OPINION ENTERED: December 7, 2011

CLAIM NO. 200996364

PURCHASE DISTRICT HOME HEALTH PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

DARLA SASSEEN,
NEUROSURGICAL ASSOCIATES,
WESTERN BAPTIST HOSPITAL,
BUTLER & ASSOCIATES,
RADIOLOGY GROUP OF PADUCAH,
LOURDES AMBULATORY SURGERY CENTER, LLC,
REHAB ASSOCIATES,
PADUCAH PHYSIATRIC PARTNERS, PSC,
ANESTHESIOLOGY OF PADUCAH,
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION REVERSING IN PART, VACATING IN PART AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman; COWDEN and STIVERS, Members.

ALVEY, Chairman. Purchase District Home Health ("Purchase"), seeks review of a decision rendered June 24, 2011, by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), granting Darla Sasseen ("Sasseen") an award of

temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits as a result of a work-related injury occurring on February 11, 2009. Purchase also appeals from the July 21, 2011 order on Sasseen's petition for reconsideration granting additional TTD benefits from June 15, 2009 through February 3, 2011.

On appeal, Purchase raises two issues. First, Purchase contends the ALJ impermissibly entered a finding of fact regarding the duration of TTD benefits in his order on reconsideration contrary to his decision on the merits. Second, Purchase asserts if the ALJ could reconsider the period of TTD benefits, the appropriate period should be from July 26, 2010, the date of surgery, until November 23, 2010 when Dr. Butler assessed she had reached MMI. We reverse in part, vacate in part, and remand.

Sasseen testified by deposition on February 1, 2011, and again at the hearing held on May 4, 2011. Sasseen is a resident of Graves County, Kentucky. She is a registered nurse ("R.N.") who began working for Purchase in March 1992, providing home health services for patients in multiple counties. Sasseen was required to spend 50-70% of her time in the field which included extensive driving, lifting, bending, stooping, and reaching. She also

assisted in transferring patients between bed and chair. On February 11, 2009, Sasseen was walking into a patient's residence when she slipped in mud, causing her body to jerk in an attempt to keep from falling. As a result, Sasseen experienced an onset of pain in her low back, right buttocks, and right leg. She completed her visit with the patient and then returned to the office where she reported the accident to her supervisor.

Sasseen initially sought treatment with Dr. Danny Butler, her family physician, on February 13, 2009, when he took her off work. She did not return to work for Purchase until April 20, 2009, and only returned then because Purchase was short-handed. When Sasseen returned to work, her work load increased. She was required to do more driving and work more hours than she was working at the time of the accident. Sasseen continued to treat for her low back and right leg complaints after her return to work. She did not undergo epidural injections recommended by Dr. Berkman because she could not take off from work. She continued to work for Purchase until June 19, 2009, when she stated the pain became so intense she had to leave. She has not worked since that date. After exhausting conservative treatment, Sasseen underwent low back surgery on July 26, 2010 performed by Dr. Sean McDonald, a

neurosurgeon. Sasseen testified she does not believe she can perform any of her previous jobs due to the effects of the February 11, 2009 work injury.

Sasseen filed the records of Dr. McDonald who first saw her on February 10, 2010, upon referral of Dr. Butler, for continued complaints of:

> "lower back, right buttock, hip, and groin pain with extension of the pain down the posterior aspect of the right lower extremity to the upper thigh region occasionally progressing down the lower extremity in its entirety."

At that time, Dr. McDonald diagnosed Sasseen with complaints of pain, right lumbar radiculitis, and questionable right hip pain. Dr. McDonald recommended diagnostic testing including a myelogram and MRI. On March 26, 2010, Dr. McDonald noted the studies demonstrated a right paracental disc bulge and narrowing at L4-5. Dr. McDonald then recommended a right L4-5 hemilaminotomy and microdiskectomy, and possible surgery at L5-S1. Dr. McDonald performed a right L5-S1 hemilaminectomy with microdiskectomy on July 26, 2010. Subsequent notes reveal Sasseen continued to complain of low back and right leg pain after the surgery.

Sasseen filed numerous medical records from Dr. Butler and deposed him on March 30, 2011. Dr. Butler has

been her primary care physician since 2002. Dr. Butler saw Sasseen for treatment on February 13, 2009, two days after the incident at work, and has continued to care for her since then. His records reflect Sasseen was taken off work on February 13, 2009. Dr. Butler saw her on June 17, 2009 for low back and leg pain, and his records indicate a problem with straight leg raising on the right. Dr. Butler eventually referred Sasseen to Dr. McDonald for treatment culminating in surgery on July 26, 2010.

Dr. Butler ordered lumbar MRIs in November 2010 due to Sasseen's continued complaints of pain. He never released Sasseen to return to work and testified he is unsure if she has reached maximum medical improvement ("MMI"). However, he believed she would qualify for a 10 to 13% impairment rating based upon the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Butler further testified Sasseen's condition did not improve between February 13, 2009 and the Spring of 2010.

Dr. Robert Byrd evaluated Sasseen at her request on February 3, 2011. He completed a Form 107-I medical report filed in evidence. Dr. Byrd diagnosed Sasseen with chronic low back pain, status post right hemilaminectomy, and right lumbar radiculitis. Dr. Byrd indicated Sasseen

had reached MMI and assessed a 13% impairment rating based upon the AMA Guides.

Purchase introduced utilization review reports from Dr. Peter Kirsch and Dr. Thomas Loeb. Dr. Kirsch opined Sasseen's symptoms were unrelated to the slipping incident occurring in February 2009. Dr. Loeb opined the record did not support Dr. Rommelman's assessment of SI joint dysfunction, piriformis syndrome, or fibromyalgia. He likewise stated Sasseen's complaints relative to the February 2009 slip had resolved. He specifically saw no need for physical therapy, Zanaflex, or injections.

Purchase also filed the report of Dr. Elalayli who examined Sasseen on February 17, 2011. Dr. Elalayli recited the history of injury and subsequent treatment including surgery. He diagnosed Sasseen with status post lumbar diskectomy. Dr. Elalayli opined there is no reason Sasseen cannot return to work. He also opined the surgery performed was not warranted due to the February 11, 2009 work injury.

Dr. Elalayli testified by deposition on March 23, 2011. He is a surgeon in Hermitage, Tennessee who performs both cervical and lumbar surgeries. He agreed Sasseen warranted a functional impairment rating based upon the AMA Guides but did not provide a rating. Dr. Elalayli stated

Sasseen's follow-up treatment was reasonable and necessary. He stated it was unusual to find a free fragment as large as noted by Dr. McDonald in the operative report when it did not appear on imaging studies. He further opined Sasseen demonstrated no symptom exaggeration or positive Waddell's signs during the examination.

Purchase also filed records of Dr. Berkman from February 1, 2005; April 17, 2009; and July 7, 2009. When Dr. Berkman saw Sasseen at Dr. Butler's request in 2005, he noted she had experienced low back and right posterior thigh pain off and on for many years which worsened in November 2004. He further noted an MRI demonstrated a bulge at L4-5 to the right and stated "I don't think it is large enough to consider surgery." On April 17, 2009, Dr. Berkman stated Sasseen's pain had worsened since slipping in February. At that time, he recommended epidural steroid injections at L4-5 on the right. In his note dated July 7, 2009, Dr. Berkman stated Sasseen's right leg pain continued but the epidural injections had not been performed because she could not get off work.

The ALJ's award of PPD benefits is not in dispute. At issue on appeal is the correct period of TTD benefits. In his opinion and order, the ALJ found as follows:

> The next issue for determination this[sic] entitlement to TTD benefits. The Plaintiff has argued that she is[sic] not achieved maximum medical improvement, pursuant to the testimony of Dr. Butler, who has referred her for orthopedic evaluation. The Plaintiff therefore argues that she should be given an open-ended award of TTD benefits until she achieves maximum medical improvement.
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> However, the functional impairment rating has[sic] been[sic] assessed the Plaintiff by Dr. Byrd and Dr. Butler which[sic] can only be determined once the level of maximum medical improvement has been achieved.
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> Therefore, the Administrative Law Judge finds the Plaintiff is at maximum medical improvement and is not entitled to any additional periods of TTD benefits. In fact, the parties stipulated Plaintiff was temporarily and totally disabled from February 12, 2009, to April 19, 2009 and the Administrative Law Judge so finds. Thereafter the Plaintiff shall receive her permanent partial disability benefits to be awarded herein.
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> The Plaintiff, Darla Sasseen, shall recover from a Defendant Employer, Purchase District Home Health, and/or their insurance carrier, TTD benefits payable at a rate of $694.30 per week commencing February 12, 2009, and continuing through April 19, 2009, together with interest at the rate of 12% per annum on all due and unpaid installments of said compensation, with the Defendant Employer taking credit for benefits previously paid by them.

Sasseen filed a petition for reconsideration asserting the ALJ erred in the opinion and order. Specifically, Sasseen pointed out the following:

> There are some internal inconsistencies within the Opinion & Order which make a Petition for Reconsideration an appropriate vehicle to correct it. For example, the Opinion & Order recites on page 5: "Ms. Sasseen resumed her regular job duties following her surgery in April of 2009." On page 10 of the Opinion & Order it is stated: "On July 26, 2010, Ms. Sasseen underwent a right L5-S1 hemilaminotomy with discectomy. The operative notes reflect they encountered a large component of subligamentous floating disk herniation and free fragment compressing the S1 nerve root. This was much bigger than indicated by the imaging studies." She only had one surgery. It was July 26, 2010 (Dr. Butler deposition pg. 12 and exhibit 4). Darla had been off work at her treating physicians' instruction from June 15, 2009 forward, beyond the time of the surgery. Copies of the sequential "off work slips" and "limited duty slips" were submitted as an exhibit after the hearing, but discussed and identified at the hearing (see transcript of hearing [hereinafter abbreviated TH], pp. 13, 14). The employer would not accept limited duty return to work (TH p. 13).
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> As the Administrative Law Judge notes on page 18 of the Opinion & Order there is an inference that maximum medical improvement was reached at the time the permanent partial impairment ratings were assessed by Dr. Byrd or Dr. Butler. Dr. Byrd's PPD rating was assessed on February 3, 2011 (Opinion &

Order, page 11). Dr. Butler assigned an impairment rating on November 23, 2010. (Opinion & Order, p. 7) Ms. Sasseen specifically requested she be allowed to return to work part time or on light duty during the period from June 15, 2009 until her surgery on July 26, 2010. Her employer told her there was no part time or light duty work available (TH 13).

The law in Kentucky is plain that temporary total disability benefits are appropriate during the period before the injured worker reaches maximum medical improvement and so long as the worker is not capable of performing her regular job duties. See Central Kentucky Steel v. Wise, 19 SW3rd 657 (Ky. 2000) & KRS 342.0011(11)(a). In sum, the Opinion & Order is clearly mistaken when temporary total disability benefits ceased in April 2009. She underwent spine surgery on July 26, 2010. She had been off work at her doctor's recommendations continuously from June 15, 2009 through the present. The inference of maximum medical improvement being reached when a physician assesses an impairment rating might reasonably support the cessation of temporary total disability benefits either when Dr. Byrd assessed a 13% impairment on February 3, 2011 (Opinion & Order, p. 11) or when Dr. Butler initially did so on November 23, 2010 (Opinion & Order, p. 7). From and after June 15, 2009, Ms. Sasseen was off work at her doctor's recommendation with her employer telling her there was no light duty available. This continued through the date of her spine surgery. It is simply not reasonable to fail to award temporary total disability benefits at least through the recuperative period following her

surgery. The Plaintiff asks the Opinion & Order be amended to so find.

The employer's argument that Dr. Berkman's cryptic response to a questionnaire from the case management nurse in early September 2009 would reasonably justify cessation of temporary total disability benefits at that point overlooks some really important details. Dr. Berkman had not seen Darla Sasseen again after July 7, 2009. At that point he was recommending an epidural injection. If that did not work, he wanted a myelogram of her lumbar spine. (See Dr. Berkman's July 7, 2009 office notes). However, Drs. Kirsch and Loeb decided the work injury was "healed" and no more medical treatment was authorized by the comp carrier. The myelogram did not take place until Dr. McDonald ordered one in 2010. It was that myelogram on which Dr. McDonald first saw the abnormality at L5-S1 which was explained by the surgical finding of a large free fragment of a disc at L5-S1. As the Administrative Law Judge astutely observed (Opinion & Order, p. 16): "The fact that the disc was seen by the surgeon during the course of the surgery is difficult to explain away." There are some additional facts and statements within the Opinion & Order which should be corrected. On page 4 the Opinion & Order recites Ms. Sasseen continued working until her resignation effective June of 2009. On the same page it is observed that she resigned her position in November of 2010 not June of 2009. November of 2010 is correct (TH, p. 9). Additionally on page 5 it is stated: "Ms. Sasseen resumed her regular job duties following her surgery in April of 2009." There was no surgery in April 2009. The surgery occurred July 26,

> 2010 (Opinion & Order, page 10; records of Dr. McDonald filed with the Form 101).

In his order on reconsideration, the ALJ amended the opinion and order to reflect the following:

> The Plaintiff filed a Petition for Reconsideration pointing out to the Administrative Law Judge that while the parties did stipulate to a period of temporary disability benefits which ended April 19, 2009, temporary total disability benefits were still listed as an issue to be decided. Temporary total disability benefits are due during the period of time when the Plaintiff has not reached maximum medical improvement and remains incapable of performing her regular work. It is apparent that the Plaintiff was off work at her treating physicians' recommendations from June 14, 2009 until after her lumbar laminectomy/discectomy in July 2010. Thereafter, she was first assessed a permanent partial impairment rating by Dr. Danny Butler on November 23, 2010, but Dr. Butler's subsequent deposition testimony indicates he really does not think she is yet at maximum medical improvement. Under these circumstances the Administrative Law Judge believe[sic] the date of permanent partial impairment assessed by Dr. Robert Byrd, February 11, 2011 is the most appropriate date to find that Plaintiff reached maximum medical improvement. It is so found. Wherefore, the Plaintiff shall recover of the Defendant temporary total disability benefits in the amount of $694.30 a week from February 12, 2009 through April 19, 2009, and from June 15, 2009 through February 3, 2011. The

> Defendant shall take credit for the payments of temporary total disability benefits stipulated to have been made already for the period February 12, 2009 to April 19, 2009.
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> Also pursuant to Plaintiff's Petition for reconsideration the Administrative Law Judge amends page 4 of the Opinion & Order by substituting the sentence: "She continued working through June 14, 2009: in place of "She continued working until her resignation effective June 2009." The latter sentence is deleted. The sentence on page 5 stating "Ms. Sasseen resumed her regular job duties following her surgery in April 2009" is amended to reflect "Ms. Sasseen resumed her regular job duties effective April 19, 2009."
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> The Opinion & Order is further amended to reflect that Plaintiff's recovery of permanent partial disability benefits of $203.07 a week for a period of 425 weeks shall begin on February 4, 2011. It is so ordered.

It is well established a claimant in a workers' compensation claim bears the burden of proof and risk of non-persuasion before the ALJ with regard to each of the essential elements of his cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 928 (Ky. 2002). A finding favoring the party with the burden of proof in a workers' compensation proceeding must be based upon substantial evidence and, therefore, be reasonable to

survive on appeal. Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615 (Ky. 2004).

Sasseen was successful before the fact-finder in regard to her award of PPD benefits. The question on appeal is whether there was substantial evidence of record to support the ALJ's decision on reconsideration pertaining to the award of TTD benefits. 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

In rendering a decision, KRS 342.275 and KRS 342.285 grant the ALJ, as fact-finder, the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. 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).

That said, the ALJ may not reverse himself on findings of fact. The award of PPD benefits is not at issue. Purchase appeals only the issue of duration of TTD benefits, arguing the ALJ impermissibly reversed himself on appeal. In Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104 (Ky. App. 1985), the Court of Appeals stated:

> The Board is limited in its granting of the petition in one respect, however. The petition may not be granted if it appears that the Board has reconsidered the case on its merits and/or changed its factual findings. [Citation omitted]

In the case *sub judice*, we believe the ALJ did precisely that. It is without dispute Sasseen missed work from February 11, 2009, the date of her work accident, through her return in April 2009. She then worked until June 14, 2009 when she testified she could no longer do so. A review of Dr. Butler's records dated June 17, 2009 reflect he only recommended she avoid "heavy lifting", but do not reflect she was prohibited from working or that she was temporarily totally disabled. This information was available to the ALJ when he originally decided the claim, and determined Sasseen was entitled to no additional TTD benefits after her return to work in April 2009.

In her petition for reconsideration, Sasseen reargued the merits of her case by stating the ALJ had mistakenly found she had undergone surgery in 2009 prior to her return to work in April. In his order on reconsideration, the ALJ did not admit to making an error or mistake. The order merely reflects a different conclusion. In ruling on a petition for reconsideration,

the ALJ is not permitted to reconsider the record and set aside his decision based upon evidence he has already considered. Accordingly, that portion of the July 21, 2011 order sustaining Sasseen's petition for reconsideration awarding TTD benefits commencing June 14, 2009, is reversed.

In the case *sub judice*, Sasseen was paid TTD benefits from February 13, 2009 until she returned to work on April 20, 2009. The ALJ initially awarded TTD benefits through that date, and as Sasseen pointed out, mistakenly stated she had already undergone surgery when she attempted her return to work. In fact, Sasseen did not have the surgery until nearly a year and a half after her accident. A finding of MMI would have been appropriate either in November 2010 or February 2011 based upon the evidence of record. In his order on reconsideration, the ALJ chose the latter date for assessing a termination date.

That said, we believe it is reasonable for the ALJ to determine whether Sasseen may be entitled to a period of TTD benefits subsequent to the surgery performed July 26, 2010. On remand, the ALJ shall review the evidence to determine whether Sasseen is entitled to a period of TTD benefits after her surgery and the period to which she was entitled to receive those benefits.

KRS 342.0011(11)(a) defines TTD as follows:

> ‘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.

The above definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

> 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.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court further explained:

> “[i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she was performing at the time of his injury.”

Id. at 659.

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 she was customarily performing at the time of the traumatic event.

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 she remains disabled from her customary work or the work she was performing at the time of the injury. The Court in 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), in regard to the standard for awarding TTD, the Supreme Court further elaborated stating:

> 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.

On remand, if the ALJ determines Sasseen is entitled to a period of TTD benefits subsequent to her

surgery, he is instructed to apply the above factors in determining the appropriate duration of TTD benefits.

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). That said, we note KRS 342.285(2)(c) provides the Board may determine on appeal whether an order, decision, or award is in conformity to the provisions of KRS Chapter 342, and KRS 342.285(3) provides, in relevant part, the Board may "in its discretion" remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." These provisions permit the Board to *sua sponte* reach issues even if unpreserved in order to properly apply the law. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

As we noted above, it is undisputed Sasseen is entitled to an award of PPD benefits. On remand, the ALJ is directed to determine the appropriate date for the award of PPD benefits in accordance with the instruction provided by the Kentucky Supreme Court in Sweasy v. Wal-Mart Stores, Inc. #1269, 295 S.W.3d 835 (Ky. 2009).

In Sweasy, the Kentucky Supreme Court held:

This appeal concerns KRS 342.730(1)(d), which provides compensable periods of 425 weeks for disability ratings of 50% or less and of 520 weeks for disability ratings that exceed 50%. KRS 342.730(1)(d)'s failure to specify when the period of a 425–week award begins may be read to imply legislative intent to permit such an award to begin on a date other than when the permanent impairment or disability of 50% or less arises. Yet, mindful of policy and purpose for which KRS 342.730(1)(b)-(e) were enacted, we conclude that the legislature intended no such absurdity. Neither the Court of Appeals nor the employer points to a reasonable basis for an ALJ to commence benefits on a date other than the date that the permanent impairment or disability arises. Perceiving there to be no reasonable basis, we turn to the question of when permanent impairment or disability arises for the purpose of commencing partial disability benefits.

A condition “arises” when it comes into being, begins, or originates. Thus, impairment arises for the purposes of Chapter 342 when work-related trauma produces a harmful change in the human organism. That usually occurs with the trauma but sometimes occurs after a latency period. In either circumstance the authors of the American Medical Association's Guides to the Evaluation of Permanent Impairment consider the amount of impairment that remains at MMI to be “permanent.” The fact that they direct physicians to wait until MMI to assign a permanent impairment rating does not alter the fact that the permanent impairment being measured actually originated with the harmful change. We conclude, therefore, that the compensable period for partial disability begins on the date that

> impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration.
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> The evidence compelled a finding that the claimant's injury produced permanent impairment and disability from the outset. Thus, it also compelled a partial disability award in which the compensable period began on the date of injury. The claim must be remanded for that purpose.
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> Sweasy, 840, 841 (footnotes omitted).

On remand, the ALJ shall determine whether Sasseen is entitled to an additional period of TTD benefits subsequent to her surgery performed July 26, 2010. If he determines she is entitled to an additional period of TTD benefits, he shall make a determination as to the appropriate period of such benefits. Finally, the ALJ shall determine the appropriate date the payment of PPD benefits are to commence in conformity with the Court's holding in Sweasy, *supra*.

Accordingly, the decision rendered June 24, 2011 by Hon. R. Scott Borders, Administrative Law Judge, as amended by the order on reconsideration rendered July 21, 2011, is hereby **REVERSED IN PART, VACATED IN PART, AND REMANDED** for further findings and entry of an amended

opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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