Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 3, 2015

CLAIM NO. 201297445

RAY HAASE HEATING & AIR CONDITIONING PETITIONER

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

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

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Ray Haase Heating & Air Conditioning ("Ray Haase") appeals from the September 19, 2014, Opinion and Order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") determining Steven Smith ("Smith") sustained a work-related injury to his neck and right upper extremity and awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical

benefits. Ray Haase also appeals from the November 5, 2014, Opinion and Order on Reconsideration ruling on the petitions for reconsideration.

In the Form 101, Smith alleged an injury occurring on December 16, 2011, as follows:

> I was lifting a heating and air unit overhead with a co-worker, weighing approximately 120 pounds, when I felt a pop in my neck. The next day I developed pain in my neck and right shoulder, radiating into my arm, compelling me to seek medical treatment.

Smith asserted his injury resulted in a cervical disc extrusion at C5/6 with pronounced right hand weakness and numbness. He underwent surgery performed by Dr. Harold Cannon.

On appeal, Ray Haase does not dispute the ALJ's determination of a cervical and upper extremity injury, which resulted in a 28% impairment rating.[1] Similarly, Ray Haase does not take issue with the ALJ's determination regarding his entitlement to enhanced benefits after performing an analysis pursuant to Fawbush v. Gwinn, 103

[1] The ALJ relied upon the impairment rating of Dr. Harold Cannon assessed pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides).

S.W.3d 5 (Ky. 2003).[2] Rather, Ray Haase argues the ALJ erroneously awarded TTD benefits during the period Smith returned to work.

In awarding TTD benefits, the ALJ provided the following analysis:

> KRS 342.0011(11)(a) defines "temporary total disability" to mean 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 *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App.2004), the Court of Appeals instructed 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 *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.
>>
>> Id. at 580-581.
>
> Based upon the plaintiffs [sic] credible and convincing testimony and the persuasive and compelling medical

[2] After performing the Fawbush analysis, the ALJ concluded Smith was not entitled to enhancement by the three multiplier. However, Smith's PPD benefits would double upon cessation of his employment upon satisfaction of the condition set forth in Chrysalis House v. Tackett, 283 S.W. 3d 671 (Ky. 2009).

> evidence from Dr. Barefoot, I make the factual determination that the plaintiff reached maximum medical improvement on July 10, 2013, which was one year following his cervical fusion surgery.

Both parties filed petitions for reconsideration. As Smith's petition for reconsideration and the ALJ's ruling regarding his petition for reconsideration have no relevance to the issue on appeal, we will not address either.

In its petition for reconsideration, Ray Haase argued the award of TTD benefits cannot extend beyond September 16, 2012, which it characterized as the undisputed and stipulated date Smith returned to unrestricted employment as a heat treatment technician. Ray Haase noted this was a job Smith previously performed between 2004 and 2010. As a heat treatment technician, Smith is earning $23.50 per hour which is $9.08 per hour more than he was earning on the date of the injury. It also noted Smith typically works in excess of eighty hours per week. Since the parties stipulated Smith was paid TTD benefits from January 7, 2012, through September 16, 2012, it maintained no additional TTD benefits should be awarded, as the award of TTD benefits after September 16, 2012, is contrary to KRS 342.0011(11)(a).

Ray Haase also maintained the heat treatment technician job to which Smith returned on September 17, 2012, is not minimal work as referenced in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. App. 2000). Ray Haase asserted the parties are entitled to findings clearly informing them of the basis for the award of TTD benefits. Further, the ALJ must utilize the criteria set forth in the statute and applicable case law. Therefore, the ALJ was requested to address whether Smith returned to employment on September 17, 2012, that was customary as opposed to minimal. Ray Haase also asserted the award should be amended to suspend the payment of PPD benefits during the period Smith was awarded TTD benefits.

In the November 5, 2014, Opinion and Order on Reconsideration, with respect to Smith's entitlement to TTD benefits, the ALJ provided the following:

> KRS 342.0011(11)(a) defines "temporary total disability" to mean 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 *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App.2004), the Court of Appeals instructed 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 *Helms*, *supra*, stated:
>
> > In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement <u>and</u> not have improved enough to return to work.
> >
> > Id. at 580-581.
>
> Based upon the plaintiffs [sic] credible and convincing testimony and the persuasive and compelling medical evidence from Dr. Barefoot, all of which is summarized above, I made and again make the determination that the plaintiff reached maximum medical improvement on July 10, 2013, which was one year following his cervical fusion surgery.

The ALJ amended the Opinion and Order suspending the payment of Smith's PPD benefits during any period TTD benefits were paid. Except for amending of the award, the ALJ overruled the petitions for reconsideration.

On appeal, Ray Haase contends, as a matter of law, Smith's TTD benefits cannot extend beyond September 17, 2012, the stipulated date he returned to unrestricted employment as a heat treatment technician earning a much greater wage than he was earning at the time of the injury. Ray Haase does not dispute Smith's entitlement to TTD benefits until he returned to unrestricted full-duty

employment as a heat treatment technician nor the ALJ's finding, based on Dr. Jules Barefoot's opinion, Smith attained maximum medical improvement ("MMI") on July 10, 2013. However, Ray Haase observes Smith was awarded TTD benefits during a ten month period he was working in excess of eighty hours per week and earning $23.50 per hour plus overtime premium pay. It notes the parties stipulated Smith's average weekly wage was $534.65. Ray Haase contends Smith cannot be temporarily totally disabled when he worked regularly and unrestricted more than eighty hours per week earning in excess of $2,350.00 per week.

Ray Haase argues the heat treatment technician job Smith has performed since September 17, 2012, is not minimal work as discussed in Central Kentucky Steel v. Wise, supra. It asserts the statute only requires Smith reach a level of improvement that would permit a return to employment. Ray Haase notes the appellate courts in defining the type of work warranting termination of TTD benefits, have used the phrase "customary or that he was performing at the time of his injury." Therefore, the job Smith was performing from and after September 17, 2012, must be considered a customary job. It contends:

> In both the Opinion and Order and Order on Reconsideration, the ALJ's findings suggest that since he accepted Dr.

> Barefoot's opinion that respondent reached maximum medical improvement (MMI) on July 10, 2013, it was settled that TTD benefits were owed until that date. However, the ALJ failed to enter into any discussion or analysis regarding the fact that respondent had returned to his previous job as a heat treatment technician on a full-time and unrestricted basis on September 17, 2012, prior to the date the ALJ found him to be at maximum medical improvement.

Ray Haase argues that since the ALJ must provide the basis for the award of TTD benefits utilizing the criteria set forth in the statute and applicable case law, he should have addressed whether Smith returned to employment that was customary.

In response, Smith relies upon the ruling of the Court of Appeals in Mull v. Zappos.com, Inc., 2013-CA-001320-WC, rendered July 11, 2014, Designated Not To Be Published, asserting the standard for determining Smith's entitlement to TTD benefits is whether he can perform all of his pre-injury employment duties. Therefore, the ALJ did not err in awarding TTD benefits. We vacate the ALJ's award of TTD benefits and remand.

Smith's testimony at his June 11, 2014, deposition and the August 26, 2014, hearing, reveal he

worked as a heat treatment technician from 2004 to 2010.[3] Smith estimated he earned approximately $18.00 an hour working twelve hours a day, seven days a week, which resulted in earnings of approximately $2,300.00 per week. Because he desired local employment so he could be with his family, Smith began working as a sheet metal worker at Advanced Technologies for approximately a month and a half. He then moved to Ray Haase working as a pre-apprentice. He regularly worked forty hours per week until he was injured.

After his work injury, Smith was initially treated at Convenient Care and referred to Dr. Cannon who performed surgery in July 2012. Dr. Cannon released him to return to work on August 23, 2012. He acknowledged his current job as a heat treatment technician is similar to the work he previously performed between 2004 and 2010. His work as a heat treatment technician requires he work away from home. He currently works for Super Heat in Illinois.

Smith testified the sheet metal work is more difficult than the work he performed as a heat treatment technician. He believes he cannot return to the work he was performing when injured because he is required to

[3] The Form 104 Plaintiff's Work History corroborates Smith's testimony regarding the period he worked as a heat treatment technician.

regularly work and lift above his head. His plan is to work as a heat treatment technician for a year, and then obtain employment near his home either at the Toyota plant or Titan Fabrication.

Smith testified when Dr. Cannon released him, the job at which he was working when injured at the local hospital had been completed and he was no longer a member of the union. Smith returned to his old job as a heat technician earning $23.00 per hour averaging approximately eighty-two hours a week.[4] Without utilizing the overtime premium in the calculation of his post-injury wages, Smith acknowledged his current wages were approximately sixty percent more than he earned at the time of the injury. Even though Dr. Cannon released him to return to work without restrictions on August 23, 2012, he did not return to work until September 17, 2012. Smith described the difference in his pre-injury and post-injury jobs as follows:

> Q: All right, if you take the sheet metal job that you had at the time of the neck injury and you compare it to the heat treatment job that you have got now, which is the heavier job and which is the lighter job?

[4] Smith's testimony was equivocal as to the number of hours worked each week but when pressed by his counsel he testified he was working eighty-two hours a week.

> A: The heavier job would be the sheet metal.
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> Q: Why is it heavier than heat treatment?
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> A: Because the – the sheet metal job was constant climbing up and down. Climbing up and down, lifting up. My heat treating job that I have now is three or four hours of work and then I'm watching a computer screen.

In determining the period during which Smith was entitled to TTD benefits, after determining the date of MMI, the ALJ should have also engaged in an analysis as to whether Smith had returned to employment as defined in Central Kentucky Steel v. Wise, supra, at any point between September 17, 2012, and July 10, 2013. In the September 19, 2014, Opinion and Order, the ALJ provided the definition of temporary total disability contained in KRS 342.0011(11)(a) and cited to the holding by the Court of Appeals in Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004). The ALJ determined the period during which Smith was entitled to TTD benefits based solely on the date Smith attained MMI. In response to the petition for reconsideration, the ALJ again cited to KRS 342.0011(11)(a) and Magellan Behavioral Health v. Helms, supra, and referenced the date Dr. Barefoot determined Smith attained MMI. The ALJ failed to determine the point

at which Smith had reached a level of improvement that would permit a return to employment as defined by the applicable case law. In order to award TTD benefits beginning on January 7, 2012, and extending through July 10, 2013, the ALJ must determine Smith had not reached MMI and had not reached a level that would permit a return to employment as defined herein during this period. The ALJ did not make such a determination in the September 19, 2014, Opinion and Order and the Order ruling on the petitions for reconsideration.

The ALJ's Opinion and Order and subsequent Opinion and Order on Reconsideration reveal he did not analyze Smith's entitlement to TTD benefits utilizing the correct standard. Although the ALJ cited to Magellan Behavioral Health v. Helms, supra, and Central Kentucky Steel v. Wise, supra, he never addressed the second prong of the analysis as required by the statute and case law.

In Central Kentucky Steel v. Wise, supra, the Kentucky Supreme Court explained that "[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 that is customary or that he was performing at the time of his injury." Id. at 659.

More recently, in Magellan Behavioral Health v. Helms, supra, 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), with regard to 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).
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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.

The mere finding that Smith had attained MMI on July 10, 2013, does not satisfy the criteria set forth above. We are cognizant of the recent ruling in Mull v. Zappos.com, Inc., 2013-CA-001320-WC, rendered July 11, 2014, Designated Not To Be Published, in which the Court of Appeals stated, in relevant part, as follows:

> The dispositive factor is always the worker's ability to perform the pre-

> injury job. Finally, *Williams* indicates that Kentucky precedent favors Mull's interpretation of the phrase 'return to employment': an employee has achieved this level of improvement if, and only if, the employee can perform the *entirety* of his or her pre-injury employment duties within the confines of their post-injury medical restrictions.
>
> We are cognizant that this interpretation flies in the face of the plain meaning of the words 'totally disabled'; it narrowly defines otherwise broad language such as 'return to employment'; and, when applied in the context of a worker who is capable of performing most pre-injury duties or pursuing some other employment for equal wages and for an equal amount of hours each week, it would seem to contradict the very purpose of awarding TTD, that is, 'to compensation workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents' *Mitchell*, 182 S.W.3d at 514. Be that as it may, this interpretation is consistent with binding precedent and, whether we agree with it or not, we are bound to follow it. It is the purview of the Kentucky Supreme Court or to the General Assembly to say otherwise.

Slip Op. at 21-22.

In addition to determining the date of MMI, the ALJ must also determine when Smith reached a level of improvement which permits a return to the type of work which is customary to the injured employee or that which he has been performing prior to being injured. Thus, we decline to

apply the standard for entitlement to TTD benefits the Court of Appeals imposed in Mull v. Zappos.com, Inc., supra, in an unpublished opinion which is currently pending before the Kentucky Supreme Court. Further, had the Supreme Court intended benefits be terminated only when the worker can perform all of his pre-injury employment duties we believe it would have so stated in Central Kentucky Steel v. Wise, supra, and Double L Const., Inc. v. Mitchell, supra.

In summary, in order for Smith to be entitled to TTD benefits during the period from September 17, 2012, through July 10, 2013, he must not have reached MMI and a level of improvement that would permit a return to employment as defined in Central Kentucky Steel v. Wise, supra, Magellan Behavioral Health v. Helms, supra, and Double L Const., Inc. v. Mitchell. Therefore, the award of TTD benefits is **VACATED**. The claim is **REMANDED** for a determination of whether Smith is entitled to TTD benefits during the period from September 17, 2012, through July 10, 2013, in conformity with the views expressed herein.

ALL CONCUR.

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