

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: April 10, 2015

CLAIM NO. 201277538

MAKER'S MARK

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

COURTNEY R. CLARK and  
HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Maker's Mark appeals from the Opinion and Award rendered November 7, 2014 by Hon. John B. Coleman, Administrative Law Judge ("ALJ"), and the order on reconsideration issued December 29, 2014, awarding temporary total disability ("TTD") benefits and medical benefits to

Courtney R. Clark ("Clark") for injuries she sustained on June 28, 2012.

On appeal, Maker's Mark makes the following arguments: 1) the ALJ erred in awarding TTD benefits from August 2, 2012 to October 4, 2012, because she performed her regular job duty during this period; 2) the ALJ erred in awarding TTD benefits from May 29, 2014 to June 16, 2014, and in assessing interest of 18% on unpaid amounts; 3) the ALJ erred in awarding TTD benefits for the entire period of September 15, 2013 to December 11, 2013 based upon the opinion of Dr. James Farrage, who it claims lacks credibility; 4) the ALJ erred in awarding 18% interest pursuant to KRS 342.040, because Clark did not seek such relief; 5) the ALJ erred in only providing credit pursuant to KRS 342.730(5) for benefits actually received by Clark, rather than the full amount it paid; and 6) the ALJ erred in finding the unpaid physical therapy bills compensable. Because we determine the ALJ did not err in awarding TTD benefits, assessing interest at 18% on unpaid amounts pursuant to KRS 342.040, or in finding the contested physical therapy bills compensable, we affirm.

Clark filed a Form 101 on June 28, 2012 alleging she injured both of her upper extremities, her right shoulder and neck due to the repetitive nature of her work

on the bottling line for Maker's Mark. In the Form 104 filed with the claim, Clark stated her work experience included working as a bottling laborer, forklift operator, line feeder, and childcare worker.

Clark testified by deposition on July 25, 2013, and again at the hearing held September 12, 2014. Clark, a resident of New Haven, Kentucky, was born on May 21, 1979. She is a high school graduate, and has an Associate of Science degree in business. Her employment experience includes working the drive-in window at a fast food restaurant, forklift operator, automobile part assembler, childcare worker, and currently on the bottling line for Maker's Mark. She initially worked at Maker's Mark through a temporary agency, but was officially hired in 2010.

Clark stated the bottling line contains several jobs, including placing boxes of empty glass bottles on the line. Another job required dipping bottles in wax with one hand and then placing them in a box with the other. She stated she was supposed to dip twenty-three bottles per minute, sometimes more depending on the size of the bottle. She stated the speed of the line was increased at times, and she actually handled more than the twenty-three bottles. She stated while performing the uncaser job she had to climb onto the line to untangle boxes. She stated the palletizer

position required her to stack boxes containing full whiskey bottles. She was unsure as to the weight of the full boxes. She stated bottles were placed into the boxes by hand. She performed all of the positions and rotated to each job every thirty minutes.

On June 28, 2012, Clark complained of hand numbness to her supervisor. An incident report was completed, and she was referred to Springview Occupational Health. Clark continued to work, and continued to have problems. She saw Dr. Richard Dubou on August 2, 2012, for her neck and left wrist problems. Dr. Dubou injected the left thumb, and restricted her to one-handed duty. She continues to have numbness and occasional cramping in both hands. At the time of her deposition, Clark also complained of neck tightness and pain from the shoulders to the neck.

Clark testified that during the time period, she was limited to using one hand, dipped glasses in wax and affixed stickers to boxes. At the hearing, Clark confirmed she was restricted to one-handed work after she saw Dr. Dubou until some point in October 2012. Despite her restrictions, she continued to work from June 28, 2012 until September 12, 2013 when she was sent home by Michelle Kuykendall, of Maker's Mark, who advised her not to return to work until she was "fixed". She was apparently sent home

because of the limitations contained in Dr. Farrage's report. She was off work until December 13, 2013 and received unemployment benefits from September 13, 2012 to December 12, 2013. She was again off work from May 29, 2014 to July 3, 2014, during which time she received unemployment benefits. No TTD benefits were paid.

Clark stated she had difficulty getting approval for medication prescribed by Dr. Dubou. She also stated she desired to receive treatment from Kleinert & Kutz instead of Dr. Dubou, but the request was denied by Maker's Mark. She also stated every physician with whom she has treated advised the symptoms were work-related. Clark stated the bills for physical therapy ordered by Dr. Frank Bonnarens remain unpaid.

In support of the claim, Clark filed a partially illegible report note from Springview Occupational Health dated June 28, 2012. This note indicates Clark complained of right median nerve compression.

Clark also filed multiple reports from Dr. Farrage. In the first report, dated August 14, 2013, Dr. Farrage noted Clark complained of a work-related right upper extremity injury occurring on June 28, 2012. She complained of pain in her neck, shoulders, wrists and hands with associated numbness and weakness. Dr. Farrage diagnosed

bilateral upper extremity repetitive use syndrome and myofascial symptoms. He stated the myofascial symptoms included an element of right shoulder impingement with ongoing issues of pain, decreased strength, and impaired functional capacity. He found her otherwise neurologically stable. Dr. Farrage diagnosed Clark with right shoulder impingement syndrome and tendinitis due to repetitive overuse syndrome. He assessed a 5% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Dr. Farrage stated Clark could perform light duty with lifting of no more than twenty pounds occasionally, or over ten pounds frequently. He also advised she should avoid repetitive use of her upper extremities, including gripping and reaching above her shoulders. Regarding her job at Maker's Mark, Dr. Farrage stated, "This patient does not retain the physical capacity to return to her previous job description which requires highly repetitive sustained upper extremity use of moderate lifting intensity without significant accommodation."

In a note dated May 16, 2014, Dr. Farrage stated Clark had reached maximum medical improvement ("MMI"), and had an excellent return of range of motion, but continued to

have problems with grip strength. Dr. Farrage advised Clark to continue with home exercises, and suggested she could return to light/medium work. He defined this as lifting no more than thirty pounds occasionally or over fifteen pounds frequently. He also suggested Clark avoid repetitive activities of the upper extremity, including gripping and above shoulder reaching. Dr. Farrage reiterated the 5% impairment rating pursuant to the AMA Guides which he had previously assessed.

In a note dated June 16, 2014, Dr. Farrage noted he had reviewed the functional capacity evaluation ("FCE") requested by Dr. Bonnarens. He stated this demonstrated Clark could safely perform her job duties at Maker's Mark, and return to work on a full duty status in her competitive work environment. He stated there was no longer a medical justification for assigning an impairment rating. Therefore, he revised the assessment to 0%.

Maker's Mark filed records of Dr. Dubou for treatment from August 2, 2012 through October 4, 2012. Dr. Dubou noted Clark worked on the dipping line at Maker's Mark, and rotated through various jobs every thirty minutes to avoid overuse syndrome. He stated Clark may have a mild compression of the median nerve, and ordered an MRI. EMG/NCV tests performed August 16, 2012 were normal, but he

noted hyperesthesia in the left thumb, which he injected. On August 21, 2012, Dr. Dubou stated Clark should remain on one-handed duty. On October 4, 2012, Dr. Dubou found Clark had reached MMI. He stated she had a 0% impairment rating and recommended no restrictions, stating she "can work as she wishes".

Maker's Mark next filed records of Dr. Rod Coxon, a chiropractor. On October 17, 2012, he stated Clark complained of neck pain into the bilateral trapezius, worse on the right. On February 13, 2013, he noted Clark complained of mild back pain.

Marker's Mark filed office notes of Dr. John Garner for treatment from December 13, 2011 through May 2, 2013. Dr. Garner treated Clark for various complaints including edema, anxiety, right neck and shoulder pain, insomnia, and depression.

Maker's Mark next filed records from Dr. Lida Oxnard with Essential Health Care, for treatment from October 19, 2006 through December 12, 2006. The treatment indicates she was seen for medication refills, and treatment for rib fractures due to falling from a horse. An x-ray was taken of the right hand on October 31, 2006 which was normal. She was seen on December 12, 2006 for a nonproductive cough.

Maker's Mark additionally filed records of Dr. Michael Sewell for treatment on October 24, 2006 and November 14, 2006. Those visits were for treatment of a bony mallet injury and avulsion of the dorsal aspect of the base of the distal phalanx of the right fifth finger.

Clark was evaluated by Dr. Ronald Fadel at Maker's Mark's request on November 15, 2013. Dr. Fadel, an orthopedic surgeon, noted Clark's work consisted of performing repetitive tasks on an assembly line for Maker's Mark. He stated she rotates among various positions. He stated her work activities included pushing/pulling cases of empty bottles, placing bottles on the line, hand dipping bottles and inspecting. He stated Clark was sent home from work on December 12, 2013 based upon the restrictions imposed by Dr. Farrage. He also noted she saw Dr. Bonnarens who ordered physical therapy which eventually resolved her problem.

Dr. Fadel diagnosed an acute spasm injury of the right shoulder with underlying multi-directional instability and muscular deconditioning caused by her employment. He found Clark had reached MMI, although he could not determine when she did so. He recommended no restrictions, and stated Clark could assume all work duties at Maker's Mark, but would benefit from performing home exercises.

Maker's Mark filed the May 29, 2014 note of Dr. Bonnarens. Although he indicated this was a return visit, no other records or reports of Dr. Bonnarens were filed as evidence. He noted Clark came in for follow up of her right shoulder and reported no problems. He stated she was working at her regular job without difficulty, and had passed an FCE. He opined Clark could return to unrestricted work, and had 0% impairment.

A benefit review conference ("BRC") was held on May 6, 2014. The BRC order and memorandum reflects the contested issues included benefits per KRS 342.730 (all factors) and TTD.

In his decision rendered November 7, 2014, the ALJ awarded TTD benefits from August 2, 2012 through October 4, 2012. He noted although Clark continued to work, she was restricted to one-handed duty, and could not perform all of her job duties. The ALJ also awarded TTD benefits from September 16, 2013 through December 12, 2013 because Maker's Mark would not allow her to work based upon the restrictions imposed by Dr. Farrage. Finally, the ALJ awarded TTD benefits from May 29, 2014 to June 16, 2014 because she was again taken off work based upon restrictions imposed by Dr. Farrage.

The ALJ also gave credit to Maker's Mark for the net unemployment benefits received by Clark after taxes were deducted. Although the unemployment benefit rate was \$415.00, Clark only received \$356.00 per week after the deduction of taxes. The ALJ also awarded interest on unpaid TTD benefits at the rate of 18% pursuant to KRS 342.040 based upon an unreasonable delay in payment. He noted Maker's Mark refused payment of TTD benefits at the same time it prevented Clark from working. Finally, the ALJ found the physical therapy bills amounting to \$699.34 were reasonable and necessary, and were incurred to allow Clark to return to work. He specifically noted there was no indication the treatment was unreasonable or "outside the type generally accepted by the medical profession."

Maker's Mark filed a petition for reconsideration arguing the ALJ erred in awarding TTD benefits from August 2, 2012 through October 4, 2012 with 18% interest, especially because Clark made no request for it. Maker's Mark argued Clark was performing her regular job despite her restrictions. Maker's Mark requested the ALJ to make additional findings to support his award of TTD benefits from September 16, 2013 to December 12, 2013 and again from May 29, 2014 to June 16, 2014, with 18% interest. Maker's Mark next argued the ALJ erred in providing credit only for

the net unemployment benefits received, instead of the full amount paid before the deduction of taxes.

In the order on reconsideration, the ALJ provided additional findings. He stated Maker's Mark clearly relied upon Dr. Farrage's report in disallowing Clark to work. He stated, "Indeed it is disingenuous to now argue that the plaintiff was not temporarily totally disabled during this time." Regarding the period of TTD benefits awarded from August 2, 2012 to October 4, 2012, the ALJ noted Clark continued to work during this time, but only performed one-handed work. He stated Clark was unable to perform her usual job in a customary fashion. The ALJ reiterated the award of TTD benefits from August 2, 2012 through October 4, 2012, but found Maker's Mark was not responsible for the payment of 18% interest on TTD benefits owing for that period.

Finally, regarding credit only for unemployment benefits actually received by Clark, the ALJ stated as follows:

The defendant also requests credit for the full amount of unemployment benefits received by the plaintiff during the periods of temporary total disability. However workers' compensation benefits are nontaxable where unemployment benefits are. Taxes were taken out of the plaintiff's unemployment benefits and she received only a net amount. It

is the net amount for which the defendant must receive credit against temporary total disability. This portion of the petition for reconsideration is also denied.

Maker's Mark essentially argues on appeal the same issues raised in its petition for reconsideration. As noted above, we affirm.

It is acknowledged an ALJ has wide range discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). It is further acknowledged KRS 342.285 designates the ALJ as the finder of fact, and is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

In reaching his determination, the ALJ must provide findings sufficient to inform the parties of the basis for his decision to allow for meaningful review.

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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). In this instance, the ALJ provided a sufficient basis for the award of TTD benefits during the period from August 2, 2012 through October 4, 2012.

As both this Board and Kentucky Court of Appeals noted previously, temporary total disability 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.

. . . .

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.

Regarding Clark's entitlement to TTD benefits from August 2, 2012 to October 4, 2012, we find the ALJ

properly set forth the basis for his decision. He noted Clark's treatment with Dr. Dubou, and the fact she was limited to one-handed duty. The ALJ noted Clark was able to perform some, but not all, of her job duties during this period of time, as cited in her testimony. Likewise, the ALJ referenced the restrictions imposed by Dr. Dubou who saw Clark at Maker's Mark's request. Although Clark clearly continued to work during this time period, it was at modified duty and did not encompass the full range of jobs performed prior to the injury. She did not achieve MMI until Dr. Dubou made the assessment in the report dated October 4, 2012.

The ALJ's determination is consistent with the holding from the Kentucky Court of Appeals in Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009); and Central Kentucky Steel v. Wise, supra. Likewise, the ALJ's decision is consistent with a trio of recent decisions of the Kentucky Court of Appeals, Sonia S. Mull v. Zappos.Com, Inc., 2014-WL-3406684 (Ky. App., 2014); Delena Tipton v. Trane Commercial Systems, 2014-WL-4197504 (Ky. App., 2014); and Nesco Resource v. Michael Arnold, 2015-WL-1284630 (Ky. App., 2015), all designated to not be published. Although not cited as authority, they are referenced for guidance. In each of these cases, the injured worker was awarded TTD

benefits during a time period when they were on light duty, and could perform some, but not all of their pre-injury job duties. As noted most recently in Nesco, the Court of Appeals clearly stated if an injured worker demonstrates the inability to return to his or her customary pre-injury work, (which includes all job duties), and has not reached MMI, he or she is entitled to TTD benefits pursuant to the Kentucky Worker's Compensation Act. In this instance, the ALJ did not err in awarding TTD benefits during the time period from August 2, 2012 through October 4, 2012 since Clark was unable to perform the full gamut of her pre-injury work.

Likewise, we find the ALJ did not err in awarding TTD benefits during the two subsequent periods of September 16, 2013 through December 12, 2013, and again from May 29, 2014 through June 16, 2014. During each of these periods Clark was prevented from working due to restrictions imposed by Dr. Farrage. Despite Maker's Mark's argument Dr. Farrage's opinions should be disregarded due to a lack of credibility, apparently they were sufficient to justify sending Clark home, and preventing her from working during the periods for which TTD benefits were awarded. Interestingly, responses which Maker's Mark's filed to Clark's request for unemployment benefits while she was not working and during the time which no TTD benefits were paid

state: "She is off due to Worker's Compensation." Based upon the fact Clark was sent home from work due to Dr. Farrage's restrictions, and the admission by Marker's Mark that Clark was not working for reasons related to her workers' compensation, the ALJ did not err in awarding TTD benefits for these time periods.

Regarding the imposition of 18% interest on the periods of TTD from September 16, 2013 through December 12, 2013, and again from May 29, 2014 through June 16, 2014, again we find no error. KRS 342.040(1) states as follows:

Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid, except that if the administrative law judge determines that a denial, delay, or termination in the payment of income benefits was without reasonable foundation, the rate of interest shall be eighteen percent (18%) per annum. In no event shall income benefits be instituted later than the fifteenth day after the employer has knowledge of the disability or death. Income benefits

shall be due and payable not less often than semimonthly. If the employer's insurance carrier or other party responsible for the payment of workers' compensation benefits should terminate or fail to make payments when due, that party shall notify the commissioner of the termination or failure to make payments and the commissioner shall, in writing, advise the employee or known dependent of right to prosecute a claim under this chapter.

In this instance, Clark was sent home and prevented from working during each of these time periods due to restrictions imposed by Dr. Farrage. Despite the fact Clark was prevented from working due to the restrictions imposed, TTD benefits were never paid. In his decision, the ALJ reviewed the applicable circumstances and determined 18% interest pursuant to KRS 342.040(1) was appropriate. It was within his discretion to do so. Having reviewed the evidence, and the ALJ's decision, we determine he engaged in the appropriate analysis in awarding this interest. Therefore, the ALJ's determination will not be set aside.

Maker's Mark next argues the ALJ erred in failing to afford it the full credit for unemployment benefits paid pursuant to KRS 342.730(5), rather than merely the net amount Clark received. We disagree. In order to be made whole, Clark is entitled to the full amount of TTD benefits to which she was awarded by the ALJ, not the full amount

reduced by taxes paid from her unemployment benefits. The ALJ did not err in providing Maker's Mark credit only for the net amount Clark received for unemployment benefits during the period she was awarded TTD benefits. Providing credit for amounts she did not receive would effectively reduce her award of TTD benefits. Again, the ALJ provided an adequate analysis of the basis for his award, and his determination will not be disturbed.

Finally, Maker's Mark argues the ALJ erred in finding it responsible for contested physical therapy bills. We find this argument without merit, and disagree. It is clear from the record Clark was referred for physical therapy by Dr. Bonnarens for treatment of her work injury. As noted by the ALJ, "there is no indication this treatment was unreasonable or outside the type of treatment generally accepted by the medical profession". The ALJ further reasoned the physical therapy was prescribed in order to enable Clark to return to her regular duty work. The ALJ performed the proper analysis pursuant to F.E.I Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007) in finding these bills compensable pursuant to KRS 342.020, and his determination will not be disturbed.

Maker's Mark requested oral arguments be held. Having reviewed the record, we conclude oral arguments are

unnecessary. Consequently, **IT IS HEREBY ORDERED AND ADJUDGED** the request is **DENIED**.

Accordingly, the decision rendered by Hon. John B. Coleman, Administrative Law Judge, on November 7, 2014 and the December 29, 2014 order on reconsideration, are hereby **AFFIRMED**.

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN  
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