and Order to reflect TTD benefits shall begin December 2010.[2] The ALJ did not expressly overrule Koch's petition for reconsideration.

On September 20, 2012, Koch filed a Notice of Preservation of Issue indicating that even though ALJ Clark's interlocutory opinion and order is not appealable, it wished to preserve the overpayment of TTD benefits as an issue.

Gaspard underwent surgery on August 24, 2012.

On December 21, 2012, Koch filed three income statements entitled "Woody Gaspard d/b/a/ Woody Gaspard Distributing Income Tax Basis Statement of Bakery Route Revenue and Expenses" prepared by Gaspard's certified public accountants. The statements pertained to the fifty-two weeks operated through December 25, 2010, the fifty-two

[2] The ALJ also determined her previous order was incorrect and Koch had timely filed a petition for reconsideration.

weeks operated through December 25, 2011, and the thirteen weeks operated through March 24, 2012. The 2010 statement reveals year-to-date revenue of $96,914.24 and total operating expenses reported of $36,674.98, leaving a net profit of $60,239.26. The 2011 statement reveals year-to-date revenue of $101,851.22 and total operating expenses reported of $42,645.16, leaving a net profit of $59,206.06. The 2012 statement reveals year-to-date revenue of 26,522.58 and total operating expenses reported of $9,260.52, leaving a net profit of $17,262.06. Except for 2010, the documents reveal there was no compensation paid to others. In 2010, the compensation paid to others is $50.00.

On January 25, 2013, Koch filed a motion to compel and a motion to terminate TTD benefits. Koch noted it had filed income statements through March 24, 2012, indicating Gaspard was earning $2,000.40 per week which is equal to or greater than his pre-injury AWW. Since Gaspard had reached a level of improvement which allowed him to return to work, Koch requested TTD benefits be terminated. Koch represented it had requested but had not received documents relating to Gaspard’s current wages, if any. Gaspard filed an objection to both motions noting he had not been placed at MMI by any physician. He argued he had

testified concerning his ownership of a franchise which is a bread delivery route. Gaspard noted he testified he was physically unable to work his franchise. He also noted he had previously provided Koch with Schedule Cs for the calendar years 2009, 2010, and 2011. Gaspard represented he would file his 2012 Schedule C. He also noted he had provided his W-2s, 2012 financial statement, and other financial tax documentation for his business operation. He asserted that even though he had been unable to perform the duties of the bread route driver which included loading and unloading and merchandising at retail groceries, the business continued while he was incapacitated. Gaspard argued this was a side business which did not require him to physically work. Thus, he insisted this was unearned income for purposes of entitlement to TTD benefits.

In a February 19, 2013, Order, the ALJ passed the motion to be resolved with the merits of the claim.

The March 26, 2013, deposition of Gaspard was introduced. Gaspard testified the surgery performed on October 24 or 26, 2012, consisted of lumbar fusion, laminectomy, and discectomy. He last saw Dr. Ramos on February 6 or 8, 2013. He explained the surgery has helped his leg pain significantly and his back feels stable. Gaspard currently takes Valium and Talwin. He is

attempting to get back to his daily routine. However, Dr. Ramos has restricted his lifting to fifteen or sixteen pounds. Currently, he stays at home and does a little walking. He is able to drive seventy or eighty miles. He still owns the distributing franchise but is not involved in the business. He does not drive a truck or make the bread deliveries. He testified he stopped working when he was taken off work on December 14 or 16, 2010. He has hired an employee who had worked as a relief driver for Flowers. Gaspard's current involvement is to "make the payroll and pay the taxes." He does not check on his employee since that employee has been in the bread business for thirty-eight years and is self-sufficient. He has no contact with his customers. Gaspard explained he purchased the truck which is subject to a lease agreement with Flowers and his employee oversees the maintenance of the truck. Gaspard testified his tax filings list him as an independent distributor. After deducting the wear and tear, payroll, taxes, and cost of fuel he estimated there is approximately $4,000.00 to $5,000.00 in "cush money" which he uses to pay his quarterly taxes and maintenance. He estimated his employee makes approximately $1,000.00 per week which is his only payroll. Gaspard believes he is lucky to make $2,000.00 or $3,000.00 a year after

everything is paid. He testified he makes less than his employee. Gaspard testified taxes were not withheld from the money he received from Flowers as he pays quarterly taxes. All of his returns are prepared by a CPA. He testified he has not attained MMI.

On May 6, 2013, Gaspard's 2010, 2011, and 2012 tax returns were filed in the record. Gaspard's 2010 individual income tax return reveals he had business income of $43,667.00 as evidenced in the Schedule C attached. His occupation was listed as bakery distributor. The Schedule C entitled Profit and Loss from business indicates Gaspard checked "yes" in response to the question, "Did you 'materially participate' in the operation of this business during 2010?" It also reveals Gaspard had gross receipts of $96,914.00 and total expenses of $53,247.00. The Schedule C reflects there was no contract labor, employee benefits, or wages paid.

Gaspard's joint return for 2011 reveals there were wages, salaries, and tips of $44,734.00 and he had also received $39,945.00 as business income as reflected in the attached Schedule C.[3] His occupation was listed as

[3] It appears the $44,734.00 was his wife's income as her occupation is listed as Coder Analyst and his occupation is listed as Bakery Distributor.

bakery distributor. The combined total income was $85,888.00. On the Schedule C attached, Gaspard again checked “yes” in response to whether he materially participated in the operation of the business. There was no payment of contract labor, employee benefits, or wages. The Schedule C lists $101,851.00 in gross receipts and $61,906.00 in expenses leaving a net profit of $39,945.00.

Gaspard’s 2012 single return reflects he was married but filing separately. He had business income of $45,507.00 as reflected in the attached Schedule C. His occupation was listed as bakery distributor. The Schedule C again reflects Gaspard checked “yes” in response to whether he materially participated in the operation of the business. As in the other two returns, there was no payment of contract labor, employee benefits, or wages. The Schedule C lists $109,667.00 in gross receipts and total expenses of $64,100.00 for a net profit of $45,507.00.

On May 6, 2013, Koch filed a motion to add fraud as an issue. In support of its motion, Koch noted Gaspard testified in his March 2013 deposition that he was not performing any work in his franchise business and all he did was pay his employee and the taxes. However, it asserted the recently filed tax information revealed he was

materially participating in the business and was making a healthy amount of money. It also noted Gaspard's income tax return revealed he did not have an employee as he did not list any wages or benefits, nor did he list anyone other than himself and a family member as a driver of the company vehicles. Further, Gaspard did not complete the section of his tax return pertaining to whether an employee drove any of the vehicles owned by him. Koch argued the tax information directly contradicts his testimony of March 26, 2013, that he was not involved in operating his business. Koch contended Gaspard's representation he was not working was a "direct attempt to fraud the insurance company into paying benefits to which he is not entitled."

In a May 29, 2013, Order the ALJ sustained the motion to add fraud as an issue.

In a July 19, 2013, Telephonic Status Order, the ALJ sustained Koch's motion to terminate TTD benefits and set a proof schedule.

On July 25, 2013, Koch filed the documents related to the distributor agreement entered into between Gaspard and Flowers. Four days later, Koch filed documents evidencing weekly payments by Flowers to Gaspard covering the payments beginning with the week of January 2, 2011, to January 8, 2011, and extending through the week from

December 30, 2012, to January 5, 2013. The parties introduced additional medical evidence.

Gaspard testified at the March 26, 2014, hearing that he began working for Koch in October 2007 and described the work he performed as very physical work, since it required extensive lifting and carrying of between 100 to 600 pounds. His job required unrestricted bending, twisting, and turning. He also has to kneel, squat, and climb. Gaspard testified he had a previous injury in the mid-1990s which required two surgeries from which he has completely recovered. He had no permanent restrictions and returned to his regular work activities. In addition, he received no follow-up treatment for his back problem prior to October 6, 2008. Gaspard again recounted how the injury occurred. Surgery was performed by Dr. Ramos on October 21, 2012. He explained that even though Dr. Ramos had previously recommended surgery, the insurance company would not authorize it. However, after entry of the second interlocutory opinion and order he underwent surgery. Dr. Ramos placed him at MMI in mid-July 2013. He received TTD benefits from December 14, 2010, to July 23, 2013. Dr. Ramos and Dr. Morris imposed restrictions of no stooping, bending, or kneeling. He could lift a maximum of five to

ten pounds and frequently carry ten pounds with a maximum of twenty pounds.

Currently, he has not returned to work for an employer. He testified he is trying to start a body shop, but because of his problems he would only be able to supervise the workers. Gaspard experiences dull burning pain in his back. He indicated the cold weather pulls against the fusion. His feet are tender, his left foot occasionally cramps, and his toes knot up. He has some numbness in his left leg. He believes surgery has helped. Commencing in December prior to the surgery, for eight to ten weeks he could not walk due to severe leg pain. Gaspard has problems with prolonged standing and walking. He is currently unable to ride his motorcycle and avoids sweeping, mopping, and bending over to do dishes. Valium is the only prescription medication he takes for his back condition. His restrictions prevent him from returning to his pre-injury work.

Gaspard testified he purchased the bread route in 2009 to produce some income. Gaspard testified he hired help because he could not perform the physical work. He estimated his distributorship entails unloading approximately 6,000 to 8,000 pounds a day. The truck is loaded daily with bread products which are delivered and

stocked in stores. At each store, the trays of bread are lowered with a lift gate and then rolled into the stores. Each tray has approximately seven to eight loaves. The bread and tray together weigh approximately ten to twenty pounds. Each day hundreds of trays of bread are delivered. The bread is placed on shelves which extend from the floor to neck level. In the course of delivering the bread the bread currently on the shelves is put on the trays, loaded on the truck, and delivered to the warehouse.

Gaspard does not believe he can perform that type of work because it requires using his back. Further, he cannot do the bending, twisting, turning, or lifting. He cannot ride in his delivery truck or climb up and down the steps to get in and out of the delivery truck. In August 2013, Gaspard tried to work for three to five days but could not tolerate the work activities. He has not worked since that failed attempt. Even though he owns the business, he does no work as he has people working for him. He pays his employees in cash. When asked if he provided the payment in an envelope or a debit card, Gaspard explained:

Q: How do you pay those employees?

A: Cash.

> Q: And how do you provide the cash to them – in an envelope, or do they have a debit card?
>
> A: Well, I used to do it in a debit card. And then when I got down in my back, I just provided him with a debit card. That way I can just transfer funds.
>
> Q: So, he would actually debit it out of the account?
>
> A: The ATM, correct.
>
> Q: All right – and that's how you would pay that?
>
> A: Yes.
>
> Q: Pay your help – is that correct?
>
> A: Correct.

At the time of the hearing, Gaspard had one helper who hired a helper. He pays the helper who in turn pays his helper. He characterized his helper as an independent contractor. Gaspard does not withhold any wages from the payments to his helper.

On cross-examination, Gaspard again confirmed he had two surgeries in the mid-90s due to a lower back work injury. He testified that during the five days he attempted to return to work, he rode on the truck and tried to help with the deliveries. His involvement consisted of rotating some of the bread on the shelves. After Gaspard purchased the business in March 2009, he never performed

most of the work involved in the business. Rather, it was his help who performed the work. He explained he considered his material involvement in the business, as stated in the Schedule C, to be taking care of payroll and speaking to the independent contractor who performs the work for him. He acknowledged that in 2010, 2011, and 2012, he did not claim payment of wages on his tax return nor did he tell his CPA he had an independent contractor working for him. Gaspard denied knowing he had the responsibility to report wages paid to an independent contractor. Gaspard estimated he earned between $20,000.00 to $25,000.00 from his business a year. When asked about his 2013 deposition testimony that he made only $3,000.00 to $4,000.00, Gaspard explained that has changed. He acknowledged the three tax returns are correct except they do not reflect the amount the help was paid. Gaspard testified he did not report paying compensation to others explaining he paid cash to his help. This resulted in him paying taxes on money he did not earn. Gaspard again denied performing the physical work involved in his business, except for the four or five days he attempted to return to work. However, he is actively involved in overseeing the business which consists of ensuring the

bread is delivered. He acknowledged his business has grown.

With respect to the issue of fraud, the ALJ entered the following findings of fact and conclusions of law:

> **2. <u>Findings of fact and conclusions of law.</u>**
>
> Gaspard has not made fraudulent statements that have led to payments to which Gaspard was not lawfully entitled.
>
> **3. <u>Evidentiary basis and analysis</u>.**
>
> Defendant/Employer has argued strenuously throughout the pendency of this claims that Plaintiff engaged in fraudulent behavior by obtaining TTD benefits of over $97,000.00 while he was also working, resulting in a windfall to the Plaintiff and substantial monetary damages to the Defendant/Employer. A lengthy discussion of the law in this state on the issue of "fraud" and the specific element required to prove fraud is not necessary here. Part "D" below, contains the reasoning behind the finding that Gaspard was not precluded from receiving TTD benefits in spite of earnings from his bread route. Statements classified by Defendant Employer as "fraud, deceit, or misrepresentation" have not lead to payments to which Gaspard was not lawfully entitled.
>
> It is also noted there are, no doubt, problems with Gaspard's tax filings: he shows earnings from the bread route on the W-2 even though he says he was self-employed; he does not

> reflect payments made to his independent contractor; and, he has listed himself as an employee of Flowers Bakery instead of the route owner, to name a few. Clearly, his tax filings contain numerous misleading statements. That, however, is not the concern of the Department of Workers' Claims. Allegations of tax fraud are questions for the IRS. None of the alleged misstatements have led to payment to which Gaspard was not otherwise entitled.

Regarding the existence of a pre-existing disability or impairment and Koch's entitlement to a carve out for that pre-existing active condition, the ALJ entered the following findings of fact:

> **1. <u>Principle of law</u>**
>
> When work-related trauma arouses or exacerbates a pre-existing condition, it has caused a harmful change in the human organism, *i.e.*, an injury as defined by KRS 342.0011(1). Although impairment that results is compensable, the type and duration of benefits depends on whether the impairment is permanent or temporary. To the extent that the condition is active immediately before the trauma occurs, it cannot have been aroused by the trauma and, thus, to that extent cannot be compensable. "[T]o be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." *Finley v. DBM Technologies*, 217 S.W. 3d 261 (Ky. App. 2007). The employer bears the

burden of proving the existence of a pre-existing, active disability

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

Plaintiff did not have a pre-existing, active condition at the time of the October 6, 2008 work injury.

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

There is simply no evidence of a "symptomatic *and* impairment ratable" condition at the time of the work injury (*emphasis added), Finley, supra*. Even Dr. Huhn who evaluated on behalf of Defendant Employer, regarding the issue of pre-existing, active and the subsequent effect of the prior surgeries on the rating stated:

> I will give Mr. Gaspard the benefit of the doubt to assume he was asymptomatic following the surgery, thus helping his current impairment rating.

*Finley* goes on to state the employer does not have to establish the condition in any way affected the employee's work immediately prior to the injury. Rather, the employer must merely show symptoms of the condition were present immediately before the injury. In the facts of this case, there is zero evidence of symptoms prior to the work injury.

Dr. Smith [sic] carved out a percentage for pre-existing active based on the prior surgeries. But absent evidence of symptoms, there is no basis for a carve out.

The ALJ determined Gaspard was entitled to PPD benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 reasoning as follows:

> **1. <u>Principle of law.</u>**
>
> 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).
>
> **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.
>
> **3. <u>Evidentiary basis and analysis</u>.**
>
> 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.

Regarding entitlement to TTD benefits, the ALJ determined as follows:

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

Plaintiff reached MMI on July 23, 2013. TTD has not been underpaid or overpaid.

**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 found to be an appropriate date considering the absence of concrete information. 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. Plaintiff argues much an [sic] 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.

Accordingly, the ALJ awarded TTD benefits of $670.02 spanning the period from December 15, 2010, through July 23, 2013, and PPD benefits of $285.88 per week from the date of injury October 6, 2008, continuing for a period not to exceed 425 weeks.

Koch filed a petition for reconsideration alleging the ALJ did not provide sufficient findings of fact as to whether Gaspard was working and receiving wages. It requested specific findings of fact which support a conclusion as to whether Gaspard's earnings from Flowers

are wages or investment income. Koch also asserted the ALJ failed to make a determination regarding the amount of wages Gaspard earned citing to his W-2s for the years 2009 through 2012. It requested the ALJ find either Gaspard earned wages as reflected in his W-2s or he did not earn this income. In the event the ALJ determined Gaspard's W-2s were not an accurate reflection of his wages, it requested the ALJ determine Gaspard's wages during this period of time and provide the evidence upon which she relied in making that determination. Koch also argued the ALJ's opinion lacks findings of fact supporting or refuting the elements of fraud. It requested findings of fact related to each element of fraud. Koch also contended the ALJ utilized the wrong standard in awarding the three multiplier and requested findings utilizing the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Finally, it argued the ALJ erred in determining there should be no carve out for a prior impairment.

The ALJ denied Koch's petition for reconsideration stating as follows:

> This matter comes before the Administrative Law Judge (ALJ) pursuant to Defendant Employer's Petition for Reconsideration of the Opinion, Award and Order dated May 27, 2014 on five different issues. Essentially, the Petition is a re-argument of the merits

of the case as, all along, Defendant Employer has argued the self-employment income was actually wages which should have precluded entitlement to TTD. The Opinion held to the contrary. Even so, the five point [sic] are addressed herein:

**1. The ALJ did not provide adequate findings of fact on whether Plaintiff was working and receiving wages**.

On pages 19 – 24, this issue is discussed. It is explained that while Plaintiff may have received income and was able to do some work, he did not return to work that would be considered customary. During the period he was entitled to TTD, any self-employment income he received did not preclude entitlement to TTD. The evidence is clear he did some work and brought in some money but neither precludes his entitlement to TTD.

**2. What was the amount of wage?** Regarding the specific amount of income, on page 24 of the Opinion, after the explanation of why the Flowers Bakery income does not preclude TTD, it is explained that the amount, in this particular instance, is not a determining factor and, therefore, not relevant.

**3. Elements of Fraud.** Defendant Employer requests findings of fact to support or refute the elements of fraud. In its brief, Defendant Employer references the six elements of fraud which must be established: 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. Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357, 359 (1978). The first

element, a material representation, it argues, is Plaintiff's request for TTD benefits because he had not reached MMI and returned to any form of employment. It is explained in the Opinion that Plaintiff's work for Flowers Bakery is not found herein to be a return to employment. The statement he had not reached MMI and not returned to employment, even if it is a material representation, it is not false.

**4. Standard for the 3 multiplier.** Defendant Employer says the ALJ used the wrong standard and should have conducted a *Fawbush* analysis. KRS 342.730 (1)(c)(1) applies the 3x multiplier where due to the injury the employee does not retain the physical capacity to return to the type of work he performed at the time of injury. Since Gaspard does not retain the physical capacity to return to the type of work he performed at the time of injury, the 3x multiplier applies. Because he has not returned to work at a weekly wage equal or greater than the average weekly wage at the time of the injury, 342.730 (1)(c)(2) does not apply and, therefore, the analysis used in *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003) is not applicable.

**5. The ALJ erred by applying no carve out for prior impairment.** This is specifically addressed on page 17:

> There is simply no evidence of a "symptomatic *and* impairment ratable" condition at the time of the work injury (*emphasis added), Finley, supra*. Even Dr. Huhn who evaluated on behalf of Defendant Employer, regarding the issue of pre-existing, active and the subsequent

> effect of the prior surgeries on the rating stated:
>
> I will give Mr. Gaspard the benefit of the doubt to assume he was asymptomatic following the surgery, thus helping his current impairment rating.
>
> *Finley* goes on to state the employer does not have to establish the condition in any way affected the employee's work immediately prior to the injury. Rather, the employer must merely show symptoms of the condition were present immediately before the injury. In the facts of this case, there is zero evidence of symptoms prior to the work injury.
>
> Dr. Smith [sic] carved out a percentage for pre-existing active based on the prior surgeries. But absent evidence of symptoms, there is no basis for a carve out.

In support of its first argument that the ALJ failed to provide findings of fact regarding the amount of Gaspard's post-injury AWW, Koch argues whether Gaspard returned to work at equal or greater wages is relevant in determining whether an analysis pursuant to Fawbush v. Gwinn, supra, is appropriate. Similarly, it is relevant to the issue of entitlement to TTD benefits.

Regarding its second argument that substantial evidence does not support a finding Gaspard did not return to work at equal or greater wages, Koch argues the only credible evidence in the record compels a finding Gaspard returned to work at equal or greater wages. Since the ALJ did not provide a finding of fact regarding Gaspard's AWW it was improper for the ALJ to find he did not return to work at equal or greater wages; as such, enhancement by the three multiplier should be reversed. It notes Gaspard's pre-injury AWW is $1,006.23 which equals $52,323.96 per year. Koch asserts Gaspard's W-2s for the years 2010, 2011, and 2012 exceed this amount and result in an AWW much greater than the pre-injury AWW. It also posits the only evidence which contradicts a post-injury AWW utilizing his W-2s is Gaspard's own inconsistent and unreliable testimony. Koch notes Gaspard testified in his second deposition that he made $4,000.00 or $5,000.00 per year but at the hearing he testified he was making between $20,000.00 and $90,000.00 per year since the injury. Therefore, a finding he returned to work at equal or greater wages is compelled. Thus, the three multiplier must be analyzed pursuant to Fawbush v. Gwinn, supra.

Koch also argues the ALJ's erroneous finding that Gaspard's return to work with Flowers did not preclude

entitlement to TTD benefits is not supported by substantial evidence. Koch argues the ALJ's reasoning that TTD benefits are appropriate because Gaspard did not return to the type of work he performed at the time of the injury is based on an incorrect standard. Therefore, the ALJ erroneously awarded TTD benefits during the time Gaspard was working for Flowers. It argues the ALJ's reliance upon Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005) and the Board's decision in J.C. Penney Co., Inc. Inc. v. Newsom, (Claim No. 200701034) rendered June 30, 2010, in finding Gaspard is entitled to TTD benefits during the period he worked for Flowers because he had not reached MMI and could not return to his pre-injury work as a glass setter is erroneous. It urges the ALJ's reliance on these cases in finding Gaspard has not reached a level of improvement which allowed a return to his customary work is improper. Koch argues Double L Const., Inc. and JC Penney define customary work as the type of work performed at the time of the injury in cases of concurrent employment only.

Koch argues because this claim did not involve concurrent employment, the standard for performing customary work is set forth in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) and Magellan Behavioral

Health v. Helms, 140 S.W.2d 579 (Ky. App. 2004) where the claimant had reached a level of improvement that allowed her to return to work which was not minimal. Therefore, since the evidence showed Gaspard returned to more than minimal work, the fact he did not return to work as a glass setter is irrelevant. Further, Koch argues Gaspard testified he actively participated in the bread delivery business and his tax returns support that testimony. It cites to Gaspard's description of his work in his December 2010 deposition, set forth herein, and his tax returns which indicate he materially participated in his business. It notes Gaspard's tax returns reflect he actively engaged in the business related activities which required him to drive a Corvette and a Chevrolet truck significant miles in 2010, 2011, and 2012 all for business purposes. It notes Gaspard's W-2s reflect he made more money than he earned while working for Koch which contradicts the finding Gaspard was performing minimal work at Flowers. Koch notes Gaspard has been working for Flowers for almost two years before December 2010 when the ALJ commenced the award of TTD benefits. By this point, Koch argues Gaspard's work with Flowers was his customary employment and therefore could not be considered minimal employment. Further, Koch argues there is no evidence Gaspard was precluded from

continuing this business at any point following his surgery nor does his income reflect any decrease in his earnings in 2010 through 2012. Consequently, an award of TTD benefits was not appropriate because Gaspard was working at Flowers.

It also contends there is a public policy argument for not awarding $97,000.00 in TTD benefits when Gaspard was working at Flowers earning over $90,000.00 per year. Consequently, awarding TTD benefits during this period would result in a windfall.

Next, Koch argues the ALJ's finding Gaspard did not engage in fraud is not supported by substantial evidence. It contends Gaspard was not entitled to TTD benefits during the same time he was working and earning wages greater than he earned while working for Koch. Furthermore, Gaspard's behavior in obtaining these funds was fraudulent. It argues Gaspard made a material misrepresentation that he had not returned to any form of employment. In support of this argument, Koch cites to Gaspard's response to its petition for reconsideration, objection to its motion to terminate TTD benefits, and his response and objection to its renewed motion to terminate or to bifurcate the claim on the issue of whether TTD benefits are appropriate. It contends the representations made in his responses were false as all written evidence

and Gaspard's testimony indicates he was working. Koch argues Gaspard's W-2s establish he was an employee of Flowers. It also relies upon Gaspard's description of what was entailed in operating the business. Further, his statements he was not working were false and made recklessly, with the intent to obtain TTD benefits. Koch contends ALJ Clark and the ALJ relied upon Gaspard's testimony in awarding TTD benefits. Consequently, it asserts the Board should find Gaspard fraudulently obtained TTD benefits of over $97,000.00 and Koch is entitled to relief under KRS 342.990.

Finally, Koch argues the ALJ's failure to carve out any portion of Gaspard's previous impairment rating is clearly erroneous. It argues the ALJ should have awarded benefits based on Dr. Thomas M. Huhn's 7% whole person impairment rating and not a 20% impairment rating. Koch notes Dr. Huhn stated Gaspard had undergone two L4-5 laminectomies and discectomies prior to the work injury and as a result of the surgeries assessed a 13% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Following the work injury and successful fusion surgery, Dr. Huhn assigned a 20% impairment rating and subtracted 13% for the prior

surgeries leaving a 7% impairment rating as a result of the subject work injury. It asserts a repair of a herniated disc results in an automatic 10% to 13% impairment rating pursuant to Lumbar DRE Category III of the AMA Guides and there are no conditions or exceptions to the impairment. Since Gaspard had undergone two prior surgeries which merited a permanent impairment rating, as a matter of law the ALJ erred in failing to carve out the existing impairment from the 20% impairment rating assessed for Gaspard's current condition.

Concerning Koch's first argument, we agree the ALJ erroneously concluded in the order ruling on the petition for reconsideration that the amount of Gaspard's post-injury earnings was not relevant. However, we find the ALJ's failure to determine the amount of income Gaspard earned from Flowers to be harmless error. The financial records, including the W-2s and tax returns, establish Gaspard was a statutory employee pursuant to federal income tax laws. As such, the amounts reflected in the W-2s introduced for the years 2009, 2010, and 2011 are not determinative of the issue of whether Gaspard returned to work earning a wage equal to or greater than his pre-injury AWW.

Our research reveals the applicable federal statute is 26 U.S.C. § 3121(d)(1)(2)(3)(A) which reads, in relevant part, as follows:

> (d) Employee.--For purposes of this chapter, the term “employee” means--
>
> (1) any officer of a corporation; or
>
> (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or
>
> (3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person--
>
> (A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal.

The above sections of the statute delineate Gaspard as a statutory employee. Further, Revenue Rule/Ruling 90-93 provides, in relevant part, as follows:

> Section 3121(d) of the Code describes four separate categories of individuals who are treated as employees for purposes of applying the FICA tax provisions. These four categories include (1) officers of a corporation, (2) common law employees, (3) individuals in specified occupational groups who are not common law employees, and (4) certain nonfederal governmental workers. Employees in the third category are commonly referred to as 'statutory

employees.' Full-time life insurance salesmen who are not common law employees are expressly included in this third category. A full-time life insurance salesman is one whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company. See section 31.312(d)-1(d)(3)(ii) of the regulations.

Section 3121(d)(3) of the Code also provides that the term 'employee' includes anyone who performs services for remuneration for any person as an agent-driver or commission-driver, as a home worker, or as a traveling or city salesman, under the conditions stated in the section.

. . .

The provisions cited above operate to treat individuals described in section 3121(d)(3) of the Code as statutory employees only for purposes of certain specified provisions of the Code. No statutory or regulatory provision, however, treats these statutory employees as employees for purposes of sections 62 and 67.

Thus, A, who is a statutory employee under section 3121(d)(3) of the Code, is not an employee for purposes of sections 62 and67. Therefore, A may use Schedule C of the Form 1040 to determine A's net profit or loss from doing business as a full-time life insurance salesman. Further, A's trade or business expenses related to being a full-time life insurance salesman are not subject to

> the 2-percent floor for miscellaneous itemized deductions.[4]

Based on the above cited statute and revenue ruling, Gaspard was permitted to deduct his business expenses which are reflected in Schedule C of his tax return. Consequently, the applicable amount for determining whether Gaspard returned to work earning a wage equal to or greater than his pre-injury AWW is that amount shown on line twelve of his tax return which is calculated in the Schedule C attached. The figure shown on the Schedule C is the amount inserted on line twelve of the tax return.

Since Gaspard was a statutory employer, he was permitted to deduct his business expenses from the amounts shown on the W-2s in arriving at his net income derived from the distributorship for purposes of determining the application of KRS 342.730(1)(c)2. Thus, Flowers was only required to deduct Social Security taxes and Medicare taxes and not any federal, state, or local income taxes.

Although a resolution of this issue does not require us to determine Gaspard's status as either an employee or an owner of a sole proprietorship, we note the payment records introduced by Koch spanning the period from

[4] Because of the volume and the complexity of the federal statutes and revenue rule/ruling, we have not set forth the full statutes.

January 2, 2011 through December 30, 2012, and the Bill of Sale executed by Gaspard and Flowers reflect Gaspard was the owner of a distributorship. In addition, the documents entitled "Distributorship Financial Guidelines" and "Addendum" specifically state Gaspard owns the distributorship and discuss the conditions under which Flowers may re-purchase the distributorship. Consequently, 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 applicability of KRS 342.730(1)(c)2.

Significantly, in its brief, Koch concedes Gaspard's average weekly wage ("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. Thus, the ALJ's failure to determine a post-injury wage constitutes harmless error, as it is clear from his tax returns Gaspard's income in 2010, 2011, and 2012 did not equal or exceed his pre-injury AWW. With respect to 2009, we note Gaspard's W-2s reflects total receipts of $71,542.94 and $6,700.00. However, his 2009 tax return and any other documents pertaining to his 2009 net income are not in the record. Thus, based on the

evidence in the record, the ALJ correctly determined Gaspard had not returned to work earning a wage which equaled or exceeded his pre-injury AWW. Therefore, the award of enhanced benefits by the three multiplier without performing an analysis pursuant to Fawbush v. Gwinn, supra, shall be affirmed.

Concerning Koch's next argument that substantial evidence does not support a finding Gaspard did not return to work at equal or greater wages, our holding with respect to Koch's first alleged error is dispositive of this issue. Again, Gaspard's W-2s are not dispositive of this issue as he is permitted to deduct his yearly operating expenses from the amount shown on the W-2 in arriving at his taxable income each year. Since Gaspard was designated as a statutory employee in the W-2s filed in the record, no local, state, or federal income tax was withheld from the amount paid to Gaspard. Similarly, the documents evidencing the payments made to Gaspard covering the week beginning January 2, 2011, through the week ending January 5, 2013, do not establish there was any withholding for local, state, or federal income taxes. Consequently, the tax returns are substantial evidence which support the ALJ's finding in the July 1, 2014, Order that Gaspard did

not return to work at an AWW equal or greater than his pre-injury AWW and KRS 342.730(1)(c)2 is inapplicable.

Regarding Koch's third argument that the ALJ's determination Gaspard's return to work with Flowers did not preclude entitlement to TTD benefits is both erroneous and not supported by substantial evidence, we feel constrained to state the case *sub judice* does not involve concurrent employment. Gaspard was injured in October 2008. At that time, he was neither a statutory employee of Flowers nor the owner of the distributorship. Koch correctly notes Gaspard did not have concurrent employment at the time of his injury as Gaspard's testimony establishes he purchased the distributorship in 2009. The financial and tax documents in the record support his testimony. At the earliest, Gaspard became a statutory employee or an owner of the distributorship approximately a year after the injury. Thus, the standard for determining Gaspard's entitlement to TTD benefits is as enunciated in Central Kentucky Steel v. Wise, supra, and Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004). In Central Kentucky Steel v. Wise, supra, the Supreme Court stated:

KRS 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.
>
> 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. Dr. Gardner stated that Wise did not reach maximum medical improvement until October 28, 1997. Moreover, Wise did not return to work until the end of September. Consequently, the award by the ALJ of TTD benefits through September 30, 1997, was supported by substantial evidence.
>
> Alternatively, CKS argues that even if the statute intends that an individual return to or, at least, be released to return to his or her usual job, the evidence in the record before the ALJ clearly indicates that Dr. Gardner stated that Wise could return to work without restrictions on September 7, 1997. We must disagree. The evidence relied on by CKS is speculative. Dr. Gardner did suggest on August 8, 1997, that Wise would be able to return to work without restrictions one month after that date. It was not until October 13, 1997, however, that he assigned Wise a maximum medical improvement as of October 28, 1997.

Id. at 661.

The Court of Appeals in Magellan Behavioral Health v. Helms, supra, explained:

> KRS 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." While the Board was correct in recognizing that that definition encompasses two analyses, it erred when it rephrased them in disjunctive terms of "or" when the statute is clearly written using the conjunctive "and." 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.
>
> In this case, once the ALJ determined that Helms had reached maximum medical improvement, she ended her eligibility for TTD benefits. Whether she remained under restrictions which prohibited her from returning to work even after reaching maximum medical improvement is relevant to the issue of the extent and duration of impairment.
>
> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to 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, [footnote omitted] the statutory phrase "return to employment" was interpreted to mean a return to the type of work which is customary for the injured employee or that which the

> employee had been performing prior to being injured.

Id. at 581.

The key date relative to the entitlement to TTD benefits is December 14, 2010, the date on which Gaspard testified he stopped working pursuant to the instructions from Dr. Ramos.[5] 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.

[5] The parties stipulated TTD benefits commenced on December 15, 2010.

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.

There is no question 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.[6] Consequently, we believe there is substantial evidence which would support either the ALJ's award of TTD benefits or an award of TTD benefits less than awarded by the ALJ.

[6] Dr. Huhn, who performed a medical records review for Koch, stated Gaspard underwent surgery on August 24, 2012. Gaspard initially testified he underwent surgery on October 24 or 26, 2012, and later changed the date to October 21, 2012. Dr. Ramos' medical records do not provide the date surgery was performed. The report of Dr. Jerry Morris dated November 21, 2013, state surgery was performed on August 2, 2012.

The ALJ's opinion and subsequent order ruling on the petitions for reconsideration reveal she did not analyze Gaspard's entitlement to TTD benefits utilizing the correct standard. The ALJ found Gaspard reached MMI on July 23, 2013, and provided her analysis in support of that finding.[7] Although the ALJ cited to Magellan Behavioral Health v. Helms, supra, and Central Kentucky Steel v. Wise, supra, she stated the evidence establishes Gaspard had never been able to return to the type of job he performed at the time of the injury.[8] The ALJ then 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. Newsom, Claim No. 200701034, rendered June 30, 2010, which deal with the entitlement to TTD benefits when there is concurrent employment. The ALJ concluded Gaspard was entitled to TTD benefits until he reached MMI and his income from the bread route did not preclude his entitlement to the TTD benefits. In the order ruling on the petitions for reconsideration, regarding Gaspard's entitlement to TTD benefits, the ALJ reiterated a portion of her opinion in which she explained the amount Gaspard had earned from Flowers did not preclude TTD benefits and

[7] See page 19.
[8] See page 21.

was not relevant. She also reiterated her finding that while Gaspard was able to do some work and may have received income, he did not return to work which would be considered customary. The ALJ also stated Gaspard's work for Flowers "is not found to be a return to employment." However, in awarding TTD benefits the ALJ does not provide any findings in support of her conclusions set forth in her opinion, award, and order and the subsequent order ruling on the petitions for reconsideration. Further, the finding Gaspard could not return to the type of job performed when injured is not sufficient to satisfy the statutory and case law criteria. We are cognizant of the recent ruling in Mull v. Zappos.com, Inc., 2013-CA-001320-WC, rendered July 11, 2014, Designated Not To Be Published, in which the Court of Appeals stated, in relevant part, as follows:

> The dispositive factor is always the worker's ability to perform the pre-injury job. Finally, *Williams* indicates that Kentucky precedent favors Mull's interpretation of the phrase 'return to employment': an employee has achieved this level of improvement if, and only if, the employee can perform the *entirety* of his or her pre-injury employment duties within the confines of their post-injury medical restrictions.
>
> We are cognizant that this interpretation flies in the face of the plain meaning of the words 'totally disabled'; it narrowly defines

> otherwise broad language such as 'return to employment'; and, when applied in the context of a worker who is capable of performing most pre-injury duties or pursuing some other employment for equal wages and for an equal amount of hours each week, it would seem to contradict the very purpose of awarding TTD, that is, 'to compensation workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents' *Mitchell*, 182 S.W.3d at 514. Be that as it may, this interpretation is consistent with binding precedent and, whether we agree with it or not, we are bound to follow it. It is the purview of the Kentucky Supreme Court or to the General Assembly to say otherwise.

As that case is on appeal and designated not to be published, we believe the ALJ must determine when Gaspard reached a level of improvement which permits a return to the type of work which is customary to the injured employee or that which he has been performing prior to being injured. Thus, we decline to apply the standard for entitlement to TTD benefits the Court of Appeals imposed in an unpublished opinion. Further, had the Supreme Court intended benefits be terminated only when the worker can perform the entirety of his pre-injury employment duties we believe it would have so stated in Central Kentucky Steel v. Wise, supra.

In summary, in order for Gaspard to be entitled to TTD benefits, he must not have reached MMI and a level of improvement that would permit a return to employment as defined in Central Kentucky Steel v. Wise, supra and Magellan Behavioral Health v. Helms, supra. Therefore, the award of TTD benefits shall be vacated and the claim remanded for a determination of the period during which Gaspard is entitled to TTD benefits. We are not suggesting any particular outcome on this issue.

Concerning Koch's argument the ALJ's finding Gaspard did not engage in fraud is not supported by substantial evidence, we note that during his deposition on December 15, 2010, Gaspard acknowledged he owned a business and indicated he is an independent distributor for Flowers. He thought this began in either 2008 or 2009.[9] In addition, Gaspard's W-2s were introduced during the stage of the litigation the parties were contesting Gaspard's entitlement to the surgery and TTD benefits. It appears Gaspard provided his year-to-date revenue and expenses and tax returns for 2010, 2011, and 2012 as Koch introduced those documents. We note that in various responses, Gaspard represented that during the course of the

[9] This deposition was taken prior to ALJ Smith resolving the jurisdictional issue.

litigation he had provided these documents to Koch, which Koch apparently does not dispute. What Koch relies upon in part, is Gaspard's response and objection to its petition for reconsideration and objection to the motion to terminate TTD benefits, both filed February 5, 2013. It also relies upon Gaspard's response and objection to its renewed motion to terminate or bifurcate the claim on the issue of whether TTD is appropriate filed May 5, 2013. We first observe those documents were filed over two years after payment of TTD benefits commenced and could not be false and material representations resulting in the wrongful payment of TTD benefits.

Further, we have reviewed the pleadings about which Koch complains. In those pleadings, Gaspard recited his testimony and represented he had provided the financial and tax documentation for his business operations. Gaspard argued Koch did not understand the difference between earned and unearned income. Gaspard contended he had been unable to perform the physical activities involved in his distributorship. However, the business had continued even while he had been incapacitated. Thus, he contended this was unearned income for purposes of determining his entitlement to TTD benefits. Gaspard also pointed out he had undergone fusion surgery, had not been placed at MMI by

Dr. Ramos, and was unable to return to his pre-injury work duties. Gaspard's responses do not constitute a false material representation, but rather his position relative to the assertion made in Koch's pleadings. Koch argues the representation Gaspard was not working was made with the intent to obtain TTD benefits. We find no merit in this argument as TTD benefits had been paid since December 2010, over two years before Gaspard filed the first response about which Koch complains.

That said, we believe 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." The ALJ referenced Gaspard's tax documents and the fact the W-2s indicate he was an employee even though he stated he was self-employed. Further, the ALJ noted his tax returns did not reflect payments made to independent contractors and that he had listed himself as an employee of Flowers instead of a route owner. Even though the ALJ concluded his tax filings contain numerous misleading statements, she also concluded the alleged misstatements did not result in payments to which Gaspard was not entitled. In the July 1, 2014, Order, she concluded the statement Gaspard had not reached MMI and not returned to employment, if a material

representation, was not false. However, the ALJ did not explain the basis for her finding Gaspard's statements in his tax filings did not result in payments of TTD benefits to which he was not entitled. The ALJ failed to provide any findings explaining why there was no fraud.

Accordingly, this claim must be remanded to the ALJ for additional findings regarding the issue of 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). On remand, the ALJ must discuss each element and provide sufficient findings of fact in support of her determination regarding the issue of fraud in order to advise the Board and the parties of the basis for her decision. *See* Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Finally, we find no merit in Koch's argument the ALJ erroneously failed to carve out any portion of the 20% impairment rating for a pre-existing impairment. Gaspard testified he had no lower back problems prior to the subject injury for more than ten years. He indicated he

was able to perform all of his job duties before the injury of October 6, 2008. In his initial report of July 8, 2012, Dr. Huhn, Koch's physician, stated Gaspard had undergone two surgeries and although he did not have the records concerning those surgeries, he believed the surgeries occurred prior to the October 6, 2008, work event, thus Gaspard qualified for a 13% impairment rating pursuant to the AMA Guides. Dr. Huhn stated this was the minimum pre-existing impairment he can assign as he did not have enough medical records to determine if Gaspard continued to be symptomatic subsequent to the second surgery. Dr. Huhn reserved the right to amend his pre-existing impairment rating should he be provided with further information. In his January 8, 2014, supplemental report, Dr. Huhn again stated pursuant to the AMA Guides, Gaspard qualified for an impairment rating due to the prior surgeries. The impairment rating was based on an individual who had surgery for radiculopathy but was not symptomatic. Dr. Huhn stated "I will give Mr. Gaspard the benefit of the doubt to assume he was asymptomatic following the surgery thus helping his current impairment rating." He reaffirmed his opinion that pursuant to the AMA Guides, Gaspard qualified for a 20% impairment rating less the 13%

impairment rating for his pre-existing condition yielding a 7% impairment rating for the October 6, 2008, work injury.

In Finley v. DBM Technologies, 217 S.W.3d 261, 265, 266 (Ky. App. 2007), the Court of Appeals stated as follows:

> It is well-established that the work-related arousal of a pre-existing dormant condition into disabling reality is compensable. *McNutt/Constr./First Gen. Servs. v. Scott*, 40 S.W.3d 854 (Ky. 2001). In its opinion, the Board correctly and succinctly set forth the law upon compensability of a pre-existing dormant condition:
>
> > What then is necessary to sustain a determination that a pre-existing condition is dormant or active, or that the arousal of an underlying pre-existing disease or condition is temporary or permanent? To be characterized as active, an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).
>
> Alternatively, where the underlying pre-existing disease or condition is

shown to have been asymptomatic immediately prior to the work-related traumatic event *and* all of the employee's permanent impairment is medically determined to have arisen after that event—due either to the effects of the trauma directly or secondary to medical treatment necessary to address previously nonexistent symptoms attributable to an underlying condition exacerbated by the event—then as a matter of law the underlying condition must be viewed as previously dormant and aroused into disabling reality by the injury. Under such circumstances, the injured employee must be compensated not just for the immediate physical harm acutely produced by the work-related trauma, but also for all proximate chronic effects corresponding to any contributing pre-existing condition, including any previously dormant problem strictly attributable solely to congenital or natural aging processes, as it relates to the whole of her functional impairment and subsequent disability rating, including medical care that is reasonable and necessary pursuant to KRS 342.020.

. . .

To summarize, a pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition. When a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable. A pre-existing condition may be either temporarily or permanently aroused. If the pre-existing condition completely reverts to its pre-injury dormant

> state, the arousal is considered temporary. If the pre-existing condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent, rather than temporary. With these legal principals in mind, we shall undertake a review of the ALJ's award.

In the case *sub judice*, in order for the ALJ to carve out the 13% impairment rating Dr. Huhn attributed to the previous surgeries, Koch had the burden of establishing that immediately before the October 6, 2008, injury Gaspard’s pre-existing condition was both impairment ratable and symptomatic. Clearly, Gaspard’s pre-existing condition was impairment ratable. However, Dr. Huhn’s statements and Gaspard’s testimony establish Gaspard’s condition was not symptomatic. This is buttressed by the questionnaire completed by Dr. Morris on October 28, 2013, in which he opined Gaspard did not have a pre-existing active condition. As noted by the ALJ, although Dr. Huhn assessed an impairment rating for the prior surgeries, he did not state Gaspard was symptomatic. Consequently, Dr. Huhn’s opinion fails to establish Gaspard’s condition was symptomatic prior to the subject injury. The ALJ concluded Dr. Huhn’s opinion established Koch had not met its burden of establishing Gaspard’s condition was symptomatic immediately prior to the injury. Significantly, the ALJ

also relied upon Dr. Huhn's impairment rating of 20%. Dr. Huhn's opinion and Gaspard's testimony constitute substantial evidence which supports the determination Gaspard's condition although impairment ratable, was not symptomatic. As the ALJ relied upon Dr. Huhn's opinion in resolving the issue of the existence of a prior active condition, Koch failed in its burden of establishing Gaspard had an active pre-existing condition meriting a carve out in the award of PPD benefits. The ALJ's decision concerning the impairment rating attributable to the subject injury shall be affirmed.

Accordingly, we **AFFIRM** the ALJ's determination Gaspard was entitled to enhanced benefits by the three multiplier contained in KRS 342.730(1)(c)1. The ALJ's failure to provide a finding regarding Gaspard's post-injury AWW was harmless error and the ALJ's determination in the July 1, 2014, Order that Gaspard did not return to work at equal or greater wages is **AFFIRMED**. Further, the ALJ's determination Gaspard did not have a pre-existing active condition and the award of PPD benefits is also **AFFIRMED**. The ALJ's award of TTD benefits and her finding Gaspard did not engage in fraud are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion and award determining the extent to which Gaspard is entitled

to TTD benefits and whether Gaspard engaged in fraud with the intent to obtain TTD benefits in conformity with the views expressed herein.

ALVEY, CHARIMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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