OPINION ENTERED: January 4, 2013

CLAIM NO. 200992380

L.A. FITNESS, LLC PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

DAVID WYRABKIEWICZ
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

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

STIVERS, Member. L.A. Fitness, LLC ("L.A. Fitness") appeals from the July 12, 2012, opinion and order in which Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits to David Wyrabkiewicz ("Wyrabkiewicz"). L.A.

Fitness also appeals from the August 13, 2012, order overruling its petition for reconsideration.

The Form 101 alleges that on March 28, 2009, Wyrabkiewicz injured his back, neck, and head with a "psychological overlay." The incident happened as follows:

> Mr. Wyrabkiewicz was employed as a general manager. Mr. Wyrabkiewicz states that on the day of the injury, he was walking into the restroom at work and slipped on a plastic razor cover. As David fell, he hit his back on the garbage can. The can flew out from underneath him, causing him to strike his head and neck against on [sic] the tile wall and floor. Mr. Wyrabkiewicz suffered injuries to his back, neck, head, right elbow, and suffered a concussion. He was taken by ambulance to St. Luke Hospital (now St. Elizabeth Medical Center) for immediate treatment.

In the Form 111, L.A. Fitness denied the claim for the following reasons:

> Extent and duration of Plaintiff's alleged injuries; whether Plaintiff meets the burden set forth by KRS 342.0011(1); causation and work relatedness; whether Plaintiff suffered from a pre-existing active condition.

In the July 12, 2012, opinion and order, the ALJ set forth the following findings of fact and conclusions of law:

> **1. Did the plaintiff sustain a physical or psychological injury as defined by the Act?** The plaintiff argues

that on March 28, 2009 he sustained a physical injury from which he has developed permanent psychological injuries. The defendant argues that the plaintiff had a pre-existing psychological injury and after a year of treatment, he has returned to baseline.

KRS 342.0011(1) defines “injury” as any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process. *Id*.

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party’s total proof. *Jackson v. General Refractories Co.*, 581 S.W.2d 10 (Ky. 1979); *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

In the present case the ALJ finds more persuasive the opinions of Dr. Wunder and Dr. Roebker. Their opinions seem more appropriate to the condition of the plaintiff as the ALJ met him. I therefore find that the plaintiff did sustain a physical and a psychological injury as defined by the Act.

2. Were the plaintiff’s injuries caused by his work for the defendant?

The plaintiff argues that the slip and fall at work caused his injuries. While doing his job, he slipped and fell. Thus, the injuries arose from his employment. The defendant argues that the plaintiff's injuries were transient and healed soon after the fall. Residual pain comes from the plaintiff being nearly 66 years old. Psychologically, Dr. Berger noted that the plaintiff had been "labeled" depressed and anxious as early as 2005.

Again, the ALJ finds more persuasive the opinions of Dr. Wunder, Dr. Newman and Dr. Roebker, as supported by other evidence of record. I therefore find the plaintiff's injuries work-related.

3. Did the plaintiff have any active pre-existing conditions at the time of the work injury? The defendant argues that the plaintiff's cervical condition relates to his being nearly 66 years of age, and that his mental problems pre-existed the work accident. The plaintiff argues that prior to the work injury, he could perform his job for the defendant full-time with no interference from cervical or depression problems.

The phrase "active disability" does not appear in statutes but is a term developed by case law. In *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1976), the Supreme Court stated that a pre-existing condition or disease was "active" if it had become "disabling" prior to the subsequent accident. On the other hand, in *Yocom v. Spaulding*, 547 S.W.2d 442, 445 (Ky. 1977), the Courts defined a "dormant" condition or disease as one which had not created any occupational disability prior to the subsequent accident.

In the present case the ALJ finds more persuasive the opinions of Dr. Wunder, Dr. Newman and Dr. Roebker, as supported by other medical records. The plaintiff had worked in fitness for more than 20 years. His cervical problem had never previously caused him to miss work. His mental health issues seem to have been resolved prior to the work injury. I therefore find that the plaintiff had no active pre-existing condition, physical or psychological.

4. What is the extent and duration of the plaintiff's permanent impairment? The plaintiff argues that he has sustained an 11% physical and a 20% psychological whole person impairment. He further argues that he lacks the physical capacity to return to his pre-injury job. The defendant argues that the plaintiff’s injuries have resolved and he retains the capacity to return to his pre-injury job.

Again, the ALJ finds persuasive the opinions of Dr. Roebker, Dr. Newman and Dr. Wunder. I find that the plaintiff has sustained an 11% whole person physical impairment and a 20% whole person psychological impairment.

I further find, consistent with *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), that the plaintiff would be entitled to the three factor. *Fawbush* and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an AWW equal to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that

level of wages for the indefinite future.

With the restrictions imposed by Dr. Kelly and Dr. Wunder and the limitations explained by Dr. Roebker, the ALJ finds that the plaintiff does not retain the physical or psychological capacity to return to his pre-injury job, managing a health club. The plaintiff tried twice, unsuccessfully, to return to that job.

The plaintiff has returned to work in a different field. The ALJ has sufficient information about the plaintiff's current earnings to conclude that he earns a lower average weekly wage. At the plaintiff's current job he is permitted great latitude to lie down and ice his neck, yet he earns almost as much in commission as in salary. I do not find sufficient evidence that the plaintiff cannot continue to earn his current wage indefinitely. Based on his inability to perform his pre-injury job, I find that he is entitled to the three multiplier.

5. Did the plaintiff unreasonably fail to follow medical advice? The defendant argues that the plaintiff unreasonably failed to follow medical advice by failing to complete physical therapy at Select Florence Physical Therapy. The ALJ notes, however, that the plaintiff did complete physical therapy in the form or [sic] chiropractic care as recommended by Dr. Kelly. I therefore find for the plaintiff on this issue.

6. Is the plaintiff entitled to additional temporary total disability benefits? The plaintiff argues that the defendant paid some but not all the TTD benefits to which he was entitled.

> KRS 342.0011 (11) (a) defines "temporary total disability" as 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. In other words, TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, and the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. *W.L Harper Construction Co. v. Baker*, 858 S.W.2d 202 (Ky. App 1993).
>
> The ALJ finds that the plaintiff is entitled to TTD at a rate of $438.04 per week from April 7, 2009 through October 20, 2009; and from November 2, 2009 through August 31, 2011; and from September 2, 2011 through February 2, 2012. The defendant shall receive a credit for amounts already paid.

In its petition for reconsideration, L.A. Fitness asserted as follows:

> Defendant/Employer requests that the ALJ reconsider his determination of impairment (20%) related to the work event, his finding of a work-related psychological injury pursuant to KRS 342.0011(1), his finding that Plaintiff did neither suffered [sic] from a pre-existing active condition nor a temporary exacerbation of his pre-existing psychological condition. If the ALJ refuses to reconsider these issues, Defendant/Employer requests that the ALJ make specific findings of fact to support his determination that: (1)

> Plaintiff did not have a pre-existing active condition; (2) Plaintiff did not have a temporary exacerbation of a pre-existing condition; (3) Plaintiff's pre-existing psychological condition had resolved and; (4) identify the substantiated [sic] evidence which support his finding of a 20% impairment rating.

L.A. Fitness also requested reconsideration and reduction of Wrabkiewicz's physical impairment rating by 3%. It asserted the ALJ's "assignment of MMI on February 2, 2012 has no basis or substantiated [sic] medical evidence supporting such conclusion." Further, L.A. Fitness asserted the ALJ erred in calculating TTD benefits.

In the August 13, 2012, order on reconsideration, the ALJ determined as follows:

> 1. Defendant has filed a Petition for Reconsideration and the plaintiff has responded thereto.
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> 2. In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. There are no patent errors here and the defendant is attempting to reargue the case.
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> ...
>
> 4. At the Benefit Review Conference the parties stipulated that the employer paid the plaintiff temporary total disability benefits of $459.75 per week from April 7, 2009 through October 14,

2009, and from November 2, 2009 through November 1, 2010, and again from December 15, 2010 through August 31, 2011, for the total amount of $33,693.13. In the Opinion and Order dated July 12, 2012, the plaintiff was awarded temporary total disability benefits at the rate of $438.04 per week from April 7, 2009 through October 20, 2009 and again from November 2, 2009 through August 31, 2011, and again from September 2, 2011 through February 2, 2012. The Opinion and Order further specified that the defendant was entitled to a credit for the amounts of temporary total disability benefits already paid. The award of temporary total disability benefits was based upon the plaintiff's sworn testimony and the medical evidence from the doctors whose records and reports have been filed herein.

5. I saw and heard the plaintiff testify at the hearing on July 6, 2012. He was a credible and convincing witness. He testified in detail at the hearing and in his deposition about his injuries caused by his work accident on March 28, 2009, including the injuries to his head, neck and resultant psychological injuries. He testified in detail about his continuing symptoms. I also found very persuasive the medical evidence from Drs. Wunder, Roebker, Kelly and Newman.

6. Fawbush v. Gwinn, 103 S.W.3d 5 (Ky.2003) and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an AWW equal to or greater than his pre-injury wage.

> Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future.
>
> 7. Based upon the totality of the evidence, including, but not limited to the plaintiff's testimony and the medical evidence from Drs. Wunder, Kelly and Roebker, it is clear that the plaintiff does not retain the physical or psychological capacity to return to the type of work that he performed at the time of his work injuries. I specifically made and again make that factual determination. For all of the above reasons, I awarded to the plaintiff enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1.
>
> In light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration is hereby overruled and denied.

On appeal, L.A. Fitness first asserts the ALJ erred by failing to find Wyrabkiewicz had an active pre-existing psychological condition. In the alternative, L.A. Fitness asserts if Wyrabkiewicz's psychological condition was "dormant," the record supports a finding he suffered only a temporary aggravation of the condition. Second, L.A. Fitness argues the record does not support a physical impairment rating greater than 6%. Third, L.A. Fitness argues substantial evidence does not support the ALJ's determination of maximum medical improvement ("MMI") on

February 2, 2012. Finally, L.A. Fitness argues the ALJ's calculations of TTD and PPD benefits were erroneous.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion before the ALJ with regard to every element of the claim. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). As Wyrabkiewicz was the party with the burden of proof and was successful before the ALJ, the sole issue is whether substantial evidence supports the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Additionally, as fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88, 98 (Ky. 2000). Additionally, if “the physicians

in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The Board's task on appeal is to decide if substantial evidence supports the ALJ's determination on the issues being appealed. If so, the ALJ's determination cannot be disturbed.

The ALJ relied upon the opinions of Dr. Roebker to conclude Wyrabkiewicz suffered a psychological injury as a result of the March 28, 2009, injury. Dr. Roebker's November 28, 2011, report states, in part, as follows:

> Mr. Wyrabkiewicz is now 57-years-old and vocationally he is now regarded as a person of advanced age. Individuals this age have their age significantly affect their ability to engage in substantial gainful activity if they have a severe impairment and cannot do at least medium strength capacity work unless they have skills that can be used at less demanding jobs that exist in significant numbers. Thus, his age is a negative factor with reference to finding employment.
>
> Physically, he is restricted to no lifting over 10 pounds and requiring frequent changes of position. He is only able to work six hours per day, five days a week. Thus, he is restricted to less than the full range of sedentary type work from a physical standpoint. His previous work positions required more lifting than 10 pounds and required

positions such as sitting and standing for durations for which he is now incapable of performing. Thus from a physical standpoint, he would not be able to return to his previous work positions nor would he be able to function at a less physically demanding position on a full time basis.

In addition to his physical problems, Mr. Wyrabkiewicz also has mental problems, namely major depression, and a somatic disorder, specifically his pain disorder that involves a psychological component. Because of his mental disorders, he would have much difficulty in terms of coping with the normal stress and pressures associated with gainful employment as well as adjusting to a new work situation. He has limitations with respect to becoming easily fatigued, easily irritated, and difficulties in terms of memory for positions requiring good memory and concentration. His psychological problems and limitations are due to the resulting problems from his work injury occurring on 03/28/09.

In terms of impairment, psychologically he has a 20% impairment to the body as a whole according to AMA Guidelines.

It will soon be almost two years since he has been unable to return to work in spite of receiving treatment. He continues to have ongoing significant problems both physically and mentally making it highly unlikely that he would be able to find employment or be able to maintain employment for any significant period of time. Such individuals typically seldom return to the labor force, particularly considering his age and limited work history.

Conclusions

> It is my professional opinion that Mr. David Wyrabkiewicz is now to be regarded as being totally occupationally disabled. His vocational status at this point is due to the problems resulting from his work injury on 03/28/09. He continues to have ongoing significant physical limitations and also mental limitations that will require treatment indefinitely into the future. It is also my opinion that he is in need of ongoing mental health treatment in view of his level of depression and need for monitoring his mental condition.

Concerning L.A. Fitness' contention Wyrabkiewicz had a pre-existing active psychological condition prior to the March 28, 2009, injury, the seminal case regarding what constitutes a pre-existing active condition is Finley v. DBM Technologies, 217 S.W. 2d 261 (Ky. App. 2007). In Finley, the Court of Appeals held that in order to be characterized as active, an underlying pre-existing condition must be both symptomatic and impairment ratable pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition is on the employer. While the record indicates Wyrabkiewicz suffered from pre-existing anxiety and

depression, L.A. Fitness failed to introduce medical evidence establishing Wyrabkiewicz suffered from *active and impairment ratable* pre-existing anxiety and depression at the time of the March 28, 2009, injury. Significantly, L.A. Fitness' medical expert, Dr. David Shraberg, in his April 24, 2012, deposition, testified as follows:

> Q: And Doctor, do you believe that the depressive and anxiety disorders that we've discussed today were preexisting and active prior to March 28th, 2009?
>
> Mr. Schulte: Objection.
>
> A: Certainly, the records go back to 2006 where he's been diagnosed with chronic anxiety and depression, so, yes.
>
> [text omitted]
>
> Q: Would- having the knowledge you have regarding his- his depression anxiety prior to March 28, 2009, would that have been impairment ratable?
>
> A: No. I think he's treatable so he's not an [sic] impairment. I mean, you know, he's one of these people, like so many patients we treat, who remain off and on on antidepressant and medication and anxiety medicines for many years over their lifetime and function pa- certainly, effectively so I think he's always had a fairly good response to this medication and can hopefully continue to.

Moreover, had L.A. Fitness introduced medical evidence indicating Wyrabkiewicz suffered from an *active and impairment ratable* pre-existing psychological

condition, the ALJ had the discretion to rely, instead, on Dr. Roebker's above-cited testimony. Dr. Roebker's testimony constitutes substantial evidence in support of the ALJ's award of benefits for Wyrabkiewicz's psychological injury.

Alternatively, L.A. Fitness argues even if Wyrabkiewicz's psychological condition was dormant at the time of the March 28, 2009, work incident, he sustained a temporary exacerbation of a pre-existing psychological condition. It argues as follows:

> Even if there was a 'dormant' pre-existing condition, the need for specific fact-finding does not end at that point. Again, whether the 'dormant' condition is temporarily aggravated or permanently aggravated dramatically affects the degree of compensability for an injury. If Plaintiff's condition was only temporarily aggravated, for instance, and then returned to a pre-injury baseline level, then only the aggravation is compensable. [citations omitted]

Even though there is medical evidence supporting the premise Wyrabkiewicz suffered only a temporary exacerbation of a pre-existing psychological condition, the ALJ was not obligated to rely on this medical evidence. Instead, the ALJ was free to rely on Dr. Roebker’s opinion Wyrabkiewicz had a 20% impairment due to his work-related

psychological condition. The ALJ's determination on this issue cannot be disturbed.

L.A. Fitness' argument Wyrabkiewicz's 9% impairment rating for his physical injuries should be reduced by 3% to a total of 6% is as follows:

> Dr. Wunder, upon whom the ALJ relied, found that the Plaintiff was entitled to a base level of 6% physical impairment based on neck pain, and a 3% additional impairment rating as a result of dizziness and continuing vestibulopathy, for a total of 9% impairment. Dr. Wunder Report, at 8 ('He would have a minimal impairment due to the complaints of dizziness and loss of balance. This would be an additional 3% whole person impairment.')
>
> There is no substantial evidence to find a 9% total rating, however, because Plaintiff himself has admitted that his dizziness has resolved. See Wyrabkiewicz Depo at 66 ('the dizziness spells are better, gone, and I believe that's from the [antidepressant].'), *see also id.* at 91 ('the dizziness has gone away.'). Because Plaintiff is no longer complaining of dizziness, Dr. Wunder's conclusion regarding a 3% impairment rating based on continuing dizziness is not supported by any evidence in the record.

Although the ALJ states he relied on the opinions of both Dr. Mark Newman and Dr. Wunder in the July 12, 2012, opinion and order, the ALJ obviously relied upon Dr. Newman's 11% impairment rating as that is the impairment rating upon which the income benefits for Wyrabkiewicz's

physical injuries are based. A review of Dr. Newman's August 28, 2009, report reveals an impairment rating consistent with the 11% whole person impairment rating relied upon by the ALJ. Thus, L.A. Fitness' argument regarding Dr. Wunder's impairment rating and opinions is irrelevant. Substantial evidence in the record supports the ALJ's determination of an 11% impairment rating for the physical injuries, therefore that determination cannot be disturbed.

Next, L.A. Fitness asserts the record does not contain substantial evidence supporting a conclusion Wyrabkiewicz reached MMI for his psychological condition any later than November 28, 2011. It asserts the ALJ's finding of MMI on February 2, 2012, is not supported by any evidence in the record.

In its petition for reconsideration, L.A. Fitness requested additional findings of fact on this issue stating, in part, as follows:

> The ALJ's assignment of MMI on February 2, 2012 has no basis or substantiated [sic] medical evidence supporting such conclusion. At worst, Plaintiff would have been at MMI either on October 26, 2011 or November 28, 2011, the dates for the IME's of Drs. Wunder and Roebker. Defendant/Employer requests the ALJ reconsider his assignment of MMI to that of September 20, 2011 based upon the testimony of Dr. Shraberg or, at worst,

> October 26, 2011, the date of impairment given by Dr. Wunder. If the ALJ refuses to reconsider this MMI date, Defendant/Employer requests that he make specific findings of fact, in particular, identification of the medical evidence he relied upon the determine MMI on February 2, 2012.

In the August 13, 2012, order ruling on the petition for reconsideration, the ALJ failed to make additional findings of fact as to when Wyrabkiewicz attained MMI. In fact, the July 12, 2012, opinion and order and the August 13, 2012, order are silent as to a definitive MMI date. L.A. Fitness and this Board are left to assume the ALJ deemed February 2, 2012, as the MMI date, as this is when the third duration of TTD benefits was terminated. However, all parties are entitled to a definitive statement regarding the date Wyrabkiewicz reached MMI and adequate findings of facts sufficient to apprise the parties of the basis for his decision. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This is particularly true in light of the fact L.A. Fitness asked for additional findings of fact in its petition for reconsideration. Furthermore, as MMI is generally a medical question solely within the province of the medical experts, the ALJ must cite to medical evidence in the record in support of his determination of MMI.

Tokico (USA), Inc. v. Kelly, 281 S.W.3d 771 (Ky. 2009). Therefore, the award of TTD benefits from September 2, 2011 through February 2, 2012, must be vacated and the claim remanded for additional findings of fact as to the date Wyrabkiewicz attained MMI.

Finally, L.A. Fitness asserts the ALJ's calculation of TTD and PPD benefits was erroneous. Regarding TTD benefits, L.A. Fitness argues it is entitled to a credit of $21.71 per week for "those weeks TTD payments were made." L.A. Fitness asserts as follows:

> Defendant/Employer requests that the Board correct the dates of TTD payments as previously and incorrectly identified within this award and issue the Defendant/Employer a credit of $21.71 per week for those weeks TTD payments were made.

A review of the record reveals numerous inconsistencies regarding when TTD benefits were voluntarily paid by L.A. Fitness. More importantly, the June 14, 2012, benefit review conference order only states as follows regarding TTD payments: "Temporary total disability benefits were paid at the rate of [handwritten: $459.75] per week from [handwritten: 3 durations] through [blank], for a total of $ [handwritten: to be produced]." Thus, despite the ALJ's statement in the July 12, 2012, opinion and order the parties agreed to a stipulation when

TTD was paid, this alleged stipulation is not set out on the BRC order. Further, we find no stipulation in the record as to the periods TTD benefits were paid. For our purposes, no stipulation occurred. Thus, we vacate that portion of the opinion and award regarding the "credit" to which L.A. Fitness is entitled for voluntarily TTD payments, including the dates voluntarily TTD benefits were paid. On remand the ALJ shall specify the precise dates TTD benefits were paid by L.A. Fitness and the exact amount of the credit to which L.A. Fitness is entitled for each week TTD benefits were voluntarily paid by L.A. Fitness.

Regarding the award of PPD benefits, L.A. Fitness asserts as follows:

> The Administrative Law Judge awarded PPD benefits in the amount of $433.63 beginning March 28, 2009. Pursuant to the current version of the ALJ's award, PPD benefits are [sic] would be payable as follows:
>
> - October 21, 2009- November 1, 2009;
> - September 1, 2011; February 3, 2012 for 425 weeks or until Plaintiff reaches old age retirement age according to the Social Security Administration.
>
> However, TTD benefits were actually paid from:
>
> - April 7, 2009- October 14, 2009;

- November 2, 2009- November 23, 2009;
- December 15, 2012- August 31, 2011.

Based upon the correct dates of TTD payments, PPD benefits set forth at a rate of $433.66 are payable as follows:

- March 28, 2009- April 6, 2009;
- October 15, 2009- November 1, 2009;
- November 24, 2009- December 14, 2010;
- September 1, 2011- February 3, 2012 for the remainder of 425 weeks or until Plaintiff reaches old age retirement age according to the Social Security Administration.

Significantly, L.A. Fitness does not maintain the ALJ's award of TTD benefits from April 7, 2009, through October 20, 2009, and from November 2, 2009, through August 31, 2011, is not supported by substantial evidence. Thus, the award of TTD benefits encompassing the first two periods of TTD benefits must remain undisturbed.

We note the ALJ’s language regarding the payment of PPD benefits "beginning March 28, 2009, and continuing thereafter for a total of 425 weeks from said date" fails to contain the necessary language regarding the interruption of the payment of PPD benefits due to overlapping periods of TTD benefits awarded. Therefore, we vacate the ALJ's award of PPD benefits. On remand, after

the ALJ renders additional findings regarding the MMI date and whether an award of a third period of TTD benefits is appropriate, the ALJ shall then specify in the award of PPD benefits that payment of PPD benefits shall be interrupted by any overlapping periods of TTD benefits awarded.

Accordingly, those portions of the ALJ's July 12, 2012, opinion and order and August 13, 2012, order on reconsideration determining Wyrabkiewicz sustained a psychological injury resulting in a 20% impairment and a physical injury resulting in an 11% impairment are **AFFIRMED**. Those portions of the July 12, 2012, opinion and order and August 13, 2012, order on reconsideration pertaining to the ALJ's determination of an MMI date of February 2, 2012, the award of TTD benefits from September 2, 2011, through February 20, 2012, the "credit" to which L.A. Fitness is entitled for voluntary payment of TTD benefits, and the award of PPD benefits are **VACATED**.

This claim is **REMANDED** for specific findings relating to when Wyrabkiewicz reached MMI. Further, the ALJ shall specify the precise dates TTD benefits were voluntarily paid by L.A. Fitness <u>and</u> the amount of credit to which L.A. Fitness is entitled, stated in a specific weekly amount. The ALJ shall also determine whether Wyrabkiewicz is entitled to a third period of TTD benefits

after determining the MMI date. Finally, the ALJ shall state the award of PPD benefits shall be interrupted during any periods TTD benefits are paid.

ALL CONCUR.

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