Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 8, 2016

CLAIM NO. 201458202

RUAN, INC. PETITIONER

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

RAYMOND THOMPSON and
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. Ruan, Inc. ("Ruan") appeals from the Opinion and Order rendered August 7, 2015 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Raymond Thompson ("Thompson") temporary total disability ("TTD") benefits from March 15, 2014 through May 13, 2015, permanent partial disability ("PPD") benefits, and medical benefits for neck and head injuries sustained on March 14,

2014, while working as a truck driver. Ruan also appeals from the September 2, 2015 Opinion and Order on Reconsideration reducing the period of the award of TTD benefits from March 15, 2014 through April 27, 2015.

On appeal, Ruan only challenges the ALJ's award of TTD benefits beyond October 20, 2014, the date Dr. Ellen Ballard agreed Thompson had reached maximum medical improvement ("MMI"). Thompson does not challenge the award of PPD benefits and that will not be addressed. Because the opinion of Dr. Jules Barefoot constitutes substantial evidence regarding the date Thompson reached MMI, and the parties do not appeal the ALJ's finding regarding his return to employment, the award of TTD benefits from March 15, 2014 through April 27, 2015 is affirmed.

Thompson filed a Form 101 alleging injuries to his low back, neck, right shoulder and head sustained as a result of a work-related motor vehicle accident ("MVA") on March 14, 2014. At the time of the accident, Thompson was working as a truck driver for Ruan.

Thompson testified by deposition on April 7, 2015 and at the final hearing held July 24, 2015. He began working for Ruan in June 2012 hauling milk tankers to locations in Tennessee, Kentucky or Indiana, depending upon where he was dispatched. Although he was not required to

load and unload the milk, Thompson testified he was required to connect and disconnect the trailer to the truck. Thompson used a hand crank on a dolly, and had to reach beneath the trailer to unhook and pull out a fifth wheel.

Thompson testified he had a previous work-related injury to his right shoulder in 2013, which was treated conservatively by Dr. Akbar Nawab. Following a period of light duty work, Dr. Nawab released him to full-duty work in January or February 2014. At that time, Thompson returned to his regular job as a truck driver without restrictions or limitations. He worked in this capacity without difficulty until the March 14, 2014 MVA.

On March 14, 2014, he was driving on an interstate in Kentucky, traveling at approximately fifty-five to sixty miles an hour, when a full size pick-up truck rear-ended the back of his empty trailer. He estimated the truck weighed approximately 27,000 to 28,000 pounds. Thompson does not recall striking his head. Although damaged, the truck was operable and Thompson completed his shift. When he awoke the following morning, he had a headache. Thompson went to the emergency room within two or three days of the MVA. He also began experiencing dizziness, and symptoms in his neck, shoulders and low

back. Thompson returned to Dr. Nawab, who was unable to treat his neck. Thompson stated he was sent to Dr. Rodney Chou. He has also treated with Dr. Michael Eldemire with Nair Internal Medicine and Dr. D. Bradley Burton at Southern Indiana Rehab Hospital. At the hearing, Thompson agreed there have been several treatment recommendations by Dr. Eldemire and Dr. Burton which have not been completed.

Thompson currently experiences symptoms in his mid-back, neck, arms, and shoulders. He continues to have intermittent headaches and some dizzy spells, as well as periods of memory and confusion problems. Thompson does not believe he can return to his position with Ruan because he is unable to connect and disconnect the trailer.

Following the March 14, 2014 accident, Thompson did not return to work for Ruan. He did not return to any work for a year and a half due to problems with his neck and low back, and also his right arm. Thompson returned to work on April 27, 2015 for Rockit Trucking driving a dump truck, delivering rock and sand. Thompson only drives, and is not responsible for loading, unloading, connecting or disconnecting. Thompson described his current job as less physically demanding than his position with Ruan. Thompson believes he earns less at Rockit Trucking than he did at Ruan.

At the hearing, the parties stipulated Ruan voluntarily paid TTD benefits in the amount of $650.00 per week from March 15, 2014 through December 9, 2014 for a total of $24,960.58, and medical expenses totaling $9,345.75. The parties also stipulated to an average weekly wage of $1,017.00 at the time of the March 14, 2014 MVA.

In support of his claim, Thompson filed the medical records from Dr. Nawab, Jewish Hospital Medical Center, Dr. Chou, Dr. Eldemire and Dr. Burton. Thompson began treating with Dr. Nawab on September 18, 2013 for a work-related August 22, 2013 right shoulder injury. Dr. Nawab diagnosed Thompson with a right shoulder partial thickness rotator cuff tear, and treated it conservatively for several months. Following a period of physical therapy and light duty restriction, Thompson was allowed to return to work without restrictions on February 10, 2014. Four days prior to the MVA on March 10, 2014, Dr. Nawab stated, "[h]e is now at MMI. He is very functional. He is doing very well. He has been back at work full duty." On April 7, 2014, Dr. Nawab again indicated Thompson had reached MMI, and assessed a 2% impairment rating for the right upper extremity.

Thompson went to the emergency room at Jewish Hospital Medical Center on March 16, 2014, reporting he was in a MVA on March 14, 2014. Thompson was diagnosed with a cervical strain and general muscle strain for which he was prescribed medication. Thompson was discharged the same day, and restricted from work until "3/18/14 after seeing occ health." Thompson returned to the emergency room on March 18, 2014 complaining of continued neck and back pain.

Thompson returned to Dr. Nawab on March 21, 2014, complaining of neck pain following the March 14, 2014 MVA. Dr. Nawab noted the pain along Thompson's cervical spine down into his shoulders and upper back, as well as headaches. Dr. Nawab diagnosed a cervical strain, recommended a course of physical therapy, and prescribed Skelaxin. Dr. Nawab restricted Thompson from driving, and allowed him to perform sit down work only. Dr. Nawab noted the possibility of an MRI and a referral to neurology. On April 14, 2014, Dr. Nawab again diagnosed a cervical strain, and issued the same restrictions.

Thompson treated with Dr. Chou on three occasions in May and June 2014 for neck and right arm pain. On May 1, 2014, Dr. Chou diagnosed Thompson with a cervical sprain and myofascial pain, prescribed medication and recommended physical therapy. Dr. Chou restricted Thompson from

overhead activities and lifting over ten pounds. On May 22, 2014, Thompson reported improvement with pain, but he experienced confusion on and off for several days. Dr. Chou noted his concern of a stroke, which would be unrelated to the work injury. Dr. Chou issued the same restrictions, and ordered Thompson to continue with therapy. On June 12, 2014, Dr. Chou noted Thompson's neck was catching and he complained of pain. Dr. Chou diagnosed Thompson with a cervical sprain and myofascial pain, and ordered a cervical MRI. He restricted Thompson from overhead activity and lifting over ten pounds. He again advised Thompson to seek treatment for confusion and dizziness since they are unrelated to the MVA.

Thompson treated with Dr. Eldemire on three occasions. On June 23, 2014, Dr. Eldemire noted complaints of neck and back pain, as well as episodes of confusion following the MVA. He assessed a cervical strain, headaches and hypothyroidism. After noting a cervical MRI had already been arranged, Dr. Eldemire recommended an additional brain MRI and ultrasound of his carotids. The July 28, 2014 cervical MRI report notes multilevel changes consisting of cervical spondylosis and mild spinal stenosis at C3-4, C4-5, and C5-6. On July 31, 1014, Dr. Eldemire again recommended a brain MRI and ultrasound of Thompson's

carotids since he has exhibited symptoms suggestive of a concussion following the MVA. He diagnosed neck pain and history of concussion. On August 29, 2014, Dr. Eldemire also ordered a CT scan of Thompson's abdomen. Dr. Eldemire did not address restrictions or Thompson's ability to return to work.

Thompson had a neurosurgical evaluation performed on December 22, 2014 by Dr. Tracy Dixon, who diagnosed neck pain, spinal stenosis in the cervical region, and cervical degenerative disc disease. Dr. Dixon did not recommend surgical intervention, but referred Thompson to Dr. Weaver for physical medicine and Dr. Jonathan Pratt for radiofrequency treatment of the cervical spine. Thompson also had a neuropsychological evaluation performed by Dr. Burton on March 12, 2015. After his examination and testing, Dr. Burton ultimately concluded, "The current data largely does not provide a compelling case for the existence of frank neurocognitive deficit as the product of his reported whiplash/concussive head injury." Dr. Burton suggested a trial of pharmacological intervention, an EEG, a referral to a clinical psychologist, and the curtailing of alcohol consumption.

Dr. Ballard performed an evaluation at the request of Ruan on October 20, 2014. Dr. Ballard noted the

2013 right shoulder injury, and the March 2014 MVA. After reviewing the medical records and performing an examination, Dr. Ballard diagnosed, “complaints of neck, right shoulder and low back pain with a normal examination, and no complaints of pain to palpation or with motion.” Relative to the March 14, 2014 MVA, Dr. Ballard opined Thompson has no findings upon examination, is not disabled, has not sustained any loss of function or permanent injury, and requires no further treatment. Dr. Ballard responded “yes” to the question of whether Thompson has reached MMI. Dr. Ballard opined Thompson can return to work and found no evidence of disability.

Thompson was evaluated by Dr. Barefoot on May 13, 2015. He noted the 2013 right shoulder injury and March 14, 2014 MVA. At the time of his examination, Thompson had been working driving a dump truck for two weeks. After reviewing the medical records and performing an examination, Dr. Barefoot diagnosed Thompson with cervical degenerative disc disease with non-verifiable radicular complaints, and status post right rotator cuff repair, treated conservatively, with apparent return to normal function. Dr. Barefoot stated Thompson’s work-related injuries brought his condition into disabling reality. Dr. Barefoot assessed an 8% impairment rating for Thompson’s

cervical condition pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides"), and attributed the entire impairment to the March 14, 2014 work injury. Dr. Barefoot noted Thompson would have marked difficulty operating equipment on a repetitive basis and is not safely able to work at heights due to his limited cervical mobility. He would also have difficulty using his right arm above shoulder level on a repetitive basis. Dr. Barefoot stated, "Mr. Thompson would be considered at MMI on the date of this evaluation." He recommended a referral back to Dr. Chou or to a pain management physician for further evaluation, but noted there is no indication for surgical intervention.

In the August 7, 2015 opinion and order, the ALJ provided summaries of Thompson's testimony, and the medical records of Dr. Barefoot, Dr. Nawab, and Dr. Ballard. The ALJ found Thompson was a credible and convincing witness. Based upon Dr. Barefoot's opinion and Thompson's testimony, the ALJ found he "sustained serious injuries to his head and neck with Dr. Barefoot translated into an 8% permanent whole person impairment under the AMA Guides . . ." The ALJ determined the three multiplier is applicable pursuant to KRS 342.730(1)(c)1. He also found Ruan failed to prove

the existence of a pre-existing, active disability. The ALJ found Thompson entitled to any and all recommended medical treatment, both past and future, for his neck and head injuries. With regard to 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.
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> 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:
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>> 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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>> Id. at 580-581.
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> Mr. Thompson testified that due to his March 14, 2014 work injuries he was unable to work for 1½ years. He testified that he returned to work for Rocket Trucking on April 27, 2015. Dr. Barefoot stated that the plaintiff reached maximum medical improvement on May 13, 2015.

> Under the above-cited legal principles and the decision of the Kentucky Supreme Court in *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000), an injured worker is entitled to a continuation of temporary total disability benefits for so long as he remains disabled from his customary work or the work he was performing at the time of his injury and has not reached maximum medical improvement.
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> Based upon the ruling case law, as cited above, and the credible and convincing lay testimony of Mr. Thompson, as covered above, and also the persuasive, compelling and reliable medical evidence from Dr. Barefoot, as covered above, I make the determination that the plaintiff is entitled to recover from the defendant and its workers' compensation insurer temporary total disability benefits from March 15, 2014 to May 13, 2015.

Ruan filed a petition for reconsideration arguing the award of TTD benefits should terminate on October 20, 2014, the date of Dr. Ballard's evaluation. It argued Thompson did not receive significant treatment thereafter, and returned to work as a dump truck driver for Rockit Trucking on April 27, 2015. It also argued Dr. Barefoot did not address TTD in that he did not specifically state May 13, 2015 was the date Thompson reached MMI. Therefore, Ruan asserted Dr. Ballard's opinion of MMI should be utilized.

The ALJ denied the majority of Ruan's petition for reconsideration, but reduced the award to TTD benefits from March 15, 2014 to April 27, 2015, the day Thompson returned to work as a dump truck driver, stating:

> The record shows that the original Opinion and Order was rendered on August 7, 2015. On August 20, 2015, the Supreme Court of Kentucky rendered its unanimous opinion in *Livingood v. Transfreight, LLC*, __ S.W.3d ___, 2015 WL 4967172 (2015), authored by Justice Barber, where the high court stated that *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000) does not stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to temporary total disability benefits. The ALJ denied the plaintiff's claim for temporary total disability benefits while he was on light duty work. The high court noted that Mr. Livingood was not on a make-work project. The Workers' Compensation Board disagreed with the plaintiff's argument that he was entitled to additional temporary total disability benefits while he was on light duty. The Supreme Court held that the evidence supported the ALJ's determination that the plaintiff was not entitled to recover temporary total disability benefits while he was on light duty.
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> I make the determination that the holding of the Supreme Court in the *Livingood* case applies to the situation in the case at bar. Here, the plaintiff was injured on March 14, 2014 and was off work for an extended period of time. He returned to work for Rocket Trucking on April 27, 2015 at a truck driving job which was lighter than his

> job with the defendant. Based on the *Livingood* case, I make the determination that the plaintiff was entitled to recover temporary total disability benefits against the defendant for the period March 15, 2014 to April 27, 2015.

On appeal, Ruan argues Thompson failed to prove both prongs of the definition of TTD. Ruan first states the ALJ's finding Thompson was unable to return to his customary work from March 13, 2015 through April 27, 2015 is not subject to its appeal. Rather, Ruan argues Thompson failed to prove the prong regarding MMI, asserting:

> Dr. Barefoot did perform an examination on May 13, 2015, and did not address the date at which he felt Respondent would have reached [MMI]. The ALJ erroneously used this date of examination as the date to terminate TTD, erroneously inferring that Dr. Barefoot meant to assign TTD on May 15, 2015.
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> The Petitioner submits that since Dr. Barefoot did not assign MMI for a certain time and since Dr. Ballard's determination that claimant was at MMI in December 2014, that December 9, 2014, is the only date offered by a physician that can be used to determine when the Respondent reached MMI.
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> In fact, Respondent was able to return to work to his customary duties as of April 27, 2015, so that it is illogical to then take Dr. Barefoot's report that just so happened to fall on May 15, 2015, to argue that he had reached MMI on that date. Dr. Barefoot's report

> was a mere examination, he did not address MMI, and the ALJ was in error in using the date of the report to assign the date that he reached MMI. Dr. Ballard's opinion regarding MMI is more valid for the reasons argued previously to this ALJ in the Petition for Reconsideration.

Based upon the definition, Ruan argues the award of TTD benefits should terminate as of the date of Dr. Ballard's examination since there is no evidence Thompson has had treatment since that time, nor evidence of improvement other than the fact he obtained employment in April 2015 with Rockit Trucking.

As the claimant in a workers' compensation proceeding, Thompson had the burden of proving each of the essential elements of his cause of action, including entitlement to TTD benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Thompson was successful in his 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).

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). 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Temporary total disability is defined as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement permitting a return to employment. KRS 342.0011(11)(a). This definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> 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.

Both prongs of the test in W.L. Harper Const. Co., Inc. v. Baker, supra, must be satisfied before TTD benefits may be awarded. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Court further explained,

"[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." 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 he was customarily performing at the time of the traumatic event. *See also* Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004). The Supreme Court of Kentucky recently reiterated 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 v. Transfreight, 467 S.W.3d 249, 254 (Ky. 2015).

In general, the duration of an award of TTD benefits may be ordered only through the earlier of the two dates, the attainment of MMI or reaching a level of improvement which would permit a return to employment as explained in Central Kentucky Steel v. Wise, supra, and Magellan Behavioral Health v. Helms, supra. In this instance, Ruan challenges the ALJ's finding of MMI. Here, the ALJ found Thompson attained MMI on May 13, 2015, the day Dr. Barefoot performed his evaluation of Thompson. He performed an examination and appears to have reviewed all

relevant medical records. After laying out his diagnoses and opinions regarding permanent impairment, causation and restrictions, Dr. Barefoot specifically stated, “Mr. Thompson would be considered at MMI on the date of this evaluation.” The attacks by Ruan against Dr. Barefoot’s opinion go to the weight of the evidence to be considered by the ALJ and do not render it unsubstantial. The ALJ was essentially presented with two conflicting opinions regarding the attainment of MMI, that of Dr. Barefoot and Dr. Ballard. The ALJ found Dr. Barefoot’s opinion most persuasive and acted well within his discretion in picking among the conflicting opinions.

A review of Ruan’s brief to this Board reveals it does not challenge the ALJ’s finding regarding the second prong of the TTD test. Ruan states, “the ALJ is within his discretion when he determined that the Respondent was unable to return to his customary work from March 13, 2015, through April 27, 2015. While the Petitioner does not agree with this factual finding, that finding is not the subject of appeal.” Therefore, we will not address the ALJ’s analysis in his opinion and order on petition for reconsideration addressing when Thompson reached a level of improvement permitting a return to employment. In the opinion, the ALJ determined the date to be May 13, 2015,

but later amended the date to April 27, 2015 in the order on petition for reconsideration, the day Thompson testified he returned to work as a dump truck driver with Rockit Trucking.

Because the ALJ determined Thompson returned to customary employment on April 27, 2015 (prior to attaining MMI on May 13, 2015) and substantial evidence supports the determination regarding MMI, we find no error in the award of TTD benefits from March 15, 2014 through April 27, 2015.

Accordingly, the August 7, 2015 Opinion and Order and the September 2, 2015 Opinion and Order on Reconsideration by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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