OPINION ENTERED: JUNE 27, 2012

CLAIM NO. 201100450

LOUDEN & COMPANY, LLC. PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

MARIA SANTILLANES
and ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

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

SMITH, Member. Louden & Company, LLC d/b/a Pine Meadows Health Care, LLC ("Louden") appeals from the January 31, 2012 Opinion, Award and Order rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), awarding Maria de Jesus Santillanes ("Santillanes") temporary total disability ("TTD"), permanent partial disability ("PPD") benefits and medical benefits for a work-related right ankle injury. Louden's appeal concerns only a portion of the

award of TTD benefits from October 1, 2010 through November 23, 2010.

Santillanes testified through an interpreter by deposition on June 13, 2011 and at the hearing held December 8, 2011. Originally from Aguascalientes, Mexico, she has resided in the United States for the past 13 years. She has a third-grade education and no vocational training. While living in Mexico, Santillanes worked in a family restaurant as a cook and performed cleaning. She worked several months in a sewing factory which she performed in a seated position, with no lifting. She also did laundry and cleaned houses.

After moving to the United States, Santillanes worked at Keeneland from 1998 to 2001 in the housekeeping department, cleaning bathrooms and hallways. After taking a break from employment, she began working at Pine Meadows in July 2005. Her duties included performing laundry and housekeeping involving cleaning rooms, dusting, mopping and cleaning bathrooms.

Santillanes testified she slipped and fell on ice on February 18, 2010, injuring her right ankle. She was transported by ambulance to St. Joseph Hospital where she underwent surgery. She was on crutches for approximately three months thereafter. Santillanes stated when she was

first given medication for her ankle pain, she did not take it because it made her sleepy and dizzy and interfered with driving. She now takes pain medication for relief from foot pain. She has difficulty walking because her ankle swells and feels unstable at the surgical site. She indicated that, when walking, she feels like there is something in her foot like a screw which causes pain.

Santillanes testified she has not worked since February 18, 2010 due to foot pain and her inability to walk for very long. She did not believe she could perform the housekeeping job at Pine Meadows because of the amount of walking involved. She was willing to work in the laundry room because “there you don't have to walk as much.” She tried returning to work after she quit using crutches, but was unable to continue. The employer offered her light duty, but it only consisted of four hours per day. Her doctor allowed her to return to the housekeeping position briefly without medical restrictions but she was told there was no work available.

Santillanes testified neither the surgery on February 18, 2010 nor the physical therapy that followed helped.

Both parties submitted treatment records from Dr. Trevor Wilkes. Dr. Wilkes saw Santillanes on February 18, 2010 at the emergency room at St. Joseph Hospital. He

performed an open reduction and internal fixation of the right ankle with internal fixation of the distal fibula and the posterior malleolus.

On June 1, 2010, Dr. Wilkes determined Santillanes was making good progress and anticipated a full release to work in six weeks. On July 13, 2010, Santillanes returned reporting she continued to struggle when putting weight on the ankle and had intermittent swelling. X-rays revealed some osteopenia, however there was good position of the hardware and a healed tri–malleolus fracture with well-maintained mortise and no movement of the posterior malleolus fragment. Dr. Wilkes recommended Santillanes be on her feet to increase her strength. He offered a brace to help her return to work.

In a July 13, 2010 report, Dr. Wilkes indicated Santillanes was at maximum medical improvement ("MMI") and released her to regular duty work. Santillanes returned on July 20, 2010, reporting she was unable to tolerate her return to work. Dr. Wilkes ordered a CT scan and took Santillanes off work. The CT scan revealed the proximal end of the dictating plate was displaced approximately 4 mm from the bone, but there was no evidence of loosening of the adjacent screws. There was also a probable non-displaced, sagittally oriented fracture at the base of the medial

malleolus. Dr. Wilkes noted Santillanes' medial sided ankle pain was perhaps secondary to nonunion of her medial malleolus fracture. He placed Santillanes in a short–leg walking cast and provided her with a bone stimulator.

Dr. Wilkes placed Santillanes on modified duty on September 28, 2010 with restrictions of no prolonged standing and walking "four hours per shift." On October 19, 2010, Dr. Wilkes noted Santillanes had attempted to return to work but had severe pain prompting an ER visit. He noted she had continued swelling and felt unstable. Dr. Wilkes restricted Santillanes to sit down work only. In a November 17, 2010 note, Dr. Wilkes indicated Santillanes was unable to return to work and projected she should be at MMI in one month.

In a November 23, 2010 questionnaire, Dr. Wilkes stated Santillanes was at MMI and assigned an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), attributable to the work injury. He assigned restrictions of no prolonged standing or walking.

On January 12, 2011, Dr. Wilkes noted he had a long discussion with Santillanes regarding her continued pattern of pain. He felt removal of the hardware was reasonable but

noted he could not guarantee this would relieve all of her symptoms.

In his Opinion, Award and Order rendered January 31, 2012, the ALJ determined Santillanes had a permanent partial disability as a result of the work injury and awarded benefits based upon the 8% impairment rating assessed by Dr. Wilkes. The ALJ determined the restrictions assigned by Dr. Wilkes would preclude Santillanes from returning to the housekeeping position she was performing at the time of her injury. Accordingly, the ALJ awarded benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 with additional enhancement based upon her educational level. The ALJ noted the parties stipulated TTD benefits were paid at a rate of $236.12 and therefore there was an overpayment as to the rate. The ALJ then found as follows regarding TTD:

> With regard to the duration of temporary total disability benefits, the Administrative Law Judge notes that those benefits were paid initially from the date of injury until January 13, 2010 when plaintiff [w]as pronounced at maximum medical improvement and released to regular duty by Dr. Wilkes. Dr. Wilkes apparently took the plaintiff off work on July 20 after she attempted to return to work but was unable to do so and then pronounced her to be at maximum medical improvement, albeit with restrictions this time, in a questionnaire dated November 23, 2010.

> Accordingly, TTD benefits have been overpaid to the extent of one week. The defendant is entitled to a credit by virtue of such overpayment as to the rate and duration but only against any accrued income benefits as to the date of this opinion and award only. Triangle Insulation Company v. Stratemeyer, 782 S.W.2d 628 (Ky. 1990).

Louden did not file a petition for reconsideration and appealed directly to the Board. On appeal, Louden argues there is no factual or legal basis for the ALJ to award additional TTD benefits beyond that previously paid by the employer. Louden argues the ALJ awarded TTD benefits through November 23, 2010 based upon Santillanes' MMI status. In doing so, Louden argues the ALJ did not complete the statutory analysis required under KRS 342.0011(11)(a) and the holding in W.L. Harper Constr. Co., Inc. v. Baker, 858 S.W.2d 202 (Ky. App. 1993). Louden argues the ALJ failed to make a finding regarding whether Santillanes had reached a level of improvement that would permit a return to her job or some other employment of which she is capable. Louden notes Dr. Wilkes assigned work-related medical restrictions that would allow her to return to a light duty position as of the evaluation on September 28, 2010. At that time, she was directed only to limit her standing. Louden contends the restriction remained unchanged until

Santillanes was placed at MMI on November 23, 2010. Louden argues it could, and did, accommodate the restriction and Santillanes went back to work. It notes she was compensated for her light duty work from October 2, 2010 through November 13, 2010.

To the extent Louden failed to request additional findings on the issue in a petition for reconsideration, any appellate complaint regarding the adequacy of the ALJ's findings on the issue has not been preserved for appellate review. *See* Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985), and Hall's Hardwood Floor Company v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Absent the filing of a petition for reconsideration, an ALJ's findings of fact are conclusive and binding. *See* Eaton Axle Corp. v. Nally, *supra*. Thus, even if we were satisfied the ALJ's findings were deficient, the Board is obligated to affirm the decision if there is substantial evidence to support his decision. In the absence of a petition for reconsideration and because the outcome reached by the ALJ was supported by substantial evidence, we are precluded from reversing or remanding for additional findings.

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." Louden is correct in noting a two part analysis must be applied before TTD benefits are awarded, including determination of whether 1) maximum medical improvement has not been reached; and 2) the employee has not reached a level of improvement that permits a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.2d 579 (Ky. App. 2004).

As to the first prong, Kentucky courts have noted MMI is reached when medical evidence establishes that the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition is over. *See* Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Louden does not dispute the finding Santillanes reached MMI on November 23, 2010.

As to the second prong, the Kentucky Supreme Court provided clarification in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), stating "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work and not the type that is customary or that he was performing at the time of the injury." Moreover, entitlement to TTD, including the duration for which such benefits are awarded, is a question

of fact to be decided by the ALJ. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327, 329 (Ky. App. 2000).

The evidence pertaining to Santillanes' entitlement to TTD benefits as a result of the February 18, 2010 injury does not compel a contrary finding. The medical reports of Dr. Wilkes provide substantial evidence supporting the ALJ's finding. While Dr. Wilkes did provide a release with restrictions on September 28, 2010, and Santillanes returned to modified duties. The wage records indicate she worked part-time during the period at issue. Santillanes was paid every two weeks and her pay dates and hours worked are as follows: October 2, 2010 – 4.0 hours, October 16 – 40.25 hours, October 30 – 40.50 hours, and November 13 – 24.25 hours. Further, Dr. Wilkes provided a statement on November 17, 2010 indicating Santillanes was "unable to return". The modified work consisting of a minimal number of hours does not preclude an additional award of TTD benefits.

Having reviewed the evidence and the arguments of the parties, and based on the medical reports of Dr. Wilkes, we conclude there is substantial evidence to support the ALJ's finding that Santillanes is entitled to TTD benefits for the disputed period. *See* Central Kentucky Steel v. Wise, *supra*.

Accordingly, the January 31, 2012 Opinion, Award and Order rendered by Hon. Robert L. Swisher, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON DANIEL J URBON
7000 HOUSTON RD BLDG 300 #26
FLORENCE, KY 41042

COUNSEL FOR RESPONDENT:

HON MARCUS A ROLAND
PO BOX 910454
LEXINGTON, KY 40591

ADMINISTRATIVE LAW JUDGE:

HON ROBERT L SWISHER
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511