Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 21, 2014

CLAIM NO. 201301650

SHERWIN WILLIAMS CO. PETITIONER

VS. **APPEAL FROM HON. J. GREGORY ALLEN, ADMINISTRATIVE LAW JUDGE**

VIRGIL GARDNER AND
HON. J. GREGORY ALLEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Sherwin Williams Co. ("Sherwin") appeals from the May 23, 2014 Opinion, Order and Award and the July 1, 2014 Order on Petition for Reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge ("ALJ"). Sherwin argues the ALJ erred in awarding temporary total disability ("TTD") benefits to Virgil Gardner ("Gardner")

because the issue of entitlement to TTD benefits was not preserved for adjudication. Alternatively, Sherwin argues Gardner is not entitled to TTD benefits during the period he performed light duty work. Finding no error, we affirm.

Gardner was employed by Sherwin as a service technician, filling tanks with ingredients and mixing them. He injured his right leg on August 21, 2012 when he walked into a valve. He did not miss work, but the wound developed a serious infection. He had difficulty walking, and the wound would periodically swell and ooze. After the incident, Gardner was placed on light duty, performing paperwork with his leg elevated. He was released to full duty work in January 2013, but only worked a few days before deciding to retire because he did not feel he could perform his regular job duties.

The ALJ initially awarded TTD benefits from August 21, 2012 through November 25, 2013, the date Dr. Arthur L. Hughes assigned a permanent impairment rating. Sherwin filed a petition for reconsideration arguing TTD was not preserved as an issue. Additionally, Sherwin argued Gardner was not entitled to TTD benefits during the period he worked on light duty, and that the ALJ overlooked the fact Dr. John Meek had placed Gardner at maximum medical improvement ("MMI") in January 2013.

In his July 1, 2014 order, the ALJ reaffirmed his ruling that the issue of entitlement to TTD benefits falls within KRS 342.730 and was thus properly before the ALJ. The ALJ determined that, following the injury, Gardner simply performed paperwork which clearly is not the type of work he performed at the time of the injury. The ALJ noted there was no evidence Sherwin intended the payment of wages for work performed after the injury to be payment in lieu of workers' compensation benefits. The ALJ found Gardner had reached MMI as of January 14, 2013 and sustained the petition to the extent the award was amended to reflect Gardner reached MMI and TTD benefits would terminate on that date.

On appeal, Sherwin again argues the issue of entitlement to TTD benefits was not preserved as a contested issue because it was not specifically discussed or listed in the benefit review conference order. Nor did Gardner argue for TTD benefits in his brief to the ALJ. Sherwin contends substantive evidence was not presented on the issue. Thus, it argues the ALJ erred in ruling entitlement to TTD benefits was contained within the issue of benefits pursuant to KRS 342.730.

We disagree. The ALJ correctly determined entitlement to TTD benefits is contained within the issue of

benefits pursuant to KRS 342.730. KRS 342.730 addresses both TTD benefits as well as permanent partial and permanent total disability benefits. This Board has consistently held questions regarding the appropriateness and duration of TTD benefits are encompassed within the question of extent and duration.

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.

Thus, entitlement to TTD benefits is controlled by a two-prong test. Both prongs of KRS 342.0011(11)(a) must be met before a claimant is entitled to TTD benefits. Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004). Here, the first prong is satisfied by the ALJ's determination Gardner reached MMI on January 14, 2013 and that determination has not been appealed. Regarding the second prong, in Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Supreme Court explained 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). Until MMI is achieved, the employee is entitled to a continuation of TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of injury.

We decline to remand for additional findings regarding Gardner's entitlement to TTD benefits during this period, as his unrebutted testimony establishes he did not return to his customary work or the work he was performing when injured. Even had the ALJ determined the post-injury light duty work was not "minimal work," the Court of Appeals recently held a claimant's ability to continue working for an employer in a light duty capacity did not preclude an award of TTD benefits. Mull v. Zappos.com, Inc., 2013-CA-001320-WC, 2014 WL 3406684, (rendered July 11, 2014, designated not to be published and currently on appeal to Supreme Court). The Court of Appeals explained 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.
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> 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 compensate 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 the General Assembly to say otherwise.

While we do not cite unpublished decisions as authority, we believe it wise to follow the guidance of the courts until such time as there is final, published authority on the issue. There being no evidence Gardner was capable of performing his pre-injury duties during his return to work, Gardner was entitled to the award of TTD benefits for that period.

Accordingly, the May 23, 2014 Opinion, Order and Award and the July 1, 2014 Order on Petition for Reconsideration rendered by Hon. J. Gregory Allen, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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