Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 24, 2016

CLAIM NO. 201178977

MANCHESTER MEMORIAL HOSPITAL — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. J. GREGORY ALLEN, ADMINISTRATIVE LAW JUDGE**

SHARLENE WAGNER — RESPONDENT/ CROSS-PETITIONER
and
HON. J. GREGORY ALLEN, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * * *

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

ALVEY, Chairman. Manchester Memorial Hospital ("Manchester Memorial") appeals from the Opinion, Order and Award rendered April 17, 2015 by Hon. J. Gregory Allen, Administrative Law Judge ("ALJ") awarding Sharlene Wagner ("Wagner") temporary total disability ("TTD") benefits,

permanent partial disability ("PPD") benefits increased by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits for a work-related left knee injury sustained on July 17, 2011. Manchester Memorial also appeals from the June 3, 2015 Order sustaining in part, and denying its petition for reconsideration.

On appeal, Manchester Memorial argues the ALJ erred in awarding TTD benefits for time periods Wagner was working light duty earning the same or greater wages. Manchester Memorial also argues the ALJ's enhancement of the award of PPD benefits by the three-multiplier contained in KRS 342.730(1)(c)1 is not supported by the evidence. Finally, Manchester Memorial argues the issue of underpayment of TTD benefits was not properly preserved.

We agree the ALJ did not perform a proper analysis regarding entitlement to TTD benefits during the periods Wagner returned to light duty work pursuant to Livingood v. Transfreight, LLC, et. al., 467 S.W.3d 249 (Ky. 2015) and Trane Commercial Systems v. Delena Tipton, 481 S.W.3d 800 (Ky. 2016). Therefore, the award of TTD benefits prior to Wagner reaching maximum medical improvement ("MMI") is vacated, and this claim is remanded to the ALJ for a proper determination of entitlement to such benefits. Regarding the issue of enhancement of the

PPD award pursuant to KRS 342.730(1)(c)1, and whether the issue of underpayment of TTD benefits was properly preserved, we affirm.

Wagner filed a Form 101 on August 18, 2014 alleging she injured her left knee and hip when she fell on a wooden ramp when walking between the kitchen and freezer while working for Manchester Memorial on July 17, 2011. Wagner has a GED and one semester of technical school coursework. She also has a food handler's card, and a paid feeding assistant certification. At the time of her accident, she was employed as a cook at Manchester Memorial. Her work history includes employment as a cook, dietary cook, waitress, cashier and general laborer.

Wagner testified by deposition on October 20, 2014, and at the hearing held February 24, 2015. Wagner is a resident of Annville, Kentucky. Wagner's previous employment as a cook and waitress involved food preparation, waiting on tables and cleaning. She was required to mop, clean cooking equipment, and carry various items. As a cashier at a market she stocked shelves, put groceries away, restocked coolers, mopped floors, vacuumed, sliced meat, operated the cash register, and lifted up to fifty pounds. As a dietary cook at a nursing home, she

prepared bulk food in larger pans and again lifted up to fifty pounds.

In 2008, while working for a previous employer, Wagner injured her back when she was pushing a cart loaded with trays. The wheel came off of the cart, and she attempted to catch it in order to prevent food spillage. During this process, she sustained injuries to her mid and low back. She received treatment for that condition, and ultimately a spinal stimulator was emplaced. She was treating for this unrelated condition when she had her knee injury. She continues to take medication and treat with a physician for the unrelated low back condition.

Wagner's job duties for Manchester Memorial included preparing desserts, loading food trays, and cooking on the grill. Her job included sweeping, mopping, as well as cleaning shelves, fire extinguishers, and pipes. She also cleaned the grill and deep fryer, in addition to stocking the freezer and pantry, washing dishes, delivering food to patients, and performing cashier duties. The job required her to lift up to fifty pounds, and push or pull up to one-hundred pounds. She worked eight to twelve hour shifts, for a total of forty hours per week.

On July 17, 2011, Wagner went to the freezer to get a Popsicle for one of the patients. This required her

to cross a wooden ramp. She fell while crossing the ramp and twisted her left knee. She initially treated at the emergency room then followed up with her family physician. She later treated with Dr. Wallace Huff, an orthopedic surgeon, who administered injections to her left knee. She later underwent arthroscopic surgery for her left knee. When her symptoms continued, she underwent a partial left knee replacement. After the incident, she continued to work light duty until she underwent arthroscopic surgery. After the arthroscopic surgery, she returned to work with sedentary work restrictions.

Subsequent to the partial left knee replacement, Wagner returned to regular duty work for approximately one year earning the same or higher hourly wage. Dr. Huff later again restricted her to sedentary duty. Her employment ended with Manchester Memorial in April or May 2014. Wagner does not believe she can return to any of her previous employment. Dr. Huff has recommended the use of a cane and a wheelchair. She cannot kneel or climb ladders. Wagner testified she began experiencing left hip pain in November or December 2013.

Both Wagner and Manchester Memorial filed records from Dr. Huff for treatment from September 8, 2011 through October 23, 2014. Dr. Huff noted Wagner sustained a left

knee injury on July 17, 2011 when she twisted and fell. He chronicled her treatment for the condition, provided various opinions regarding when she could return to work, and outlined her restrictions.

On May 17, 2012, Dr. Huff saw Wagner for a follow up of her knee arthroscopy. He noted she was doing well and allowed her to return to work without restrictions. On February 18, 2013, he stated she was nearly one year post-op and was at MMI. He stated she had no permanent restrictions, but inconsistently stated she was limited to sedentary work only. On June 10, 2013, Dr. Huff stated Wagner should continue home exercises for quad strengthening, and return for a follow up examination in one year. He also stated, "Return to work with no restrictions." On September 5, 2013, he noted Wagner had experienced an episode of left knee swelling which had resolved, and she was doing well. He noted she had a well-functioning medial compartment and partial knee replacement. He indicated he would see her as needed, or every other year for routine x-rays.

On October 23, 2014, Dr. Huff assessed a 20% impairment rating due to loss of range of motion pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA

Guides”). He further opined she could occasionally lift up to ten pounds, carry up to ten pounds, and during an eight hour work day she could sit for up to six hours, stand for up to two hours and walk up to two hours. He also stated she needs to use a cane.

Wagner filed the March 11, 2013 office note of Dr. Michael Helig, who stated she complained of left knee pain. A stimulator was ordered to treat her quad atrophy.

Wagner was evaluated by Dr. Phillip Corbett at Manchester Memorial’s request. In his December 15, 2014 report, Dr. Corbett noted Wagner fell at work in July 2011 and outlined the treatment including injections and surgeries. He noted during the recovery process she experienced pain and swelling in the left knee and she reportedly felt she was unstable. She also complained of left hip pain beginning in August 2013.

Dr. Corbett diagnosed Wagner as being status post left medial compartment resurfacing, partial knee arthroplasty, and having undergone a partial medial and lateral meniscectomy via arthroscopic technique. He stated the left hip complaints are not in any way associated with the left knee procedure and complaints. He stated Wagner reached MMI one year after her last surgical procedure. He assessed a 20% impairment rating pursuant to the AMA

Guides. Dr. Corbett stated Wagner would have no permanent restrictions due to her left knee injury and surgeries. He also stated there was no need for a total knee replacement.

Manchester Memorial filed treatment records from the White House Clinic for treatment from August 15, 2011 through August 29, 2013. On August 15, 2011, she was allowed to return to regular duty work with no restrictions. The records document treatment for the left knee, low back and left-sided sciatica.

Manchester Memorial filed additional records from the White House Clinic for treatment from August 4, 2011 through May 6, 2014. The records document treatment for the low back, left leg, suspected mental condition, rib pain and left foot numbness. The records also document treatment with various medications, including opioids, primarily for treatment for her unrelated low back condition.

Manchester Memorial filed a Form 112 medical dispute contesting treatment for the left hip condition. In support of this dispute, the report of Dr. Bart Goldman was filed. Dr. Goldman stated as follows:

> Based on the original mechanism of injury on [sic] not sure the partial knee replacement was related to the injury in question. However I can find no way to directly relate bilateral

> trochanteric bursitis to a well-functioning hemiarthroplasty of the knee.
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> It is therefore recommended that the current treatment of the left hip be denied for lack of relatedness to the almost 3-year old left knee injury.

Manchester Memorial also filed the records from the pre-employment physical performed on September 23, 2009 at Williamsburg Occupational Health. Those records indicate a concern with Wagner's back pain and unrelated right hip condition.

In addition to the medical records listed above, Manchester Memorial filed the November 13, 2014 vocational report of Dr. Stephanie Barnes who assessed Wagner at its request. Dr. Barnes noted Wagner had a flat affect during the evaluation. She noted Wagner is not permanently totally disabled. Based upon Dr. Corbett's opinion, she noted Wagner retains the capacity to perform her pre-injury work. Dr. Barnes stated Wagner is a questionable candidate for rehabilitation. Manchester Memorial also filed the report of Mr. Rick Pounds, who stated Wagner can clearly work light duty, and possibly medium duty with improvement of her overall physical condition. Manchester Memorial additionally filed records from Wagner's Social Security disability claim.

A Benefit Review Conference ("BRC") was held on January 16, 2015. The issues preserved for decision in the BRC Order and Memorandum included capacity to return to the type of work performed on the date of injury, benefits per KRS 342.730, permanent total disability, work-relatedness/ causation, unpaid or contested medical expenses, injury as defined by the Act, exclusion for pre-existing active disability, and TTD benefits (overpayment and duration).

In the opinion rendered April 17, 2015, the ALJ determined Wagner's left knee condition is a combination of conditions aroused from a dormant, asymptomatic condition by the July 17, 2011 fall, and is therefore work-related pursuant to McNutt Construction/First General Services v. Clifford F. Scott, et al., 40 S.W.3d 854 (Ky. 2001). After performing an analysis pursuant to Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the ALJ determined Wagner is not permanently totally disabled.

The ALJ awarded TTD benefits and PPD benefits based upon the 20% impairment rating assessed by both Drs. Huff and Corbett. He determined both the multipliers contained in KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2 were applicable, and he conducted an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). After performing this analysis, he found the three-multiplier

pursuant to KRS 342.730(1)(c)1 most appropriate. The ALJ dismissed the claim for the hip condition.

Manchester Memorial filed a petition for reconsideration arguing the ALJ erred in awarding TTD benefits during periods Wagner was working. It also argued the underpayment of TTD benefits was not preserved as an issue. It finally argued the ALJ erred in enhancing the award of PPD benefits pursuant to KRS 342.730(1)(c)1.

In the June 3, 2015 order denying the petition for reconsideration, the ALJ stated the correct TTD amount was preserved as an issue. He cited to the holding in Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman, 233 S.W.3d 710 (Ky. 2007) as supporting this determination. Regarding the argument he erred by awarding TTD benefits during periods Wagner was actually working, the ALJ determined he was compelled to overrule the petition because she had not returned to work to the exact job she was performing on the date of the injury. Finally, he stated the application of the multiplier contained in KRS 342.730(1)(c)1 was supported by the record.

We first note, as the claimant in a workers' compensation proceeding, Wagner had the burden of proving each of the essential elements of her cause of action, including the appropriate period of TTD benefits, and

entitlement to the multipliers contained in KRS 342.730(1)(c). *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was successful in that burden, the question on appeal is whether substantial evidence of record supports 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on

appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

TTD is statutorily defined in KRS 342.0011(11)(a) 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 Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court 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." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed

that 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 Magellan Behavioral Health v. 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.
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> . . .
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> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), regarding the standard for awarding TTD, 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. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
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> . . .
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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.

In Livingood v. Transfreight, LLC, et al., supra, the Kentucky Supreme Court addressed the ALJ's denial of Livingood's request for additional TTD benefits during the period he had returned to light duty work by stating, "Except for bathroom monitoring, Livingood had performed the other activities before the injury; further they were not a make-work project." The Court specifically stated as follows:

> As the Court explained in *Advance Auto Parts v. Mathis*, No. 2004-SC-0146-WC, 2005 WL 119750, at (Ky. Jan. 20, 2005),

> and we reiterate today, **Wise does not "stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.**" Livingood had the burden of proof on the issue. Where the ALJ finds against the party with the burden of proof, the standard of review on appeal is whether the evidence compelled a contrary finding. *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). The Board and the Court of Appeals were not convinced that it did. Nor are we. "The function of further review in our Court is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Western Baptist v. Kelly*, 827 S.W.2d 685, 688, 39 4 Ky. L. Summary 54 (Ky. 1992). (Emphasis added).
> Id. at 254-255.

More recently, in Trane Commercial Systems v. Tipton, supra, the Kentucky Supreme Court again addressed whether an employee was entitled to TTD benefits upon returning to light duty work prior to reaching MMI. The Court first noted:

> "'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Or, to put it positively, an employee is entitled to receive TTD benefits until such time as she reaches maximum medical improvement (MMI) or has improved to the point that she can return to employment. There is

> no dispute that Tipton reached MMI on July 7, 2011. However, the parties dispute whether Tipton reached the point that she could "return to employment" when she returned to work for Trane assembling circuit boards. The ALJ and the Board concluded that her return to work and return to employment occurred at the same time. As noted above, the Court of Appeals disagreed. For the reasons set forth below, we disagree with the Court of Appeals.
> Id. at 803

The Court additionally stated the following:

> We take this opportunity to further delineate our holding in *Livingood,* and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.,* 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.
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> As we have previously held, "[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 [of work] that is customary or that he was performing at

> the time of his injury." *Central Kentucky Steel v. Wise,* 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; *and* the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.
> Id. at 807

That said, the award of TTD benefits is hereby vacated. The evidence clearly establishes Wagner continued to work after the date of the injury, and various times after her surgery. Contrary to the statement in his decision, the ALJ was not compelled to award TTD benefits for all times she was not "performing the exact same job plaintiff was performing at the time of the injury." On

remand, the ALJ must determine, based upon the evidence, if Wagner is entitled to TTD benefits during the time periods she worked prior to reaching MMI, and if so, the appropriate time period bearing in mind the direction of the Kentucky Supreme Court in Livingood v. Transfreight, LLC, et al., supra, and Trane Commercial Systems v. Tipton, supra.

This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). However, any determination must be supported by the appropriate analysis and findings.

Regarding Manchester Memorial's argument the ALJ improperly enhanced the award of PPD benefits pursuant to KRS 342.730(1)(c)1, we affirm. The ALJ made the appropriate analysis pursuant to Fawbush v. Gwinn, supra, and its progeny. He clearly and appropriately set forth the factors he considered, and his decision regarding this issue will not be disturbed.

Finally, regarding the issue of whether the underpayment of TTD benefits was properly preserved, we again affirm. In United Parcel Service, Inc. v. Stoudemire, 251 S.W.3d 331 (Ky. App. 2008), the Court of

Appeals held a worker properly preserved as an issue whether she was entitled to additional TTD benefits, although the employer contended the issue was not raised at the BRC, when extent and duration of disability was specifically designated as a contested issue before the ALJ. In Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman, supra, the Kentucky Supreme Court held the parties' listing of contested issues, which included the extent and duration of disability, also included the worker's claim for additional TTD benefits. Although the above-cited cases dealt with the preservation by the employee of her entitlement to additional TTD benefits, it stands to reason the employer's total liability for TTD benefits is also preserved as an issue when extent and duration is identified as a contested issue.

In this instance, entitlement to benefits pursuant to KRS 342.730 was listed as an issue in the BRC Order and Memorandum. We believe the term "benefits per KRS 342.730" replaced and necessarily encompasses the issue of extent and duration of disability. Since KRS 342.730(1)(a) provides the formula for calculating TTD benefits, entitlement to and the total liability for TTD benefits are included within the issue of "benefits per KRS 342.730." We therefore determine the issue of underpayment

of TTD benefits was properly preserved, and may be considered by the ALJ upon remand when considering Wagner's entitlement to such benefits.

Accordingly, the April 17, 2015 Opinion, Award and Order and the June 3, 2015 Order on petition for reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge are hereby **AFFIRMED IN PART** and **VACATED IN PART.** This claim is **REMANDED** for additional determinations and an opinion in conformity with the views expressed herein.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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