Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 23, 2015

CLAIM NO. 201297445

RAY HAASE HEATING & AIR CONDITIONING PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF**
ADMINISTRATIVE LAW JUDGE

STEVEN SMITH
HON. WILLIAM J. RUDLOFF
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING & REMANDING
* * * * * *

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

RECHTER, Member. Ray Haase Heating & Air Conditioning ("Ray Haase") appeals from the May 27, 2015 Amended Opinion and Order on Remand, and the June 22, 2015 Opinion and Order on Reconsideration, rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). Ray Haase challenges the period of temporary total disability benefits awarded to

Steven Smith ("Smith"). For the reasons set forth herein, we vacate and remand.

Smith was employed by Ray Haase as a sheet metal worker, earning an average weekly wage of $534.65. He sustained a work-related injury to his neck and right upper extremity on December 16, 2011 while lifting a heating unit over his head. He sought medical treatment and eventually underwent cervical fusion surgery on July 10, 2012. His surgeon, Dr. Harold Cannon, released Smith to return to work without restrictions on August 23, 2012. Dr. Jules Barefoot conducted an independent medical examination, and placed Smith at maximum medical improvement ("MMI") as of July 10, 2013. He further opined Smith does not retain the physical capacity to return to his position at Ray Haase.

Smith did not return to work for Ray Haase after Dr. Cannon released him. He testified he was afraid he would be reinjured if he returned to sheet metal work, due to the overhead work involved. Instead, he took a less strenuous position as a heat treatment technician on September 16, 2012. He was qualified to perform this job because he had previously worked as a heat treatment technician from 2004 to 2010. He earns approximately $2350 per week in this position.

In an opinion dated September 19, 2014, the ALJ awarded temporary total disability ("TTD"), permanent partial disability ("PPD") and medical benefits based on a 28% impairment rating. The ALJ considered the issue of multipliers pursuant to KRS 342.730(1)(c)(1), and determined Smith could not return to the type of work which he performed at the time of the injury. He relied upon Smith's testimony and Dr. Barefoot's opinion to reach this conclusion. He also awarded TTD benefits from the date of Smith's injury through the date Dr. Barefoot placed him at MMI (July 10, 2013).

Ray Haase appealed to this Board, arguing Smith's award of TTD benefits could not extend beyond the date he returned to work as a heat treatment technician (September 16, 2012). Smith responded he is unable to return to sheet metal work, and therefore is entitled to TTD benefits until he reaches MMI. In an opinion dated April 3, 2015, this Board vacated only the award of TTD benefits. We determined the ALJ had failed to consider whether Smith had "returned to work" within the meaning of KRS 342.0011(a) when he began working as a heat treatment technician.

In an opinion on remand dated May 27, 2015, the ALJ again awarded TTD and PPD benefits. Though the award of PPD benefits contained in the Board's September 19, 2014

opinion had not been vacated on appeal, the ALJ revisited this issue. This time, the ALJ stated:

> Based upon the plaintiff's sworn testimony, which I found to be very credible and convincing, and the persuasive and compelling medical evidence from Dr. Cannon, as summarized above, I make the factual determination that Mr. Smith can return to the type of work which he performed at the time of his work injuries in accordance with KRS 342.730(1)(c)(1).

In addressing the issue of entitlement to TTD benefits, the ALJ acknowledged Dr. Cannon released Smith to work without restrictions on August 22, 2012. Nonetheless, he again awarded TTD benefits from the date of injury to the date Dr. Barefoot placed Smith at MMI (July 10, 2013). The ALJ provided no analysis as to whether Smith's position as a heat treatment technician, commencing September 16, 2012, constituted a return to work for purposes of an award of TTD benefits.

Ray Haase has appealed, again arguing the ALJ has failed to fully articulate his reasoning for awarding TTD benefits through July 10, 2013. We agree the ALJ has not sufficiently analyzed the issue. In fact, the ALJ's May 27, 2015, opinion has created more confusion due to inconsistent findings. On page nine of the opinion, the ALJ relies upon Dr. Cannon's opinion and Smith's testimony to conclude Smith

can return to the type of work which he performed at the time of his injury. Smith did not challenge that finding via a petition for reconsideration, or by appeal. Nonetheless, the ALJ awarded TTD benefits through July 10, 2013, well past the date Dr. Cannon released Smith to return to his position at the time of injury.

The first problem is that the ALJ revisited his findings with respect to the award of PPD benefits in the May 27, 2015 opinion. As stated above, in the September 19, 2014 opinion, the ALJ addressed the issue of multipliers pursuant to KRS 342.730(1)(c), and concluded Smith *does not* retain the physical capacity to return to his position as a sheet metal worker. In reaching this conclusion, he stated his reliance on Dr. Barefoot's opinion and Smith's testimony. In the May 27, 2015 Opinion, the ALJ altered this portion of his PPD analysis. He now stated his reliance on Dr. Cannon to conclude Smith *is* able to return to the work performed at the time of the injury. However, the actual award of PPD benefits, providing a contingent application of 342.730(1)(c)2, remained unchanged.

This revision causes concern because neither the award of PPD, nor the application of KRS 342.730(1)(c)2, was raised as an issue before this Board in the first appeal. Neither party has raised the issue in the present appeal,

either. Certainly, Smith and Ray Haase would be prevented from challenging the award of PPD benefits in the current appeal. A party essentially waives review of an issue that could have been raised in a prior appeal, and was not. Brown v. Commonwealth, 313 S.W.3d 577 (Ky. 2010). More importantly, we conclude the ALJ has not complied with the mandate contained in our prior opinion. We vacated only the award of TTD benefits. Thus, the ALJ was without authority to revise the award of PPD benefits and any revision constitutes an abuse of discretion. Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009)(concluding an ALJ is without authority to reverse, in a final order, a dispositive factual finding previously made in a prior interlocutory order).

Thus, we must remand this matter for the ALJ to first reinstate his original analysis regarding the award of PPD benefits. Given the most recent findings of the ALJ contained in the May 27, 2015 opinion, this Board is compelled to again vacate the award of TTD benefits. Concerning the award of TTD benefits, the ALJ explained:

> Based upon the plaintiff's lay testimony and the persuasive, compelling and reliable medical evidence from Dr. Cannon, the treating physician, and also the persuasive, compelling and reliable medical evidence from Dr. Barefoot, the examining physician, I again make the

> determination that the plaintiff is entitled to recover temporary total disability benefits from the defendant and its workers' compensation insurer beginning on January 7, 2012 and extending to July 10, 2013.

This analysis fails to fully articulate the ALJ's application of the law to the facts of this case. Dr. Cannon released Smith to work without restrictions on August 23, 2012. Dr. Barefoot opined Smith is unable to return to his prior position at Ray Haase. As it relates to the proper date of termination of TTD benefits, these two medical opinions are at odds. On remand, the ALJ must clearly indicate which physician he relies upon, and identify the relevant portion of the physician's opinion.

Furthermore, under the circumstances of this case, the ALJ must provide a more comprehensive analysis of Smith's entitlement to TTD benefits after his return to work as a heat treatment specialist. As explained above, we have reinstated the ALJ's prior finding that Smith is physically incapable of returning to sheet metal work. However, a worker is only entitled to TTD benefits until he reaches "a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). This provision has been interpreted as permitting TTD benefits so long as the injured employee is unable to perform work which is

"customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000).

Despite the inconsistent factual findings contained in the ALJ's most recent opinion, it appears he accepts that Smith is unable to return to his position at Ray Haase. Even if we are correct in this assumption, the finding does not address whether Smith's current employment as a heat treatment specialist constitutes a return to "employment" within the meaning of KRS 342.0011(11)(a). The ALJ must provide this analysis. In doing so, he must determine whether heat treatment, a position Smith previously performed for six years, constitutes a "return to employment" or "customary work" for Smith.

For the foregoing reasons, this matter is **REMANDED** to the Administrative Law Judge for a decision consistent with this opinion. The award of temporary total benefits contained in the May 27, 2015 Amended Opinion and Order on Remand, and reaffirmed in the June 22, 2015 Opinion and Order on Reconsideration, is hereby **VACATED** with directions to provide a more comprehensive analysis of Smith's entitlement to temporary total disability benefits. Furthermore, the analysis concerning Smith's entitlement to permanent partial disability benefits, contained at pages 6-

10 of the May 27, 2015 Amended Opinion and Order on Remand and titled “Benefits per KRS 342.730”, is hereby **VACATED**. The Administrative Law Judge is directed to reinstate the analysis entitled “Benefits per KRS 342.730” contained in the September 19, 2014 Opinion Order and Award at pages 6-10.

ALL CONCUR.

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