# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: October 23, 2015**

CLAIM NO. 201400347

MANPOWER OF INDIANA PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

STEVEN BELCHER and
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

* * * * * *

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

**ALVEY, Chairman.** Manpower of Indiana ("Manpower") appeals from the Opinion, Award and Order rendered April 2, 2015 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") awarding Steven Belcher ("Belcher") temporary total disability ("TTD") benefits from June 26, 2013 through June 25, 2014, permanent partial disability ("PPD") benefits, and

medical benefits for a work-related injury sustained on June 25, 2013. Manpower also appeals from the May 5, 2015 Order denying its petition for reconsideration.

On appeal, Manpower challenges the ALJ's calculation of Belcher's average weekly wage ("AWW"), arguing he did not compute it based on thirteen consecutive weeks pursuant to KRS 342.140(1)(d). Manpower argues Belcher is only entitled to TTD benefits from July 10, 2013 through July 26, 2013. Finally, Manpower argues the ALJ should have relied upon the impairment rating and opinions rendered by Dr. Ronald Fadel. Because the ALJ's determinations regarding entitlement to TTD benefits and extent and duration of disability are supported by substantial evidence, we affirm. However, we vacate in part and remand for computation of Belcher's pre-injury AWW based upon the most favorable period of thirteen consecutive calendar weeks pursuant to KRS 342.140(1)(d). Because we determine the ALJ improperly provided an offset credit for wages earned during Belcher's subsequent employment with Employment Plus against Manpower's obligation of TTD benefits, we additionally remand that portion of the ALJ's award for a determination such credit is not applicable.

Belcher filed a Form 101 alleging he injured his right knee, hip and low back on June 25, 2013, when he

slipped and fell while stocking vending machines. At the time of his injury, Belcher was employed by Manpower and assigned to Canteen Vending ("Canteen") performing janitorial and maintenance tasks.

Belcher testified by deposition on May 14, 2014 and at the hearing held January 29, 2015. Belcher began working for Manpower in early 2013, a "temp-to-hire company." He was assigned to three or four facilities while employed by Manpower. His last assignment was with Canteen performing janitorial work. Belcher cleaned floors, picked up cardboard, operated a baler, and restocked shelves. Belcher described his job assignment at Canteen as physically demanding.

Belcher estimated he had been working for Canteen for approximately a month when he was injured on June 25, 2013. Near the end of his shift, Belcher stepped on an empty crate, slipped, and fell to the floor, hitting his tailbone on a pallet. Belcher experienced low back pain and tingling in his right leg and foot. Belcher reported his injury and went home. The following day, he called Canteen and Manpower to inform them he could not report to work due to his injury. Belcher was told not to return to Canteen Vending. Belcher began treating with Occupational Medical Physicians ("OMP") on June 26, 2013, and also saw Dr. George

Raque. He continues to experience numbness and tingling in his right leg and foot in addition to low back pain.

Belcher testified he earned $11.00 per hour while working at Manpower, and typically worked thirty-two to thirty-six hours a week. After the accident, Belcher was told to report to the Manpower facility in July 2013. For approximately two weeks, he watched safety videos in the office, and did nothing else. At the hearing, Belcher disputed the payment history document indicating he worked for Manpower for four weeks following the accident. Regardless, his employment with Manpower ended near the end of July. Belcher did not work anywhere else until January 2014, during which time he received $140.00 per week in unemployment benefits.

Belcher began working for Employment Plus, another temp-to-hire company, in January 2014. He was assigned to Crunchers, a potato chip company, as an inspector. Belcher stood and inspected potatoes as they came down a conveyor belt. Belcher testified he worked more hours and earned more per hour while working for Crunchers. He stated he earned $11.50 per hour, and worked at least forty hours a week. The work at Crunchers was neither physically demanding nor strenuous. He continued working for Crunchers until May 24, 2014 when he stopped due to continuing

symptoms in his legs. In his current condition, Belcher testified he cannot return to either the janitorial job at Canteen through Manpower or his inspector job at Crunchers. Both parties relied upon the same “payment history” form which reflects Belcher was compensated for working nine weeks at his first assignment, 02/03/2013 to 03/31/2013. During this time period, he was paid $480.00 each week, with the exception of one week where he earned $360.00. Belcher did not receive compensation for work for the weeks ending on 04/07/2013, 04/14/2013, 04/21/2013, 04/28/2013, and 05/05/2013. Belcher then began a second assignment and was paid $243.00 for 27 hours for the week ending on 05/12/2013 and $324.00 for 36 hours for the week ending on 05/19/2013. Belcher did not receive compensation for the weeks ending on 05/26/2013 and 06/02/2013. Belcher then began his assignment with Canteen and was paid $154.00 for 14 hours on the week ending on 06/09/2013; $385.00 for 35 hours for the week ending on 06/16/2013; and $401.50 for 36.50 hours for the week ending on 06/23/2013.

Subsequent to his work injury on June 25, 2013, Belcher was paid $154.00 for 14 hours for the week ending on 06/30/2013; $275.00 for 25 hours for the week ending on 07/21/2013; $182.00 for 18 hours for the week ending on

07/21/2013; and $275.00 for 25 hours for the week ending on 07/28/2013.

In support of his claim, Belcher filed the records from OMP. Belcher treated at OMP on at least thirteen occasions from June 26, 2013 through February 18, 2014 with Drs. Kevin Dew and Dennis McClain. Belcher was treated conservatively with medication, physical therapy, and home exercises. Dr. McClain ordered an EMG/NCV study of the right leg on September 6, 2013 when Belcher's symptoms did not improve. The EMG/NCV was conducted on September 20, 2013 by Dr. Joseph Seipel, who concluded it was abnormal in the L5-S1 myotomes and recommended clinical correlation for possible L5-S1 radiculopathy. Dr. McClain ordered a lumbar MRI for the suspected L5-S1 radiculopathy, which was denied by the workers' compensation insurer. Dr. McClain then referred Belcher to a neurosurgeon who refused to see him without diagnostic studies.

After some delay, a lumbar MRI was performed on February 12, 2014, which demonstrated mild to moderate facet degenerative change lumbar spine; mild disc bulges at L3-4, L4-5, and L5-S1; mild flattening of the ventral thecal sac at these levels; and mild neural foraminal narrowing bilaterally at the L4-5 and L5-S1 levels. On the last visit of record dated February 18, 2014, Dr. McClain diagnosed a

hip strain, resolved abdominal muscles strain, and paresthesia right leg-radiculopathy. Dr. McClain noted the lumbar MRI showed lumbar spondylosis. He recommended a lumbar epidural steroid injection and continuing home exercises.

The OMP records reflect Belcher was restricted to light duty on his first visit, June 26, 2013. Dr. McClain returned Belcher to regular duty on June 29, 2013. On July 10, 2013, Dr. Dew restricted Belcher to seated duty. On his next visit on July 19, 2013, Dr. Dew noted, “work status is regular duty. Seated duties only.” The records of the following nine visits from July 26, 2013 through February 18, 2014 reflect Belcher was permitted to perform regular work duties.

Belcher filed the records of Dr. George Raque who examined him on April 18, 2014. Dr. Raque diagnosed lumbosacral spondylosis without myelopathy. He did not find Belcher was a surgical candidate at the time of his evaluation and recommended a course of lumbar epidural blocks.

Belcher filed the June 25, 2014 report of Dr. Jules Barefoot who diagnosed L5-S1 right-sided radiculopathy and opined the work-related injuries brought his condition into a disabling reality. Dr. Barefoot placed Belcher in

the upper limit of DRE Lumbar Category III, noting he has significant signs of radiculopathy and verifiable electro-diagnostic findings. He assessed a 13% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Barefoot noted although Belcher may have had an underlying degenerative disc disease at the time of his injury, it was asymptomatic, dormant and non-disabling, and aroused into symptomatic disabling reality by the June 25, 2013 work injury.

Dr. Barefoot noted Belcher would have difficulty with any job requiring repetitive bending, squatting, kneeling, crouching, or crawling; lifting and carrying heavy loads; walking on uneven surfaces; and climbing and descending stairs. Dr. Barefoot advised against working on ladders or scaffolding. Dr. Barefoot opined Belcher has reached maximum medical improvement ("MMI") if no further treatment is available. Dr. Barefoot recommended a referral to pain management for consideration of epidural injections, as well as a follow-up visit with Dr. Raque. Dr. Barefoot did not rule out the possibility of future surgery.

In an addendum dated December 11, 2014, Dr. Barefoot disagreed with Dr. Fadel's methodology in rating Belcher's impairment. In an addendum dated January 14,

2015, Dr. Barefoot cited to the evidence supporting his diagnosis including his findings on examination, the September 30, 2014 EMG, and the February 2014 MRI.

Manpower filed the August 20, 2014 report prepared by Dr. Fadel who diagnosed Belcher with “traction injury right sciatic nerve” and “sprain/strain lumbosacral spine.” Dr. Fadel attributed the traction injury to the June 2013 work accident. Dr. Fadel noted traction injuries may take six months to three years to resolve. Dr. Fadel recommended periodic EMG/NCT studies to monitor his recovery and medicinal regimen, to include escalating Neurontin, under the supervision of a neurologist. Dr. Fadel noted Belcher’s condition should fully resolve with proper treatment, and he assessed a 2% impairment rating pursuant to the AMA Guides. Dr. Fadel declined to assign permanent restrictions and opined Belcher has the physical capacity to return to his prior position with Manpower where he worked at Canteen doing janitorial work. In an addendum dated December 31, 2014, Dr. Fadel discussed his disagreement with Dr. Barefoot’s diagnosis of radiculopathy based upon a low back injury, and felt he sustained a sciatic nerve injury resulting in his right leg symptoms.

After providing a thorough summary of the evidence, the ALJ found the opinion of Dr. Barefoot most

convincing. He awarded PPD benefits based upon a 13% impairment rating. The ALJ also found Belcher entitled to the three multiplier pursuant to KRS 342.730(1)(c)1 based upon the restrictions assigned by Dr. Barefoot and the fact he was relegated to "make work" tasks such as reading safety manuals upon his short return to work for Manpower. Regarding AWW and TTD benefits, the ALJ stated as follows:

> Before I address the other issues in this case, I must first establish the Plaintiff's average weekly wage. The parties were unable to stipulate the Average Weekly Wage, although both had extrapolated one from limited wage information available. Plaintiff had only been in the Defendant's employ for a few weeks at the time of his fall.
>
> At any rate, the Plaintiff proposed an AWW of $314.43, while the Defendant proposed an AWW of $286.15.
>
> At his deposition, Mr. Belcher testified that he had signed on with Manpower perhaps in 2011. He had several temporary assignments before being assigned to Canteen Vending, where he was assigned to perform maintenance, like a janitor position. He was working between 32 and 36 hours per week at a rate of $11.00 per hour. He thought he had been there for about a month at the time of the accident.
>
> The Plaintiff filed wage records with his form 101 that showed 18 weeks employment with the Defendant/Employer, working anywhere from 14 to 40 hours per week. Defendant/Employer filed the same payment history as the Plaintiff as Exhibit D-1 to the final hearing.

> An employee's average weekly wage must be computed according to the provisions of KRS 342.140. In this case, because Mr. Belcher was paid by the hour, the applicable method is set forth in sub-paragraph (1) (d) of the statute. It must be remembered that the Plaintiff was at all times an employee of Manpower of Indiana, temporarily assigned to various concerns with which the employer had contracted to provide labor. For that reason, we are not limited to the weeks he was assigned to Canteen Vending, because he never worked as an employee of Canteen Vending. Because the claimant was employed for 18 weeks, we would take the wage most favorable to the employee computed by dividing by 13 the wages of said employee earned in the first 13 week period of the thirteen consecutive weeks in the 52 weeks <u>immediately preceding the injury</u>, excluding overtime or premium pay (emphasis provided).
>
> As there is only one 13 week period, I exclude the post-injury weeks and commence with the week ending June 23, 2013. Computing gross pay for 13 weeks of 40 hours per week or less, the weekly earnings of $401.50, $385.00, $154.00, $324.00, $243.00, $480.00, $480.00, $480.00, $480.00, $480.00, $480.00, $480.00, $480.00, and $480.00 when added total $5,347.50, which divided by 13 equals an average weekly wage of $411.35. There is no other 13 week period for comparison unless we extrapolate the maximum gross wage of $480.00 for a full 13 week quarter or factor in wages earned post injury, neither of which is authorized by the terms of the statute. Thus, Mr. Belcher' average weekly wage at the time of the injury was $411.35.
>
> . . . .

As to TTD, Mr. Belcher reached MMI on June 25, 2014, according to Dr. Barefoot, upon whose opinion I rely in making this finding. The employer paid no TTD benefits and did not return the Plaintiff to his usual and customary work during the 4 weeks he remained employed post-injury.

KRS 342.011 (11) (a) defines "Temporary total disability" as being "…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" (emphasis supplied). Thus, as the use of the conjunctive "and" requires it, both conditions precedent must be present in order for an injured employee to be eligible to collect "TTD". With regard to the present matter, according to the opinion of Dr. Barefoot, during the period of time in question (6/26/2013-6/25/2014) the Plaintiff had not reached MMI.

Apparently, the Defendant/Employer attempted to provide a type of "wage continuation" rather than TTD, through a program of mandatory "light duty" (for lack of a better term) for which the employee received pay at his usual rate.

As a corollary to the issue presented, there is a lesser included sub-issue as to what, if any credit for previous payment of wages the employer should receive if it is determined that TTD was the Plaintiff's sole statutory remedy.

Taking the second and corollary sub-issue out of order, it seems clear that if an employer voluntarily pays some benefit to an injured employee that is outside the scope of the statutory scheme, the employer is only entitled to

a credit against statutorily mandated benefits.

KRS 342.011 (12) defines "Income benefits" in pertinent part as "…payments made under the provisions of this chapter to the disabled worker…excluding medical and related benefits." (note: medical benefits are other than income benefits and not at issue here).

KRS 342.011 (14) defines "compensation" as including only income benefits as defined and medical and related benefits as defined.

The only off-sets or credits authorized by the chapter are found at KRS 342.730 (5) and (6), directing credits for payment of unemployment insurance benefits paid for unemployment during a period of TTD or an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer funded plan contains an internal off-set provision for worker's compensation benefits which is inconsistent with this provision. As the legislature could have included other off-sets or credits, but chose not to, the presumption is that there is no intention that other exclusions apply.

Going to the issue of Plaintiff's claim for TTD, it appears from the evidence taken as a whole that for some reason not divulged the employer has made a business decision that rather than pay TTD to Mr. Belcher, there was an artifice created that substitutes for statutory benefits. There is testimony from the Plaintiff in the record concerning the employer's back to work program.

The term “work” is defined at KRS 342.011 (34) as “…providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.”

Here, according to Dr. Barefoot, the Plaintiff could not perform the usual and customary duties of the assignment to Canteen Vending. In fact, he never was returned to that assignment, but rather was relegated to “make work” for the remaining four (4) weeks of his employment with the Defendant/Employer.

He was immediately eliminated from productive work at the employer for whom he had originally been hired by the defendant temp agency. He couldn’t clean. Canteen Vending had no work for him. Still, his actual employer, Manpower of Indiana, told him he would work. He sat in a room for a month and did essentially nothing. The claimant’s version of these events is essentially unrebutted by any other lay testimony. The employer is not entitled to a credit for these wages paid because they were “bona fide” since they were paid ostensibly for labor and the evidence does not permit a reasonable finding that the employer intended to pay them in lieu of workers compensation benefits. Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008).

The employer would be entitled to a credit for unemployment insurance benefits paid at the rate of $140.00 per week from July, 2013 until January, 2014. KRS 342.730 (5). The employer would also be entitled to a credit for greater or equal wages earned from January 2014 through May 24, 2014.

> Mr. Belcher is therefore entitled to an award of TTD benefits at the weekly rate of $274.37 from June 26, 2013 through June 25, 2014, subject to the employer's credit for unemployment insurance benefits paid during the period of TTD and a set-off for wages earned by the Plaintiff during his employment with Employment Plus from January 2014 through May 24, 2014.
>
> Thus, according to my calculations the Plaintiff would be entitled to 52 weeks of TTD at $274.37 for a total of $14,267.24 less 18 weeks of full employment at wages equal to or greater than those earned with Manpower of Indiana for a set-off or credit of $4,938.66 and a credit for 24 weeks of unemployment insurance at $140.00 per week equaling $3,360.00. This leaves a balance of $5,968.58 in unpaid TTD due and owing from the Defendant/Employer to the Plaintiff.

Manpower filed a petition for reconsideration making the same arguments it now raises on appeal, and to correct typographical errors in the award section of the opinion. In the May 5, 2015 order, the ALJ corrected the typographical error, and denied the remainder of its petition stating as follows:

> As to the first allegation of error, the Defendant is incorrect. I did calculate the Plaintiff's AWW using the only 13 week period prior to the injury, but excluding the incomplete week of the injury itself, which is what I believe the statute requires.
>
> As to Defendant's second argument, I considered all the medical evidence in

> the record and so stated. I know of no authority that requires me to parse it out item by item. I have clearly articulated the evidence upon which I have relied. Defendant Employer's allegation of error patently appearing on the face of the Opinion, Award & Order is a disagreement with my interpretation of the medical evidence in the record, which is not within the scope of my review under the provisions of KRS 342.281. *Francis v. Glenmore Distilleries*, 718 S.W.2d 953 (Ky.App. 1986).

On appeal, Manpower argues the ALJ erred in calculating Belcher's pre-injury AWW pursuant to KRS 342.140(1)(d) since he did not use thirteen consecutive weeks immediately preceding the injury. Rather, his calculation is based upon a period of time from the week ending February 11, 2013 to the week ending June 23, 2013, approximately twenty weeks which were not consecutive. Manpower asserts the ALJ did not realize Belcher had no earnings for some of the weeks during this time period. Based upon its calculation, Manpower asserts the most favorable 13 week period is the second quarter when the weeks he did have earnings are factored in, and shows an AWW of $286.15.

Manpower also argues Belcher is only entitled to TTD benefits from July 10, 2013 through July 26, 2013 based upon the return to work slips indicating he was released to

regular duty on July 26, 2013 by his treating physicians at OMP. Finally, Manpower argues the ALJ should have adopted Dr. Fadel's diagnosis and impairment rating.

As the claimant in a workers' compensation proceeding, Belcher had the burden of proving each of the essential elements of his cause of action, including AWW, entitlement to TTD benefits, and extent and duration of his disability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Belcher was successful in his burden, the question on appeal is whether there was substantial evidence of record to support 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson

v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact finder by superimposing its own appraisals as to weight and credibility, or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find substantial evidence supports the ALJ's findings of diagnosis and impairment, as well as entitlement to TTD benefits. In this instance, the ALJ was presented with two differing medical opinions regarding

Belcher's injury sustained due to the fall, and the resulting impairment. Dr. Barefoot diagnosed Belcher with L5-S1 right-sided radiculopathy and assessed a 13% impairment rating. Dr. Fadel felt Belcher sustained a traction injury to the right sciatic nerve as a result of the June 25, 2013 accident and assessed a 2% impairment rating.

The ALJ, as fact-finder, has full discretion to determine the physician or physicians upon which he relies. We acknowledge the differing medical opinions in the record. However, if "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Where evidence is conflicting, the ALJ, as fact-finder, has the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Manpower does not raise any arguments indicating the opinions of Dr. Barefoot are deficient or insubstantial. The ALJ found Dr. Barefoot's opinion most persuasive and his opinion constitutes substantial evidence supporting the ALJ's determination.

We likewise find substantial evidence supports the ALJ's determination that Belcher is entitled to TTD benefits from June 26, 2013 through June 25, 2014. 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. *See also* Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004).

In this instance, the ALJ determined Belcher did not reach MMI until June 25, 2014, when Dr. Barefoot opined he had reached MMI. The ALJ also determined Belcher did not and could not return to his usual and customary work based upon the restrictions imposed by Dr. Barefoot and Belcher's unrebutted testimony regarding his post-injury job duties at Manpower for four weeks. The ALJ found Dr. Barefoot's restrictions precluded Belcher from performing the usual and customary duties of the assignment he was performing at the time of his injury. Instead, the ALJ found Belcher was relegated to 'make work' for several weeks where he sat "in a room for a month and did essentially nothing." The ALJ noted Belcher's testimony indicating he watched safety videos for four weeks following his injury was not disputed or rebutted. Belcher also testified at the hearing he tried to return to other employment as an inspector from January

2014 through May 2014, but could not maintain his job due to his symptoms.

Dr. Barefoot's opinion as to MMI and restrictions, in conjunction with Belcher's testimony, constitutes substantial evidence supporting the ALJ's determination he was entitled to TTD benefits from June 26, 2013 through June 25, 2014. The return to work slips relied upon by Manpower do not conclusively establish the appropriate period of TTD benefits. Rather, they constitute conflicting medical evidence which the ALJ, as fact-finder, could either believe or disbelieve. Caudill v. Maloney's Discount Stores, supra.

With that said, the Board vacates and remands the claim for a determination of Belcher's pre-injury AWW using the most favorable period of thirteen consecutive weeks pursuant to KRS 342.140(1)(d), which would include weeks in which Belcher did and did not receive compensation. KRS 342.140(1)(d) is the applicable statute since Belcher earned an hourly wage, and had worked for Manpower for more than 13 weeks immediately preceding the injury. Since Belcher earned an hourly wage, his AWW shall be "the wage most favorable to the employee computed by dividing by thirteen (13) the wages . . . of said employee earned in the employ of the employer in the first, second, third or fourth period of thirteen consecutive calendar weeks in the

fifty-two (52) weeks immediately preceding the injury." KRS 342.140(1)(d).

Belcher filed a payment history document indicating he was employed by Manpower from February 2013 through the end of July 2013. The payment history indicated Belcher was paid for the following weeks prior to his injury:

| **Week ending:** | **Gross** | **Week ending:** | **Gross** |
|---|---|---|---|
| 06/23/2013 | 401.50 | 03/17/2013 | 480.00 |
| 06/16/2013 | 385.00 | 03/10/2013 | 480.00 |
| 06/09/2013 | 154.00 | 03/03/2013 | 480.00 |
| 05/19/2013 | 324.00 | 02/24/2013 | 480.00 |
| 05/12/2013 | 243.00 | 02/17/2013 | 480.00 |
| 03/31/2013 | 480.00 | 02/10/2013 | 480.00 |
| 03/24/2013 | 480.00 | 02/03/2013 | 360.00 |

Belcher was not compensated for the weeks ending on May 26, 2013 and June 2, 2013; and for the weeks ending on April 7, 2013, April 14, 2013, April 21, 2013, April 28, 2013 and May 5, 2013. Utilizing the same weekly earnings above and taking into account the weeks Belcher was not compensated, Manpower filed an AWW form indicating a pre-injury AWW of $286.15:

| **Quarter 1** | | **Quarter 2** | |
|---|---|---|---|
| Week Ending | Weekly Wage | Week Ending | Weekly Wage |
| 06/23/13 | 401.50 | 03/24/13 | 480.00 |
| 06/16/13 | 385.00 | 03/17/13 | 480.00 |
| 06/09/13 | 154.00 | 03/10/13 | 480.00 |
| 06/02/13 | 0.00 | 03/03/13 | 480.00 |
| 05/26/13 | 0.00 | 02/25/13 | 480.00 |

| | | | |
|---|---|---|---|
| 05/19/13 | 324.00 | 02/18/12 | 480.00 |
| 05/12/13 | 243.00 | 02/11/12 | 480.00 |
| 05/05/12 | 0.00 | 02/04/13 | 360.00 |
| 04/28/13 | 0.00 | 01/28/13 | 0.00 |
| 04/21/13 | 0.00 | 01/21/13 | 0.00 |
| 04/14/13 | 0.00 | 01/14/13 | 0.00 |
| 04/07/13 | 0.00 | 01/07/13 | 0.00 |
| 03/31/13 | 480.00 | 12/31/12 | 0.00 |
| **AWW** | **152.88** | **AWW** | **286.15** |

In his analysis, the ALJ noted there is only one thirteen week period when excluding Belcher's post-injury wages. The ALJ computed the gross pay for thirteen weeks, "the weekly earnings of $401.50, $385.00, $154.00, $324.00, $243.00, $480.00, $480.00, $480.00, $480.00, $480.00, $480.00, $480.00, and $480.00 when added total $5,347.50, which divided by 13 equals an average weekly wage of $411.35."

Upon review, it appears the ALJ based his computation of Belcher's AWW on wages paid from February 3, 2013 through June 23, 2013, more than thirteen weeks, but excluded those weeks in which Belcher did not receive compensation from Manpower. In other words, the ALJ took into consideration only the weeks Belcher received compensation, and excluded the weeks he did not receive compensation in computing a thirteen week period. Therefore, we find the ALJ's computation of Belcher's pre-injury AWW is not in accordance with KRS 342.140(1)(d) since

he did not base it on the a period of "thirteen *consecutive* calendar weeks." On remand, the ALJ must compute Belcher's pre-injury AWW by using the most favorable period of thirteen consecutive weeks, which is to include the weeks in which Belcher earned no wages. Once this determination is made, the ALJ shall adjust the award of income benefits accordingly.

Further, this Board is permitted to *sua sponte* reach issues even if not raised on appeal. KRS 342.285(c); KRS 342.285(3). George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

Although not raised as an issue on appeal, this Board also vacates and remands the claim with directions to the ALJ to not provide an offset credit for wages earned by Belcher while employed by Employment Plus against Manpower's obligation of TTD benefits. Here, the ALJ determined Manpower was entitled to a credit for unemployment benefits, in addition to, "a set-off for wages earned by the Plaintiff during his employment with Employment Plus from January 2014 through May 24, 2014" during the period of TTD benefits.

There is no statutory or case authority for such a "set-off" or credit, and the ALJ provided no support for his determination. The Act contains two bases where an employer can receive a credit against its TTD obligation.

KRS 342.730(5) provides for an offset or credit for unemployment benefits paid to the employee while KRS 342.730(6) provides that certain payments made under a non-compensation disability plan funded solely by the employer may offset the employer's statutory obligation to pay TTD benefits. Neither provision applies to wages earned by a claimant working a less physically demanding job for a different employer, earning the same or greater wages, prior to reaching MMI.

Although the factual scenario in the case *sub judice* differs from that in Millersburg Military Institute v. Puckett, 260 S.W. 3d 339 (Ky. 2008), where the employer sought a credit for wage continuation for an injured worker who continues light duty work, the holding is useful for guidance in this instance. There, the Court held a credit is unavailable where wages are paid ostensibly for labor and not in lieu of workers' compensation benefits. Id. at 342. We therefore conclude the ALJ erred and he is directed to not allow an offset credit for wages earned during Belcher's short employment with Employment Plus, and he must recalculate Manpower's obligation of TTD benefits accordingly.

For the foregoing reasons, the April 2, 2015 Opinion, Award and the May 5, 2015 Order on petition for

reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART,** and **REMANDED** for computation of Belcher's AWW in accordance with KRS 342.140(1)(d) and to not allow an offset credit for wages earned by Belcher during his employment with Employment Plus, and recalculate Manpower's obligation of TTD benefits.

ALL CONCUR.

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