Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 26, 2015

CLAIM NO. 201401423

LEXINGTON-FAYETTE URBAN COUNTY GOV. PETITIONER

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

ERIC HIGGINS and
HON. WILLIAM J. RULDOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Lexington-Fayette Urban County Government ("LFUCG") appeals from the Opinion and Order rendered December 29, 2014 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Eric Higgins ("Higgins") temporary total disability ("TTD") benefits from January 11, 2014 to March 4, 2014 and past medical benefits for

bilateral knee contusions occurring on March 25, 2013, which have since resolved. LFUCG also appeals from the orders denying its petition for reconsideration, and granting the one filed by Higgins awarding TTD benefits from July 1, 2013 to March 4, 2014.

Higgins filed a Form 101 alleging he injured both knees on March 25, 2013 when he was struck by the automated arm of a garbage truck. Higgins began working for LFUCG as a public service worker in April 2009. Higgins sought treatment at Concentra in July 2013, approximately two months after the date of the accident. There, Dr. Richard Ramirez ordered physical therapy, prescribed medication, and placed restrictions on Higgins' activities. Higgins also received conservative treatment from Dr. Ryan Donegan on five occasions from September 18, 2013 through January 10, 2014. On September 23, 2013, Dr. Donegan restricted Higgins from squatting or climbing, and limited him to occasional bending and climbing stairs. On his last visit of record, January 10, 2014, Dr. Donegan noted Higgins continued to experience persistent bilateral knee pain despite physical therapy and the use of anti-inflammatory medication. Dr. Donegan assessed bilateral knee pain secondary to a work injury. He recommended a functional capacity evaluation ("FCE") and restricted Higgins from work until it was

completed. There is no evidence or record the FCE was ever performed.

Higgins testified at the final hearing held December 10, 2014. He stated he had worked for LFUCG as a public service worker for four years at the time of his March 25, 2013 injury. He was required to collect yard waste and tree debris which he placed in a garbage truck. Higgins stated on March 25, 2013, both of his knees were struck by the automated arm of the garbage truck causing immediate pain. Higgins reported the accident the same day to the safety coordinator, and completed an accident report. Higgins explained he waited two months to seek medical treatment for his knees due to a mix up or delay in the workers' compensation paperwork. He initially treated at the Urgent Treatment Center, and was then referred to Dr. Donegan.

During direct examination, Higgins indicated he returned to his regular job as a public service worker the next day, and continued to work in this capacity for approximately a month despite his knee pain. He did not work again until July 2013, when he was placed in a light duty position as a dispatcher at LFUCG. This required him to distribute keys to drivers in the morning, send routes to trucks, answer phones, and perform other clerical tasks.

Prior to his March 25, 2013 injury, Higgins had never worked as a dispatcher. This job was not similar to his job as a public service worker. Higgins agreed the dispatcher job is a normal and customary job of LFCUG, and was not created as a result of his light duty restrictions. Higgins performed the light duty job from July 2013 through January 10, 2014. Dr. Donegan restricted him from work until he took an FCE, which he indicated he was never given the opportunity to have. Higgins was eventually dismissed from LFUCG. Since his dismissal, Higgins unsuccessfully attempted to obtain work twice with other employers. Higgins testified he continues to have difficulty with his knees and believes he is unable to return to his former position as a public service worker due to its heavy physical demands.

Alan Morgan ("Morgan"), a safety specialist and insurance coordinator for LFUCG, division of Waste Management, also testified at the hearing. Higgins' payroll records were introduced as an exhibit. Morgan stated the records indicate Higgins began his modified duty position as a dispatcher on July 1, 2013. Like Higgins, Morgan stated the dispatcher position is a customary position within the department and is staffed regularly. Morgan confirmed Higgins worked the dispatcher position through January 9, 2014, and was on sick leave beginning January 10, 2014.

Morgan testified LFUCG paid workers' compensation benefits from January 27, 2014 through April 4, 2014.

Higgins filed the October 13, 2014 107-I report of Dr. James Owen, who examined him on October 8, 2014. He diagnosed Higgins with "persistent knee pain with slight diminution of range of motion associated with mild ambulatory difficulty. No need for cane or crutch." Dr. Owen stated Higgins' injury caused his complaints and he had reached maximum medical improvement ("MMI"). Dr. Owen assessed a 6% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, (AMA Guides"). Dr. Owen opined Higgins does not have the physical capacity to return to the type of work he performed at the time of injury and assigned permanent restrictions.

LFUCG filed the March 4, 2014 report of Dr. Daniel Primm, an orthopaedic surgeon, who evaluated Higgins at its request. Dr. Primm also testified by deposition on November 7, 2014. After reviewing the medical records and performing an examination, Dr. Primm diagnosed Higgins with soft tissue contusion involving the anterior aspect of both knees which had resolved. Dr. Primm did not believe Higgins sustained a significant or major injury to either knee, noting MRI scans did not show evidence of more serious injuries. Dr. Primm

stated no additional medical treatment, diagnostic testing or medication is needed since the soft tissue injury should have resolved no more than six months following the injury date. Dr. Primm indicated Higgins has attained MMI. He also opined there is no objective evidence of a permanent injury to either knee, or of a harmful change to the human organism, warranting a permanent impairment rating pursuant to the AMA Guides. Dr. Primm opined Higgins retains the capacity to return to his previous employment with no temporary or permanent restrictions.

Dr. Primm's deposition testimony is consistent with his report. He noted his examination of Higgins' knees, approximately a year following the work accident, was essentially unremarkable. Dr. Primm stated Higgins should have fully recovered at the time of his examination, particularly in light of the diagnostic studies revealing no ligament or tendon tears, or cartilage injuries. The MRI showed some edema in the subcutaneous tissue, an injury which should not result in any permanency. Dr. Primm found no evidence of a harmful change in the human organism due to the March 2013 incident. He determined Higgins may have sustained temporary soft tissue contusions, which should have resolved at the time of the March 2014 examination. Dr. Primm opined Higgins would have reached MMI six months

after the work accident on March 25, 2013. Dr. Primm reiterated Higgins' injury does not warrant an impairment rating, and he retains the physical capacity to return to his former duties.

LFUCG also filed "LFUCG Ordinance Sec 21-39," which is its disability leave policy.

The December 2, 2014 benefit review conference ("BRC") order reflects the following as contested issues: work-relatedness/causation, benefits per KRS 342.730, injury as defined by the Act, TTD (overpayment/underpayment), medical benefits and concurrent wages. The parties stipulated Higgins "last worked for defendant in Feb., 2014." At the hearing, the parties stipulated LFUCG voluntarily paid Higgins weekly TTD benefits at a rate of $306.20 from January 11, 2014 through April 6, 2014 for a total of $3,884.75, and medical expenses totaling $4,706.58. Higgins also withdrew the issue of concurrent wages, and stipulated his average weekly wage to be $525.10.

In the December 29, 2014 Opinion and Order, the ALJ determined Higgins sustained soft tissue contusions to both knees as a result of the March 25, 2013 accident. Based upon Dr. Primm's report, the ALJ found Higgins' work-related injury had resolved, and he has attained MMI. The ALJ found no indication of permanent injury to either knee,

harmful change to the human organism, or permanent impairment pursuant to the AMA Guides. Therefore, based upon Dr. Primm's report, the ALJ found Higgins was not entitled to permanent partial disability benefits. Since Dr. Primm opined Higgins does not need any additional medical treatment, the ALJ declined to award Higgins future medical benefits. He awarded Higgins past medical benefits totaling $4,706.58, the amount stipulated by the parties representing the medical expenses LFUCG has voluntarily paid. Regarding TTD, the ALJ stated as follows:

> KRS 342.0011(11)(a) defines "temporary total disability" to mean 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 *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in *Helms*, *supra*, stated:
>
>> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>> Id. at 580-581.

> Based upon the persuasive and compelling medical evidence from Dr. Primm, the examining orthopedic surgeon, I make the determination that the plaintiff is entitled to recover temporary total disability benefits in the amount of $306.20 per week from January 11, 2014 to March 4, 2014, when Dr. Primm determined that the plaintiff reached maximum medical improvement.

Higgins filed a petition for reconsideration, arguing he is entitled to an additional period of TTD benefits during the time he worked light duty as a dispatcher for LFUCG beginning July 1, 2013. Higgins argued since he was not at MMI at the time, "the burden shifts to the defendant on the (sic) whether the wage continuation payment was made in lieu of TTD payment." He argues LFUCG failed in its burden:

> it was patent error for the ALJ to make a finding that the 'defendant documented that [TTD] benefits were paid to the defendant in the amount of $306.20 per week from January 11, 2014 to April 6, 2014.' Holding that there were wage continuation payments made by the Defendant and these wage continuation payments should be credited against any due and owing TTD is patent error.

The ALJ granted Higgins' petition for reconsideration on February 4, 2015, and amended the award of TTD benefits to reflect entitlement from July 1, 2013, the day he began light duty, to March 4, 2014, the date Dr. Primm found him to be at MMI, stating as follows:

At the Final Hearing on December 10, 2014, the plaintiff **Eric Higgins** testified that his work injuries occurred on March 25, 2013. He testified that he was put on a light duty job in a dispatch position beginning in July, 2013 and continued to work on that job until January, 2014. The parties stipulated that Mr. Higgins last worked for the defendant in February, 2014. At the Hearing, the defendant documented that [TTD] benefits were paid to the plaintiff in the amount of $306.20 per week from January 11, 2014 to April 6, 2014. **Dr. Daniel Primm** stated that the plaintiff reached [MMI] on March 4, 2014.

I make the determination that the above evidence from the plaintiff and from Dr. Primm is credible, convincing, persuasive and compelling.

The plaintiff contends that he should be awarded [TTD] benefits in the amount of $350.06 per week from July 1, 2013 until he reached [MMI] on March 4, 2014. The plaintiff cites in support of his position *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000). In the *Wise* case, the plaintiff sustained work-related injuries on April 28, 1997. Central Kentucky Steel voluntarily paid the plaintiff [TTD] benefits from April 29, 1997 to August 1, 1997. Judge Steen awarded the plaintiff [TTD] benefits from April 29, 1997 to September 30, 1997. The Workers' Compensation Board, the Court of Appeals and the Supreme Court all affirmed that award of TTD. The Supreme Court noted that 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 <u>and</u> has not reached the level of

improvement that would permit a return to employment. The defendant argued that the statute required a termination of TTD benefits as soon as the worker is released to perform any type of work, but the Supreme Court stated that it could not agree with that interpretation.

The plaintiff testified at the Final Hearing that his dispatch job was considered by the defendant to be light duty work, that he had never performed that type of light duty for any significant period of time prior to his work injuries and that the dispatch job was not the type of work he did as a public service worker. The plaintiff stated that he performed this light duty job starting in July, 2013 and ending in January, 2014.

I make the determination that the above sworn testimony of the plaintiff is credible, convincing, persuasive and compelling.

I further make the determination that the plaintiff's position is correct under the *Wise* case and that the plaintiff is entitled to additional [TTD] benefits of $350.06 per week from July 1, 2013 to January 11, 2014 and continuing to March 4, 2014, and the original Opinion and Order is amended and corrected to so state.

. . . .

WHEREFORE, in light of the above findings of fact and conclusions of law, plaintiff's Petition for Reconsideration is hereby granted and sustained to the extent that the plaintiff's award of [TTD] benefits is amended and corrected to state that he is entitled to recover [TTD] benefits in the amount of $350.06 per week from

> July 1, 2013 to March 4, 2014, plus interest thereon at the rate of 12% per annum for any past due and unpaid benefits. Defendant is entitled to a credit for workers' compensation benefits heretofore paid.

LFUCG filed a petition for reconsideration, arguing the February 4, 2015 order sustaining Higgins' petition was prohibited pursuant to KRS 342.281 since Higgins failed to identify or seek to correct a patent error appearing in the December 29, 2014 Opinion and Order. In the alternative, LFUCG argues Higgins' and the ALJ's reliance on Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) is misplaced since it only applies to situations where an employee is returned to minimal work, which is not applicable to Higgins' circumstances. Since Central Kentucky Steel v. Wise does not apply, LFUCG argued the ALJ was not required to award the additional period of TTD during Higgins' light duty employment. The ALJ denied LFUCG's petition for reconsideration in a March 3, 2015 order.

On appeal, LFUCG argues the ALJ abused his discretion in reversing prior findings of fact in the February 4, 2015 Opinion and Order on Reconsideration, which is prohibited pursuant to KRS 342.281, Beth-Elkhorn Corp. v.

Nash, 470 S.W.2d 329 (Ky. 1971), and Bowerman v. Black Equipment Company, 297 S.W.3d 858 (Ky. App. 2009).

In the alternative, LFUCG argues the award of additional TTD benefits during the time period Higgins returned to light duty work should not be permitted. It argues the recent line of unpublished opinions which allow TTD benefits for a worker who is not at MMI and is working light duty have no precedential value and cannot be cited or used as authority. It then urges the Board to interpret the word "customary" as used by the Court in Central Kentucky Steel v. Wise, supra, as meaning "customary to the particular employer or industry," rather than to the particular employee. Under this interpretation, the lay testimony of Higgins and Morgan establish the dispatcher job was a regular and customary position at LFUCG within the Division of Waste Management, and was not specifically created for Higgins. Therefore, Higgins is not entitled to TTD benefits during the time period he worked as a dispatcher while on light duty. Finally, LFUCG argues it is entitled to a credit for benefits paid under a disability leave plan.

KRS 342.281 permits an ALJ to correct "errors patently appearing upon the face of the award, order, or decision" when they are raised in a petition for

reconsideration. The statute is not limited to the correction of clerical errors only. It must be liberally construed to allow correction of all patent errors. This would include the authority to decide a still unresolved question on the merits. Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104, 106 (Ky. App. 1985); *See also* Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329 (Ky. 1971). Wells v. Ford, 714 S.W.2d 481 (Ky. 1986). However, the statute does preclude the ALJ for reconsidering the case on its merits or changing his or her factual findings. Wells v. Beth-Elkhorn Coal Corp., supra; Beth-Elkhorn Corp. v. Nash, supra.

Upon careful consideration, we conclude the ALJ corrected a patent error by amending the opinion in light of Higgins' brief to the ALJ, and the deficient analysis contained within the December 29, 2014 opinion regarding entitlement to TTD during the period in question. As summarized above, Higgins testified regarding his light duty position as a dispatcher beginning in July 2013, which was confirmed by the testimony of Morgan. In his brief to the ALJ, Higgins specifically argued he was entitled to TTD benefits during the time he worked light duty for LFUCG pursuant to Central Kentucky Steel v. Wise, supra. However, despite Higgins' argument, the ALJ made no findings of fact regarding TTD benefits during that period of time. In

summarizing Higgins' testimony regarding the dispatcher position, the ALJ only stated he testified he went on a light duty job at a dispatch position from July 2013 until January 2014. In summarizing Morgan's testimony, the ALJ stated he testified Higgins went on modified duty on July 1, 2013. The ALJ did not summarize the testimony regarding the details of the dispatcher position. After quoting the definition of TTD found in KRS 342.0011(11)(a) and Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the ALJ determined Higgins was entitled to TTD benefits from January 11, 2014 to March 4, 2014 (the date he reached MMI per Dr. Primm), without performing any analysis or making findings of fact in support of his ultimate conclusion. He made no findings regarding the onset of entitlement to TTD benefits, and apparently merely accepted the stipulated date LFUCG voluntarily began paying benefits on January 11, 2014.

It was only after Higgins filed a petition for reconsideration, again arguing he is entitled to an additional period of TTD during the time he worked light duty as a dispatcher, that the ALJ performed the analysis. Because the ALJ was completely silent on the issue of entitlement to TTD benefits during the period of light duty work and performed a deficient analysis regarding the same

in the December 29, 2014 opinion, we conclude he addressed an unresolved issue in the February 4, 2015 order on petition for reconsideration, and thus corrected a patent error.

As the claimant in a workers' compensation proceeding, Higgins had the burden of proving each of the essential elements of his cause of action, including entitlement to TTD benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Higgins was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

The ALJ performed no analysis regarding Higgins' asserted entitlement to TTD benefits during the period he was placed in the dispatcher position while on light duty in the December 2014 opinion. However, the ALJ cured the opinion with an analysis in the February 2015 order on reconsideration, and we find substantial evidence supports the ALJ's determination.

TTD is defined as "the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement permitting a return to employment". KRS 342.0011(11)(a). This definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Both prongs of the test in W.L. Harper Const. Co., Inc. v. Baker, supra, must be satisfied before TTD benefits may be awarded. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Court further explained, "[i]t 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." In other words, where a claimant has not reached MMI, TTD benefits are payable until such

time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court 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 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. (Emphasis added)

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment.
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> . . . .
>
> 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 342.0011(11)(a). 19 S.W.3d at 659.

We determine substantial evidence supports the ALJ's determination Higgins is entitled to TTD benefits during the time period he was working for LFUCG on light duty. It appears uncontested the restrictions placed on Higgins' activities in July 2013 precluded him from returning to his job at the time of the accident as a public service worker. As a result, both Higgins and Morgan testified he was placed in the dispatcher position from July 1, 2013 through January 2014. Higgins testified this light duty position required him to distribute keys, send out routes, answer phones, and other clerical tasks. Higgins

testified prior to his injury, he had never worked as a dispatcher, which was not similar to his job as a public service worker. Higgins agreed the dispatcher job is a normal and customary job of LFCUG, and was not created as a result of his light duty restrictions. Morgan confirmed Higgins began his modified duty position as a dispatcher on July 1, 2013 and agreed with Higgins' description his duties performed during that time. Like Higgins, Morgan stated the dispatcher position is a customary position within the department and is staffed regularly.

Since the ALJ determined Higgins did not reach MMI until March 4, 2014, the essential question is whether he reached a level of improvement permitting a return to employment during the time period in question, i.e, "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." Magellan Behavioral Health v. Helms, 140 S.W.3d at 581. In light of case law regarding the second prong language of "return to employment," Higgins' testimony regarding the duties of his pre-injury job as a public service worker versus the dispatcher job held while on light duty, and the fact the latter was not the type of work which was customary for him or he had been performing prior to the injury. Substantial

evidence supports the ALJ's decision, and his determination will not be disturbed on appeal. We simply find no case law to support LFUCG's assertion a return to "the type [of work] that is customary" as used Central Kentucky Steel v. Wise, supra, should be interpreted as meaning customary to the employer or industry, rather than the injured worker. "In Central Kentucky Steel v. Wise, 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." Magellan Behavioral Health b. Helms, 140 S.W.3d at 581. (emphasis added)

Finally, LFUCG did not properly preserve the issue of credit for disability leave. Pursuant to Eaton Axle v. Nally, 688 S.W.2d 334 (Ky. 1985), issues not preserved through the filing of a petition for reconsideration are not subject to further review. LFUCG did not initially file a petition for reconsideration from the original December 29, 2014 Opinion and Order. Rather it filed a response to Higgins' January 12, 2015 petition for reconsideration, arguing he did not identify any patent errors, and disputed the contention he is entitled to an additional period of TTD benefits. LFUCG did not raise the issue of credit, or request additional findings of fact on

this issue. LFUCG filed a petition for reconsideration from the ALJ's February 4, 2015 order arguing the order was prohibited pursuant to KRS 342.281, or in the alternative, inconsistent with the law on TTD. Importantly, the issue of credit was not identified as a contested issue at the December 2, 2014 BRC. 803 KAR 25:010 §13(14) provides as follows regarding BRCs: "Only contested issues shall be the subject of further proceedings."

Accordingly, the December 29, 2014 and the February 4, 2015 and March 3, 2015 orders on petitions for reconsideration by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED.**

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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