Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 22, 2016

CLAIM NO. 201296913

MARTHA FAY PURCELL PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

RBRC, INC. d/b/a RIVER'S BEND RETIREMENT CENTER
KESA
HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Martha Fay Purcell ("Purcell") appeals from the November 21, 2014 Opinion, Award and Order and the December 15, 2014 Order on Petition for Reconsideration rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"). The sole issue on appeal is whether Purcell is entitled to temporary total disability ("TTD")

benefits during a period she returned to work at light duty. For the reasons set forth below, we affirm.

Purcell was employed at River's Bend Retirement Center ("River's Bend") as a cook. She suffered an injury to her right shoulder on January 24, 2012, while reaching overhead for a box of frozen food. She reported the injury immediately and visited her family physician, Dr. Debra Lee Wilder, who treated her conservatively for several months. When the condition did not improve, she was referred to Dr. Brian Kern, an orthopedic surgeon.

Dr. Kern placed Purcell on light duty on May 29, 2012, and treated her with injections and physical therapy. She remained on light duty following office visits on September 18, 2012 and July 3, 2013. Eventually, Dr. Kern performed a right shoulder manipulation under anesthesia and took Purcell completely off work on August 19, 2013. Purcell's pain continued to worsen and, eventually, a rotator cuff surgery was scheduled for August 6, 2014. In a July 30, 2014 letter, Dr. Kern expressed his opinion Purcell's injury is work-related, and she had not yet reached maximum medical improvement ("MMI"). He also confirmed she had never been released to return to full duty work.

Purcell was 65 years old on the date of her injury. She left her job at River's Bend on June 19, 2013 for reasons unrelated to her injury. From the date of injury through her last day, she worked her normal job under restrictions. She was paid TTD benefits from July 13, 2013 through February 14, 2014.

Applying KRS 342.730(4), the parties agreed Purcell is limited to two years of income benefits because she was 65 years old at the time of her injury. Citing KRS 342.0011(11)(a), Purcell argued she is entitled to TTD benefits for that two year period because she had not reached MMI and had not returned to her customary employment. She testified she missed no work following the injury, but never returned to her full duties. According to Purcell, she prepared and cooked food, washed dishes, put away stock, mopped floors, and lifted large boxes of food and cookware before her injury. Following her injury, she was restricted from lifting with her right arm. She testified her new duties included taking inventory, filling drinks, preparing trays of desserts, drinks or other lightweight items, bagging silverware, and placing tray cards on tables.

In the November 21, 2014 Opinion, Order and Award, the CALJ determined Purcell is entitled to TTD

benefits from August 19, 2013, the date Dr. Kern took her completely off work, through January 24, 2014, the two year anniversary of her work injury. However, he rejected the assertion Purcell is entitled to TTD benefits during her period of light duty work. He explained TTD benefits are intended to protect injured workers from wage loss. Because Purcell earned her regular salary from January 24, 2012 through June 19, 2013, the date she quit work for reasons unrelated to her injury, she suffered no income loss. He further provided public policy reasons an employee should not be entitled to TTD benefits during periods of light duty work at full wages. The CALJ concluded Purcell is likewise not entitled to TTD benefits from June 20, 2013 through August 19, 2013, when she was taken completely off work, because she voluntarily quit her position. Because River's Bend had voluntarily paid TTD benefits from January 24, 2014 through February 14, 2014, the net effect was an overpayment of TTD benefits which was not recoverable by the employer.

Purcell filed a petition for reconsideration requesting the CALJ to make specific findings of fact as to whether she returned to her customary employment following the work injury. In the December 15, 2014 Order, the CALJ denied the petition but offered additional findings of

fact. He stated Purcell had not yet reached MMI. He further determined Purcell's job "did not change after her injury and that her reason for terminating her employment with Defendant Employer was in no way related to her injury." The CALJ also noted the only medical restriction placed on Purcell after the injury was "no lifting the right upper extremity." As such, the CALJ declined to award Purcell additional TTD benefits.

On appeal, Purcell advances the same argument concerning her entitlement to TTD benefits. She argues her job duties changed completely after her injury and, therefore, she never returned to her customary employment. She cites Dr. Kern's restrictions against lifting with her right arm as support for this argument.

TTD is "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). In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained: "It 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).

The parties agree Purcell has not reached MMI. Therefore, the analysis centers on whether her light duty work constituted a "return to work" within the meaning of KRS 342.0011(11)(a). Recently, in Trane Commercial Systems v. Tipton, the Kentucky Supreme Court further explained the required analysis concerning entitlement to TTD benefits during a period of light duty work:

> 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.
> --- S.W.3d --- (Ky. 2016).

The evidence in this case established Purcell returned to her position as a cook following her injury. She testified she was no longer able to lift heavy food boxes or cookware, and was unable to mop floors and perform other cleaning tasks. Purcell testified, after her injury, her position and job duties did not change. Once she was placed on restrictions, she no longer lifted heavy items, but continued to perform inventory, plate food, fill drink trays and prepare meals.

As the claimant in a workers' compensation proceeding, Purcell had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful in that burden as it relates to the award of TTD benefits, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the

ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

Purcell's testimony regarding her light duty work supports the CALJ's conclusion that she "returned to work" within the meaning of KRS 342.0011(11)(a). The CALJ enjoys the discretion to draw reasonable inferences from the evidence. Though she was restricted from performing some of her particular job duties, Purcell's testimony supports the conclusion she returned to her position as a cook. She performed duties she had previously performed before her injury. As such, we find no error.

Accordingly, the November 21, 2014 Opinion, Award and Order and the December 15, 2014 Order on Petition for Reconsideration rendered by Hon. J. Landon Overfield, Chief Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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