

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 3, 2013

CLAIM NO. 201200214

MASCO

PETITIONER

VS. APPEAL FROM HON. M. CHRISTOPHER DAVIS,
ADMINISTRATIVE LAW JUDGE

ALFREDO DIAZ-NEVAREZ,
AND HON. M. CHRISTOPHER DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING IN PART,
VACATING IN PART,
AND REMANDING

* * * * *

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

RECHTER, Member. Masco appeals from the April 11, 2013 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"), awarding Alfredo Diaz-Nevarez ("Diaz") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits,

and medical benefits. Masco also appeals from the May 6, 2013 order denying its petition for reconsideration. On appeal, Masco argues the ALJ misconstrued or misunderstood the evidence, failed to make statutorily mandated findings of fact regarding eligibility for TTD benefits, and erred as a matter of law in awarding any TTD benefits after June 21, 2011. We reverse in part, vacate in part and remand.

Diaz began working for Masco's predecessor, Sexton Insulation, in 1993. His work consisted of installing gutters. On August 13, 2010, Diaz sustained a right shoulder injury while removing a gutter from a three-story home. Dr. Navin Kilambi performed a right shoulder arthroscopy with rotator cuff repair on October 29, 2010. Masco voluntarily paid TTD benefits until Diaz was released to light duty on November 24, 2010, and thereafter accommodated his restrictions. On February 28, 2011, he was released to regular duty work.

Over the next two months following his release to regular duty, Diaz' pain increased. Dr. Kilambi performed a revision to the rotator cuff repair on May 27, 2011. TTD benefits were reinstated. Diaz was released to light duty on June 21, 2011 and TTD benefits were terminated. However, prior to the release, Diaz's employment with Masco

was terminated for reasons unrelated to the shoulder injury.

Dr. Kilambi released Diaz to regular duty following this second surgery on October 5, 2011. Diaz testified he requested the release, and Dr. Kilambi's notes indicate the release was given on a trial basis. Indeed, Diaz returned a few weeks later with complaints of severe pain. On October 28, 2011, Dr. Kilambi restricted him to one-armed work duty. Following a December 5, 2011 evaluation, Dr. Kilambi modified that restriction to no lifting more than sixty pounds from floor to chest, no repetitive overhead use, and no overhead lifting of more than ten pounds. He lessened Diaz' restrictions, in part, because a functional capacity evaluation conducted on November 29, 2011 indicated he could perform medium to heavy work. On February 27, 2012, Dr. Kilambi administered a steroid injection and again released Diaz to regular work.

Dr. Kilambi placed Diaz at maximum medical improvement ("MMI") as of September 10, 2012. Based on the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, Dr. Kilambi assigned a 3% impairment rating due to weakness in the upper extremity

and a 2% impairment rating due to pain, for a combined 5% impairment rating.

Diaz also underwent two independent medical evaluations at Masco's request. Dr. Andrew DeGruccio believed Diaz had reached MMI as of June, 2012 and assigned a 0% impairment rating. Dr. Thomas Loeb also assigned a 0% impairment rating and theorized Diaz was at MMI as of the date of his examination, August 14, 2012.

At his deposition, Diaz testified regarding his work history. He confirmed that he was fired from Masco in April of 2011. He also testified he worked at a whiskey bottling company in Louisville for one month after Dr. Kilambi released him to regular duty on October 5, 2011, though he could not recall the name of the company or the exact dates he worked. He testified that he lifted and stacked cases of whiskey weighing up to fifty pounds each. For this one month period, he worked ten hours per day, six days a week and earned \$9.00 per hour. As to why he only worked at the whiskey bottling facility for one month, Diaz testified he wasn't making enough money and that he was physically unable to continue.

After leaving the whiskey bottling company, Diaz testified he began operating his own gutter and dry wall installation business. Although physically incapable of

performing several aspects of the work, his business employs eleven people who performed these tasks. Diaz estimated his earnings at \$700 to \$800 per week. Again, Diaz could not recall the exact date he began self-employment, and provided no earnings records.

Ultimately, the ALJ determined Diaz had suffered a work-related injury and awarded PPD benefits based on a 3% impairment rating. The ALJ also awarded medical benefits and TTD benefits. With respect to the award of TTD benefits, the ALJ stated:

As the Plaintiff notes and argues he did not return to work until February 27, 2012, as allowed by Dr. Kilambi. This was actually prior to his date of maximum medical improvement and came about as a result of his specific request to Dr. Kilambi. As such his final period of TTD shall be extended to February 27, 2012, the date he actually returned to work and prior to his date of MMI.

Masco filed a petition for reconsideration, arguing, in pertinent part, that Diaz was not entitled to TTD benefits for the periods he was working at the bottling facility and self-employed. Diaz filed a response, asserting he was entitled to TTD until February 27, 2012 because this was the date Dr. Kilambi released him to regular duty, which was prior to the date he reached MMI. Relying on his testimony, he was physically incapable of

performing all tasks associated with gutter installation, Diaz argued he had yet to return to his "customary work" prior to February 27, 2012. By order dated May 6, 2013, the ALJ overruled Masco's petition for reconsideration "for the reasons set out in the original Opinion, Award and Order as well as the Plaintiff's Response to Petition for Reconsideration which is specifically adopted..." Masco now appeals, challenging any award of TTD benefits after June 21, 2011.

TTD is the condition of an employee who has not reached MMI following a work-related injury *and* who has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). The Court of Appeals characterized the second requirement broadly, explaining TTD benefits must cease when "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." W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993). However, the Kentucky Supreme Court later provided a more narrow interpretation of KRS 342.0011(11)(a), requiring not just a return to any employment or "minimal work." Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000). In order to terminate TTD on this basis, the employee must be able to return to

work "that is customary or that he was performing at the time of his injury." Id. Considering both of these slightly different definitions, this Board has affirmed the denial of TTD benefits where the claimant has not returned to the exact same employment, but has returned to work "for which he had training or experience." Woodall Construction v. Gregory, WCB 201200929 (June 14, 2013).

In this case, the ALJ did not identify a specific date MMI was reached, but did state Diaz was not at MMI on February 27, 2012. Thus, the central inquiry is whether Diaz reached a level of improvement permitting a return to his customary employment at any time after June 21, 2011. For purposes of analysis, we consider three separate time periods.

The first is from June 21, 2011 until October 5, 2011. During this time, Diaz was released to light duty work but did not return to Masco because he had been terminated for reasons unrelated to his injury. The ALJ made no specific findings regarding whether Diaz had reached a sufficient level of improvement to permit a return his employment during this time. Where the evidence establishes the employer had a suitable position available to the claimant within his restrictions, but the claimant remained off work for reasons other than his work-related

disability, no award of TTD benefits will issue. See Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). See also Robinson v. Newberg, 849 S.W.2d 532, 534 (Ky. 1993) ("Of course, if the claimant's continued unemployment is the result, not of his employment-related impairment, but of personal ailments unrelated to his employment, there is no possible ground for continuing temporary benefits." (citing Larson, The Law of Workmen's Compensation, §57.12(e))). We vacate the ALJ's award of TTD benefits from June 21, 2011 through October 5, 2011. On remand, a determination must be made as to whether Diaz had reached a level of improvement that would permit a return to employment, whether light duty work was in fact available at Masco, and whether it was suitable employment.

The second period in question is from October 5, 2011 through October 28, 2011. On October 5, 2011, Dr. Kilambi provided an unrestricted release to work. Diaz then began working at the bottling facility. This return to work ended on October 28, 2011, when Dr. Kilambi reinstated restrictions.

Considering Diaz's uncontroverted testimony regarding the physical demands of this job and that he had been released to work without restrictions, it is readily apparent this work is not "minimal employment" and, as a

matter of law, Diaz would not be entitled to TTD benefits during the time he maintained that employment. We therefore reverse the award of TTD benefits during the period Diaz worked at the whiskey bottling facility.

The final period in question is from October 28, 2011 until February 27, 2012. During this time, Diaz owned and operated a business installing gutters and drywall, earning \$700.00 to \$800.00 per week. This is the same type of work he performed at Masco. The fact Diaz hired employees to perform certain physical aspects of the job is immaterial. He certainly used his training and experience installing gutters to operate his business. For this reason, Diaz's self-employment constitutes a return to his customary work, and TTD benefits should not have been awarded during any period Diaz was self-employed.

Accordingly, the April 11, 2013 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge and the May 6, 2013 order denying Masco's petition for reconsideration are **REVERSED IN PART, VACATED IN PART AND REMANDED** for further findings and entry of an award consistent with the views expressed herein.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE
OPINION.

ALVEY, CHAIRMAN. I respectfully dissent in part from the majority in this decision. I agree with the majority regarding the first period of TTD from June 21, 2011. That portion of the award should be remanded to the ALJ for further determination. Likewise, I believe the majority has engaged in unauthorized finding of fact regarding the second and third periods of TTD benefits in question. I would remand all three periods of TTD benefits for the ALJ's reconsideration.

COUNSEL FOR PETITIONER:

HON JUDSON F DEVLIN
1315 HERR LN STE 210
LOUISVILLE, KY 40222

COUNSEL FOR RESPONDENT:

HON WAYNE C DAUB
600 W MAIN ST STE 300
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON M CHRISTOPHER DAVIS
410 W. CHESTNUT ST 7TH FLOOR
LOUISVILLE, KY 40202