

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 13, 2016

CLAIM NO. 201271815

OLDHAM COUNTY BOARD OF EDUCATION

PETITIONER

VS.

APPEAL FROM HON. UDELL B. LEVY,
ADMINISTRATIVE LAW JUDGE

STEPHEN TYLER GARDNER and
HON. UDELL B. LEVY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING & REMANDING

* * * * *

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

ALVEY, Chairman. The Oldham County Board of Education ("Oldham County") appeals from the Opinion, Award and Order rendered April 8, 2015 by Hon. Udell B. Levy, Administrative Law Judge ("ALJ") awarding Stephen Tyler Gardner ("Gardner") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a work-related low back injury he

sustained on June 6, 2012 while attempting to move a pottery wheel in order to clean a floor in a classroom. Oldham County also appeals from the June 1, 2015 order denying its petition for reconsideration. Because the only issues on appeal concern TTD benefits, the ALJ's award of PPD and medical benefits are affirmed.

On appeal, Oldham County argues the award of TTD benefit for the period from June 6, 2012 through January 20, 2013 is not supported by substantial evidence. Oldham County also argues the award of TTD benefits for the period from June 6, 2012 through the last date Gardner worked for it is erroneous as a matter of law. Because we agree the ALJ did not perform a proper analysis regarding entitlement to TTD benefits during the periods in question in light of 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), we vacate in part and remand for additional findings and analysis regarding the periods to which Gardner may be entitled to TTD benefits.

Gardner filed a Form 101 on September 25, 2014 alleging he injured his low back and leg (he did not designate left or right) on June 5, 2012 while attempting to move a pottery wheel at work. The date of injury was later amended to June 6, 2012.

Gardner, a college student at Eastern Kentucky University, worked for Oldham County during the summers and after school from the time he was sixteen years old through the second week of August 2012. On June 6, 2012, he began working as a temporary custodian to assist in preparing classrooms for the upcoming school year. His previous employment with Oldham County included working as a day camp leader with children, some of whom had special needs. His employment history provided in the Form 104 reflects Gardner worked as a bartender in Richmond, Kentucky from December 2011 through May 2013, except for when he was home during the summer. He later worked selling timeshares and vacation packages. At the time of the hearing, Gardner was working as a shoe salesman at Dillard's in Louisville.

Gardner testified by deposition on November 17, 2014 and at the hearing held February 23, 2015. Gardner was born on August, 1990. At the time of the incident he was a full-time student at Eastern Kentucky University, and his home was in Crestwood, Kentucky.

As noted above, Gardner worked periodically for Oldham County from the age of sixteen through the summer of 2012. On June 6, 2012, he began summer employment with Oldham County which consisted of janitorial work preparing a school for the upcoming school year. At the time of the

accident, he and a co-worker were attempting to move a pottery wheel from a classroom. He estimated the object weighed approximately three hundred pounds. He bent down to move the pottery wheel onto a dolly, and when he stood up, his back popped. He developed pain and weakness down the right leg during the course of the day. He reported the incident to his supervisor. He was placed on light duty, which included mopping and sweeping but no heavy lifting. He worked on light duty for Oldham County until the second week of August 2012 when he left to return to college. After he returned to college, he resumed working as a bartender.

After the incident, Gardner went to Baptist Hospital Northeast and was referred to Baptistworx. He had several sessions of physical therapy, and an MRI was performed on July 9, 2012. He was eventually referred to Dr. Jonathan Hodes, a neurosurgeon, and later obtained a second opinion with Dr. Chris Shields, another neurosurgeon, who performed surgery in January 2013.

Gardner testified he continues to experience chronic pain and numbness in the right leg since the surgery. He also complained of chronic shooting pain down the right leg into three toes, and ongoing weakness in the right leg.

In support of the Form 101, Gardner filed records from the Baptist Hospital Northeast, Dr. Hodes, Dr. Shields, Dr. Mitchell Campbell, Baptistworx, and the operative report from Norton Healthcare. On June 6, 2012, Gardner presented at Baptist Hospital Northeast complaining of an onset of pain due to a work-related back injury. X-rays were negative, however he was prescribed Prednisone, Vicodin and Flexeril. He saw Dr. Hodes on August 21, 2012, who diagnosed a severe right lumbosacral disc herniation, cigarette abuse, and thoracic Schmorl's nodes. Dr. Hodes recommended surgery, and advised him to stop smoking.

Gardner treated at Baptistworx from June 14, 2012 through July 12, 2012 for continued complaints of low back pain and numbness into the right leg and foot. The June 9, 2012 MRI was interpreted as showing mild dessication at L4-L5, a broad based bulge at L4-L5, a right paracentral disk herniation, and a right L5-S1 mass effect on the right S1 nerve root.

Gardner was referred to the Leatherman Spine Center in Louisville on November 11, 2012. Dr. Campbell referred him to Dr. Shields who saw him on December 29, 2012, and also recommended surgery. Dr. Shields performed an L5-S1 discectomy on January 21, 2013. After the surgery, Dr. Shields stated Gardner did well, but continued

to experience tightness in the back and right foot numbness. Dr. Shields found Gardner reached maximum medical improvement ("MMI") on March 9, 2013, and assessed a 7% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (AMA Guides) due to the work-related injury and surgery. On May 5, 2014, Dr. Shields noted Gardner continued to complain of pain and weakness in the right leg which he stated was consistent with post-operative scarring. A follow-up MRI revealed no recurrent disk or nerve root compression.

Dr. Ellen Ballard evaluated Gardner at Oldham County's request on November 19, 2014. She noted the date of injury as June 6, 2012 when he attempted to move a pottery wheel. She noted the history of continued low back pain with numbness into the right leg and foot. She diagnosed Gardner with an L5-S1 disc herniation, post-surgery, with S1 or L5 radiculopathy. She agreed Gardner reached MMI on March 9, 2013. She assessed a 12% impairment rating pursuant to the AMA Guides. She also assessed restrictions of no repetitive bending or stooping, and no lifting greater than fifty pounds occasionally. Dr. Ballard opined Gardner does not retain the capacity to

work as a custodian, and ongoing treatment should consist of medication and activity restrictions.

A Benefit Review Conference was held on February 10, 2015. The parties noted TTD benefits were paid by Oldham County from January 21, 2013 through March 10, 2013 at the rate of \$174.01 per week for a total of \$1,218.06. The average weekly wage was stipulated as \$378.00 per week. The issues preserved for decision included whether Gardner retained the capacity to return the work performed on the date of injury, benefits per KRS 342.730, and TTD benefits (rate and duration).

In the opinion rendered April 8, 2015, the ALJ determined Gardner sustained work-related injuries, and awarded PPD benefits based upon a 12% impairment rating enhanced pursuant to KRS 342.730(1)(c)1. Regarding the award of TTD benefits, the ALJ stated as follows:

Entitlement to TTD Income Benefits

The evidence in this case shows that Plaintiff was restricted from performing any work "for two days until better" upon discharge from Baptist Hospital Northeast on June 6, 2012. This was immediately after sustaining his injury. He continued to have work restrictions which prevented him from performing his job as a high school custodian while he treated at Baptistworx and after he was seen by Dr. Hodes. Moreover, Dr. Hodes' restrictions were to apply "up until

surgery". On February 9, 2013, Dr. Shields documented that Plaintiff could "not return to any vigorous activity such as lifting or returning to work for one month" which, he noted, would be a total of six weeks after his surgery. He provided Plaintiff with a note on February 25, 2013 that would allow him to return to work on 3/11/13. On the questionnaire completed for KEMI the following day, Dr. Shields clarified that Plaintiff would have no restrictions (at least at that time) and that he would reach MMI on March 9, 2013.

The issue in this case is whether TTD benefits are available to an injured worker who, prior to reaching MMI, is not able to return to his pre-injury work duties, but does return to work for the same employer performing light duty work. KRS 342.0011(11)(a) defines "temporary total disability" 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." The Act does not define the "employment" in relation to TTD. In other words, the Act does not explicitly lay out whether the term means simply a return to any employment or a return to the type of employment the worker was performing at the time of injury. Likewise, the Act does not specify whether it matters for the purpose of awarding TTD whether the employee returns to work for the same employer he was working for at the time of injury.

Temporary total disability (TTD) benefits are 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, and which is available in the local labor market. *W.L. Harper Constr. Co. v. Baker*, 858 S.W.2d 202 (Ky. Ct. App. 1993) [sic] TTD benefits should not be terminated as soon as a worker is released to perform simply any type of work but only when they are released to perform the type of work that is customary for them or that he was performing at the time of his injury. *Central Ky. Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000)

To demonstrate that he is entitled to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury. In this case, Plaintiff is entitled to TTD benefits from the date of injury until he reached MMI on March 9, 2013, even though he had been released to and, at least for a portion of time, did return to work for the Oldham County Board of Education in a light duty capacity. Despite returning to light duty employment, Mr. Gardner was unable "to return to the type of work he performed when injured or to other customary work." See *Bowerman v. Black Equipment Company*, 297 SW3d 858 (Ky. App. 2009).

Oldham County filed a petition for reconsideration on April 27, 2015 requesting additional findings of fact regarding whether Gardner met the burden of proof to establish he was physically unable to perform other work which was customary for him during the period of

June 6, 2012 through the day before his January 21, 2013 surgery. Specifically, Oldham County requested a finding of whether, "he had not reached a level of improvement that would allow a return to employment as a day camp leader or as a bartender, which is other work that was customary for him."

In the order denying the petition for reconsideration issued June 1, 2015, the ALJ found as follows:

Based on the foregoing, Plaintiff's inability to either return to the type of work that was customary for him or perform substantially all of his job duties as a custodian that he was performing for the Oldham County Board of Education at the time of his injury entitled him to TTD benefits from the date of his injury on June 6, 2012 until Dr. Shields allowed him to return to work on March 11, 2013. The evidence in this case certainly shows that the Board of Education made a good faith effort to accommodate Plaintiff's restrictions after he was injured and paid Mr. Gardner bona fide wages equal to what he was making at the time of his injury. However, that does not defeat a claim for temporary total disability income benefits under the provisions of Kentucky's Workers Compensation Act. *W.L. Harper Constr. Co. v. Baker*, 858 S.W.2d 202 (Ky. Ct. App. 1993); *Central Kentucky Steel v. Wise, supra*; *Nesco Resource v. Arnold*, 2013-CA-001098-WC (Decided March 13, 2015) Therefore, after reconsideration, the award set out in the Opinion Award

and Order entered on April 8, 2015 will not be altered.

On appeal, Oldham County argues Gardner was not totally disabled at any point from June 6, 2012 to the January 21, 2013 surgery. He returned to work as a custodian after the accident, and continued to perform most of his customary duties for the remainder of the summer, earning the same wages he was expected to earn absent the injury. After Gardner returned to college, he resumed his work as a bartender. Oldham County argues, "[D]uring the entire period from June 6, 2012 through January 21, 2013, Gardner was released to return to work that was customary for him; i.e. work within his physical restrictions and for which he has the experience, training and education." Based upon this, Oldham County argues Gardner was not entitled to an award of TTD benefits until he underwent surgery on January 21, 2013. Gardner counters he is entitled to TTD benefits as awarded by the ALJ, his job with Oldham County after the date of injury consisted of only light work including some sweeping and mopping, but no heavy lifting, and, "He never did his regular job again". (original emphasis). Gardner also argues the evidence is unclear as to his employment after he left Oldham County in

August 2012, therefore the ALJ's decision should be affirmed.

As the claimant in a workers' compensation proceeding, Gardner had the burden of proving each of the essential elements of his cause of action, including the appropriate period of TTD benefits, and the entitlement of 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 he was successful in that 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).

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, "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).

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.

. . .

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).

. . .

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." Id. at 253. 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.

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. While Gardner may have significant limitations on

his activities, the evidence establishes he returned to work for Oldham County and continued to work as a custodian, albeit without performing heavy lifting, until the second week of August when he returned to college and resumed employment as a bartender. On remand, the ALJ must determine, based upon the evidence, if Gardner is entitled to TTD benefits during the period he 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. Delena 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.

Accordingly, the award of TTD benefits in the April 8, 2015 Opinion, Award and Order and the June 1, 2015 Order denying Oldham County's petition for reconsideration rendered by Hon. Udell B. Levy, Administrative Law Judge is hereby **VACATED**. This claim is **REMANDED** to an Administrative Law Judge as designated by the Chief Administrative Law Judge for additional findings of fact

and an amended opinion in conformity with the views expressed herein.

ALL CONCUR.

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