Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 12, 2014

CLAIM NO. 201078151

SHERRY A. SMITH PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

FORD MOTOR COMPANY
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

and

FORD MOTOR COMPANY PETITIONER

VS.

SHERRY A. SMITH
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Sherry Smith (“Smith”) appeals from the January 21, 2014, Opinion, Award, and Order of Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") finding Smith sustained a work-related back injury and awarding income and medical benefits. Smith also appeals from a separate order dated February 21, 2014, in which the ALJ denied her petition for reconsideration.

Ford Motor Company (“Ford”) also appeals from the January 21, 2014, Opinion, Award, and Order. While Ford's petition for reconsideration was granted by order dated February 21, 2014, Ford also appeals from this order.

On appeal, Smith asserts the ALJ committed reversible error by not awarding temporary total disability (“TTD”) benefits through the date of maximum medical improvement ("MMI"), January 15, 2013. Next, Smith contends the ALJ committed reversible error in not awarding TTD benefits during the periods Smith was not at MMI and not physically capable of performing her customary duties at work. Finally, Smith contends the ALJ erred in failing to commence the award of permanent partial disability ("PPD") benefits from the date of injury.

On appeal, Ford asserts the ALJ erred in determining Ford's refusal to pay TTD benefits from September 22, 2010, through December 15, 2010, was

unreasonable and in awarding 18% interest pursuant to KRS 342.040(1).

The Form 101 alleges Smith injured her lower back on July 20, 2010, within the scope and course of her employment with Ford in the following manner: "Plaintiff working on truck frame installing steering shaft injured her back." In its Form 111 Notice of Claim Denial or Acceptance, Ford denied the claim stating the alleged injury did not arise out of and in the course of employment.

Smith testified at three depositions, and the April 26, 2011, hearing. At the hearing, Smith testified concerning her pre-injury job duties as follows:

> Q: What position did you hold in 2010, when this injury occurred?
>
> A: I want to say it was the brake- not the brake, power steering- the power steering job. I put the power steering...
>
> Q: You're trying to reference the drive shaft?
>
> A: Yes, drive shaft- it has been three years I ain't [sic] been there- the drive shaft.
>
> Q: Sure, I understand.
>
> A: Plus the brake line was a part of that, and then there were seven guns on top that I shot different bolts all along the left side of the frame.

Q: Okay- now we have- you were on the drive shaft line. Why don't you describe for the Judge basically what the physical requirements of that job were? What were you required to do on that particular job?

A: All I have when it comes towards me is the frame of the truck and the engine that was just dropped onto the frame. There's no shell. There's- the front tires and the back tires are also on. The frame is lifted up above the line, where it comes to about my waist. So, the first part I did was I shot a few bolts in the front, on the frame, securing some wires. Then, I got the drive shaft. And there was a cylinder, I guess you want to say, like a stub, and it was partially oval and then one side was flat. Now, the one side was flat needed to be facing me, and it always didn't come that way- because I knew when I had to put this on, for that to be even, I had to get that bolt in there to shoot it. So, when I seen [sic] that- the way I was trained was to go in between that front tire and the frame- there was a gap about this big....

Q: And you're indicating it was about twelve inches- a foot and a half?

A: Yeah, about a foot and a half- and you put your- to move that front tire- when you moved that front tire, that left, front tire, you're also moving the right front tire- the power steering for the truck. So, when you put your body in between there, you either pushed it out or you got on the outside of the tire....

Q: Let me interrupt you for a second because I need to describe this for the record. When you would position your body in that foot or foot and a half

> space, you would have to manipulate the tire with your body. And you indicated that you were making a twisting motion?
>
> A: Correct.
>
> Q: With your upper body?
>
> A: Correct.
>
> Q: Okay, then what did you do?
>
> A: And that turned the spindle- let's say clockwise. If it wasn't to go to clockwise and I needed to go counterclockwise, I had to put my body on the outside of the tire and use the right side of the hip to push the tire the other way to get it to go counterclockwise.
>
> Q: Okay.
>
> A: And the job is very, very loaded, so I had to eyeball that spindle- and I knew which way to do it; if I had to go in between the tire or on the outside. Most of the time it was on the outside. That's where....
>
> Q: How difficult were there tires to move?
>
> A: You were the power steering. You was [sic] moving both tires. It was very, very difficult.

Smith also testified regarding the work she performed after her first return to work.

> Q: Did you return to work on September 22nd of 2010?
>
> A: I returned to Ford and I sat in the cafeteria.

> Q: What did they have you doing in the cafeteria?
>
> A: Sitting.
>
> Q: Were you doing any sort of work at all?
>
> A: I was laying on chairs, laying on floors. I was sitting. I was walking. I was going to medical to get relief. Yeah, I was in much pain.
>
> Q: Okay, so basically they had you in the cafeteria, and you were doing modalities or whatever to alleviate your back pain, that you were experiencing, if I understand your testimony correctly?
>
> A: Correct.

At the hearing, Smith also explained the tasks she performed after her return to work for the second time on March 19, 2012:

> A: They sent me over to Gate Six where they sell tickets for raffling, for junior diabetes or all them [sic] donations that they have up there. And we would sit out at a table and sell tickets.
>
> Q: Okay, so you were just at a table in an employee area, like a break room or something?
>
> A: It was a hallway, as the employees entered the building, before they got into the plant.
>
> Q: So, you were selling raffle tickets?

> A: Correct- t-shirts, raffle tickets, whatever they had me to sell, with a few other people?

Smith was taken off of work on June 3, 2012.

Smith testified further regarding the work she performed from October 16, 2012, through November 11, 2012:[1]

> Q: And then I have that you continued off of work until October 16th of 2012, is that correct?
>
> A: Yes.
>
> Q: Did you return to work at that point?
>
> A: I want to say I returned in- was it November or something, we were syncing the trucks. They got a new system- computer system in the trucks, and they wanted to sync it with a Blackberry. And we were- they were having problems with it, and they wanted us to test it. There was [sic] like thirty of us that they called in off medicals to come in and test that. You go sit in a truck and you plug this thing up to it, and you let it run its course.
>
> Q: And did you perform that job until about November 12th of 2012?
>
> A: Yes.
>
> A: Then I have the last date of TTD payments as December 9th of 2012, is that correct?
>
> A: Yes.

[1] Neither party contests the ALJ's finding Smith was off work from June 3, 2012, through October 15, 2012, and from November 11, 2012, through December 9, 2012.

> Q: Have you returned to work, in any capacity, since December 9th of 2012?
>
> A: No.

On May 18, 2012, Smith filed certain records of Dr. John Guaranaschelli. Those records indicate Smith underwent the following procedure on January 11, 2011: "Two level decompressive hemilaminotomy, partial facetectomy, microsurgical discectomy with an inferiorly migrated disc fragment arising from the 4-5 disc space inferiorly. No fusion, no instrumentation."

A fill-in-the-blank report by Dr. Guaranaschelli dated February 1, 2012, reflects his opinion that Smith does not retain the physical capacity to return to the type of work she was performing at the time of the injury. The restrictions include no lifting above 10 pounds.

The November 4, 2013, Benefit Review Conference ("BRC") order and memorandum lists the following contested issues: benefits per KRS 342.730, TTD, and extent and duration with multipliers. Under "other matters" is the following: "* 7/27/10 - 9/21/10, 12/16/10 - 3/18/12, 6/6/12 - 10/16/12, 11/12/12 - 12/9/12 - proof open to hearing over objection." The BRC order and memorandum indicates voluntary TTD benefits were paid in the amount of $68,128.48.

In the January 21, 2014, Opinion, Award, and Order, the ALJ provided the following "Analysis" and "Findings of Fact, And Conclusions of Law":

> Based upon the medical evidence and Plaintiff's testimony, it is clear that she has suffered a work related injury that arose out of and in the course of her employment. The traumatic injury to her lower back is the proximate cause of a permanent disability according to the medical testimony of Dr. John Guarnaschelli, M.D., her treating neurosurgeon.
>
> Dr. Guaranaschelli assigns the Plaintiff a whole person impairment (WPI) of 13% according to the AMA *Guides to the Evaluation of Permanent Impairment, 5th edition*. He also assigns restrictions to the Plaintiff that would prohibit her from performing the job that she performed at the time of her injury.
>
> Both parties argued in their briefs that the Plaintiff should receive permanent partial disability benefits with a statutory multiplier, which would be calculated as $533.84 x 13% X 1 x 3 = $208.20 per month.
>
> There is a significant difference of opinion concerning TTD. Plaintiff claims that she should receive it at the rate of $711.79 per week for every week since July 27, 2010, the first date upon which she was eligible to receive TTD, until January 15, 2003 the revised date upon which Dr. Guarnaschelli states that she reached MMI. The Defendant/Employer argues that she has received exactly that amount of TTD to which she is entitled.

The uncontested evidence is that during her first return to work from September 22, 2010 until December 15, 2010 she did nothing. She performed no meaningful work. She sat in the cafeteria all day every day doing nothing. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky., 1977).

On her 2nd return to work on March 19, 2012 she did light-duty work selling tickets for raffles and other items for charity with a group of employees who were also physically limited. She earlier testified that she really enjoyed that job until she was taken off work again on June 3, 2012.

She returned to work again on October 16, 2012, working in assembly under her restrictions until November 12, 2012. She was paid TTD until December 9, 2012 when she was released by her physician for work with restrictions and placed on "out of work" by Ford.

KRS 342.011 (11) (a) defines "Temporary total disability" as being "…the condition of an employee who has not reached maximum medical improvement from an injury <u>and</u> has not reached a level of improvement that would permit a return to employment" (emphasis supplied). Thus, as the use of the conjunctive "and" requires it, both conditions precedent must be present in order for an injured employee to be eligible to collect "TTD". With regard to the present matter, both parties agree that during the period of time in question (July 27, 2010-January 15, 2013) the Plaintiff had not reached MMI. Where they disagree is whether she

reached a level of improvement that would permit a return to employment.

The Defendant argues that Ford provided "employment" within Plaintiff's restrictions rather than TTD. If the employee is able to do anything at all, Ford accommodates the employee's restrictions through a program of "light duty" for which the employee receives pay at his or her usual rate.

As a corollary to the issue presented, there is a lesser included sub-issue as to what, if any credit for previous payment of wages the employer should receive if it is determined that TTD was the Plaintiff's sole statutory remedy.

Taking the second and corollary sub-issue out of order, it seems clear that if an employer voluntarily pays some benefit to an injured employee that is outside the scope of the statutory scheme, the employer is only entitled to a credit against statutorily mandated benefits.

KRS 342.011 (12) defines "Income benefits" in pertinent part as "…payments made under the provisions of this chapter to the disabled worker…excluding medical and related benefits." (note: medical benefits are other than income benefits and not at issue here).

KRS 342.011 (14) defines "compensation" as including only income benefits as defined and medical and related benefits as defined.

The only off-sets or credits authorized by the chapter are found at KRS 342.730 (5) and (6), directing credits for payment of unemployment

insurance benefits paid for unemployment during a period of TTD or an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer funded plan contains an internal off-set provision for worker's compensation benefits which is inconsistent with this provision. As the legislature could have included other off-sets or credits, but chose not to, the presumption is that there is no intention that other exclusions apply.

Going to the issue of Plaintiff's claim for TTD, it appears from the evidence taken as a whole that for the period of September 22, 2010 until December 15, 2010, the employer made a business decision that rather than pay TTD to the Plaintiff, there would be an artifice created that substitutes for statutory benefits. There is no contraverting testimony in the record concerning the fact that for the period in question, the Plaintiff did nothing but sit in the company cafeteria.

The term "work" is defined at KRS 342.011 (34) as "…providing services to another in return for remuneration on a regular and sustained basis in a competitive economy."

Here, it is uncontested that the employee did no productive work for the period in question, although Ford argues that she was awaiting work assignments within her restrictions.

As to the other periods for which the Plaintiff worked within her restrictions, she would not be entitled to TTD. Finally, she was released to work with restrictions by Dr. Guarnaschelli on December 9, 2013, but

again, according to Dr. Guarnaschelli, she did not reach MMI until January 15, 2013. According to the statute, December 9 is the operative date because she was able to return to work on that date.

Thus, the Plaintiff is entitled to an award of TTD from July 27, 2010 through March 18, 2012. She is also entitled to a second period of TTD from June 3, 2012 until October 15, 2012. She is entitled to a third period of TTD from November 12, 2012 until December 9, 2012.

FINDINGS OF FACT, AND CONCLUSIONS OF LAW

1. Facts as stipulated by the parties and set out herein above.

2. As to the issue of work-relatedness, causation or injury as defined by the Act, the Plaintiff suffered a work related injury, timely reported same and actively sought relief from her symptoms. I find that the Claimant, SHERRY SMITH, suffered a work-related injury on July 20, 2010 while in the employ of the Defendant/Employer, FORD MOTOR CO. In making this finding, I have relied upon the opinion of Dr. John J. Guarnaschelli, M.D. and Plaintiff's testimony which, concerning the work causation of Plaintiff's injury, I find to be the most credible and convincing evidence in the record.

3. As a result of his July 20, 2010 work-related injury, the Plaintiff has a whole person impairment rating of 13% according to the *AMA Guides, 5th ed.* In making this finding, I have relied upon the opinion of Dr. John J. Guarnaschelli, M.D. which, concerning Plaintiff's functional impairment rating as a result of the subject

injury, I find to be the most credible and convincing evidence in the record.

4. As opined by Dr. Guarnaschelli, the Plaintiff does not retain the physical capacity to return to the type of work performed at the time of the injury. Further, Dr. Guarnaschelli recommended light-duty work restrictions, limiting lifting to 10 pounds, limited repetitive bending, overhead work, and some periodic rest. The Plaintiff is therefore entitled to the statutory enhancement of a multiplier pursuant to KRS 342.730 (1) (c) 1.

5. Plaintiff is thus entitled to a weekly benefit calculated at $533.84 x 13% x 1 x 3 = $208.20 per week.

6. The Plaintiff was temporarily, totally disabled due to the effects of her work related injury from July 27, 2010 through March 18, 2012, and again from June 3, 2012 until October 15, 2012, and again from November 12, 2012 until December 9, 2012 until she was released to work by her treating physician. KRS 342.0011 (11) (a). E. & L. Transport v. Hayes, 341 S.W.2d 240 (Ky., 1906); Williams v. Eastern Coal Corp., 952 S.W.2d 696 (Ky., 1997).

7. The Defendant/Employer is entitled to a credit for TTD paid in the amount of $68,128.48. KRS 342.730 (2);

8. The denial of TTD to the Plaintiff by the Defendant-Employer for the period from September 22, 2010 until December 15, 2010 was without reasonable foundation. KRS 342.040 (2).

9. The Plaintiff is entitled to the cost of reasonable and necessary treatment for the cure and relief of her work related injury.

Both Ford and Smith filed petitions for reconsideration. Significantly, Ford's petition for reconsideration did not address the issues it now raises on appeal. Pursuant to KRS 342.285(1), in the absence of a petition for reconsideration, the ALJ’s findings “shall be conclusive and binding as to all questions of fact” as long as substantial evidence supports the ALJ’s findings. As Ford's petition for reconsideration did not address the issues it now raises on appeal, in the context of this appeal, it is as though Ford did not file a petition for reconsideration. Nevertheless, we will address Ford's arguments on appeal.

We will first address Ford’s argument that there is no reasonable basis for the ALJ's determination Ford's failure to pay TTD benefits from September 22, 2010, through December 15, 2010, was "unreasonable." In the January 21, 2014, Opinion, Award, and Order, the ALJ states that the uncontested evidence indicates that between September 22, 2010, and December 15, 2010, Smith was sitting in the cafeteria all day performing no meaningful work. Ford failed to contest this finding in its petition for reconsideration and on appeal. The ALJ further held that both parties agreed that from July 27, 2010, through January 15, 2013, Smith had not reached MMI. Again, Ford

failed to contest this finding in its petition for reconsideration and on appeal. The ALJ ultimately concluded that Ford's failure to pay TTD benefits from September 22, 2010, through December 15, 2010, was "without reasonable foundation," pursuant to KRS 342.040(2). As the factual findings substantiating this decision were not contested by Ford, we will not disturb the ALJ's conclusion. That said, the accrued interest of 18% can only be assessed for the unpaid TTD benefits for the period spanning September 22, 2010, through December 15, 2010. The ALJ’s decision on this issue shall be affirmed.

Smith's first argument on cross-appeal is the ALJ committed reversible error by not awarding TTD benefits through the date of MMI, January 15, 2013. Instead, the ALJ awarded TTD benefits from July 27, 2010, through March 18, 2012, from June 3, 2012, through October 15, 2012, and from November 12, 2012, through December 9, 2012.

Entitlement to a period of TTD benefits is controlled by a two-prong test.

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.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 580, 581 (Ky. App. 2004), the Court of Appeals instructed that both prongs of KRS 342.0011(11)(a) must be met before a claimant is entitled to TTD benefits stating as follows:

> KRS 342.0011(11)(a) states that 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." While the Board was correct in recognizing that that definition encompasses two analyses, it erred when it rephrased them in disjunctive terms of "or" when the statute is clearly written using the conjunctive "and." 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.

Regarding the first prong of the two-part test, MMI, as defined by the Supreme Court of Kentucky, "refers to the time at which a worker's condition stabilizes so that any impairment may reasonably be viewed as being permanent." Tokico (USA), Inc. v. Kelly, 281 S.W.3d 771, 775-776 (Ky. 2009). Regarding the second prong of the two-part test, in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court explained a release to perform minimal work rather than 'the type that is

customary or that [she] 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). Central Kentucky Steel v. Wise at 659. The release must be viewed in light of the employee's prior work activities. Until MMI is achieved, the 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 injury. Id. However, once an employee reaches MMI, his eligibility for TTD benefits ceases regardless of whether he remains under restrictions which prohibit him from returning to his normal and customary work. Magellan Behavioral Health v. Helms, supra. In contrast, if an employee returns to his or her customary work or the work he or she was performing at the time of the injury *before* he or she reaches MMI, TTD benefits must cease.

Dr. John J. Guarnaschelli testified by deposition on March 21, 2013. Regarding MMI, he testified as follows:

> Q: Doctor, you know we look to you medical specialists as to when you would place your patient at maximum medical improvement. Based upon your treatment history and follow-up and surgery, when would you place Ms. Smith at medical maximum improvement?

A: Well, initially I had placed her on [sic] an [sic] MMI 12 months following her surgery which would have been 2012. However, she had continued to complain of aching in the back. She had the inability to return to work on a full-time basis.

And when I last saw her along with her family members on January 15th of 2013 I tried my best to explain to her and to her father what my understanding of the meaning of maximal [sic] medical improvement is, and not only from a medical viewpoint but a potential legal viewpoint. And I really asked her to consult with her personal attorney so that that can be fully understood and made a decision for that....

Q: So just to make the record clear, in your definition of MMI you would have placed her at MMI on your January 15, 2013, date?

A: Well, that's the way we left it when I last talked to her.

Q: Okay.

A: Although, I have in my reports documentation that the usual MMI is at the time in which they have returned to work and are 12 months following their injury or 12 months following their surgery, if surgery had been done, whichever event occurs first.

Q: Okay. If her surgery was on January 11, 2011, is that saying that her MMI date would have been January 11th of 2012?

A: That's what I had initially put her down as. Although, subsequently after talking to her we also had tentatively scheduled it for a year later, January 2013.

> Q: All right. And that's what I want to try to get to. I hear what you're saying. But in this lady's case you feel the MMI date would be more appropriate, based upon your treatment and history, on January 15, 2013?
>
> A: I had initially thought that she had essentially received the ability to go back to work on a full-time basis a year earlier than that, but she really has not. She continues to have some forms of conservative treatment including medications and physical therapy and such.

The only other opinion in the record regarding MMI was provided by Dr. Jerry Morris who opined Smith was at MMI as of the date of his examination on September 25, 2013. Additionally, and as noted by the ALJ in the January 21, 2014, Opinion, Award, and Order, the parties were in agreement that MMI was reached on January 15, 2013.

Regarding entitlement to TTD benefits after the initial period of TTD benefits awarded terminating on March 18, 2012, the ALJ failed to conduct any meaningful analysis of the second prong of the TTD benefits test pursuant to the applicable law. KRS 342.001(11)(a); *See* Central Kentucky Steel v. Wise, supra. Concerning the termination of TTD benefits on December 9, 2012, the ALJ merely stated as follows in the "Analysis" section of the order: "She was paid TTD until December 9, 2012 when she was released by her physician for work with restrictions and placed on 'out

of work' by Ford." The ALJ then terminated the third period of TTD benefits on December 9, 2012, without explanation. However, Smith testified she has not returned to work in any capacity since December 9, 2012. Thus, this award of TTD benefits must be vacated and the claim remanded for the appropriate analysis pertaining to her entitlement to TTD benefits beyond December 9, 2012, until she reached MMI on January 15, 2013.

Further, since the ALJ failed to conduct the appropriate analysis of the second prong of the TTD benefits test regarding the period Smith worked from October 16, 2012, until November 12, 2012, the ALJ must also revisit Smith’s entitlement to TTD benefits during this period.

Smith’s second argument on appeal is that the ALJ erred by failing to award TTD benefits from March 19, 2012, through June 2, 2012. We agree. The ALJ noted that during this period of time, Smith performed light-duty work selling raffle tickets and that she enjoyed the work. This is consistent with Smith's testimony. Selling raffle tickets does not comprise a "return to employment" pursuant to KRS 342.001(11)(a) and Central Kentucky Steel v. Wise, supra, as this is a return to minimal work. We decline to remand for additional findings regarding Smith’s

entitlement to TTD benefits during this period as Smith's unrebutted testimony firmly establishes there was not a return to her customary work or the work she was performing when injured.

Finally, Smith asserts the ALJ erred by failing to initiate the award of PPD benefits on the date of injury, to be interrupted by any periods of TTD benefits. Smith is correct.

In Sweasy v. Wal-Mart Stores, Inc., 295 S.W.3d 835 (Ky. 2009), the Supreme Court stated as follows:

> 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. [citation omitted]

> 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.

Id. at 839-840.

Consequently, the ALJ is required to begin the award of PPD benefits on July 20, 2010, the date of the injury, to be interrupted during any periods TTD benefits are paid.

Further, 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). The ALJ's award of benefits as contained in section one of the opinion, award, and order clearly does not comport with the statute. There is no provision in the statutes which allows a lump sum award of TTD benefits. The statute requires the award of PPD benefits to commence on

the date of the injury to be interrupted by the specific periods of TTD benefits awarded. Therefore, the ALJ must spell out in the award the specific period or periods of TTD benefits awarded, i.e. the beginning date and ending date of each period of TTD benefits. Consequently, the award of TTD benefits must be vacated.

On remand, Smith is at least entitled to TTD benefits for the period from the date of the injury through October 15, 2012, including the period of time she worked from March 19, 2012, through June 2, 2012, as it is clear she had not reached a level of improvement that would permit a return to employment as defined by applicable case law. Further, as found by the ALJ, Smith is entitled to TTD benefits from November 12, 2012, through December 9, 2012. However, the ALJ shall determine whether Smith is entitled to any additional periods of TTD benefits during the period spanning from October 16, 2012, through November 11, 2012, and from December 10, 2012, through January 15, 2013.

Further, on remand, the ALJ shall enter an award awarding PPD benefits of $208.20 per week for 425 weeks commencing on July 20, 2010, the date of injury. The award shall also state the payment of PPD benefits shall be interrupted during any period TTD benefits are paid and shall recommence upon cessation of payment of TTD benefits.

The ALJ shall set out in the award the specific periods during which Smith is entitled to TTD benefits. Smith shall be entitled to 18% interest only on the TTD benefits to be paid from September 22, 2010, through December 15, 2010. All other unpaid TTD benefits and PPD benefits shall bear interest at the rate of 12% per annum.

Finally, paragraph three of the award is vacated, and the ALJ shall state Ford is entitled to a credit for the weeks of TTD benefits it has already paid.

Accordingly, as to the issue raised by Ford on appeal, the ALJ's decision as set forth in January 21, 2014, Opinion, Award, and Order is **AFFIRMED**. Concerning Smith's appeal, the commencement date of the award of PPD benefits and the award of TTD benefits as set forth in the January 21, 2014, Opinion, Award, and Order and the February 21, 2014, Order reaffirming the awards are **VACATED**. This claim is **REMANDED** for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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