Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 23, 2015

CLAIM NO. 201470894

ST. JOSEPH HOSPITAL PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

PAMELA COMBS and
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, & REMANDING

* * * * * *

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

ALVEY, Chairman. St. Joseph Hospital ("St. Joseph") appeals from the Opinion, Award and Order rendered July 28, 2015 by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ") and the September 4, 2015 order on petition for reconsideration. In the opinion, the ALJ awarded Pamela Combs ("Combs") temporary total disability ("TTD") benefits

from August 20, 2014 through March 27, 2015, permanent partial disability ("PPD") benefits, and medical benefits for a low back injury sustained on August 20, 2014 while working as an operating room nurse for St. Joseph.

On appeal, St. Joseph argues the ALJ erred in awarding TTD benefits during the time Combs returned to her position on light duty from August 20, 2014 through October 18, 2014 since she performed most of her pre-injury tasks during this time frame. We vacate and remand for additional findings of fact supporting of the ALJ's award of TTD benefits.

Combs filed a Form 101 alleging she injured her left shoulder, neck and low back on August 20, 2014 when she pushed a cart over a metal strip on the floor while transporting equipment, causing her to fall forward. Combs' Form 104 indicates she has worked as a registered nurse in the healthcare industry since 1980, and specifically at St. Joseph from December 11, 2012 through October 17, 2014.

Combs testified by deposition on March 30, 2015, and at the final hearing held June 2, 2015. Combs testified she injured the left side of her low back at work in 2003. Thereafter, she continued to have left-sided symptoms "off and on," but continued to work. Combs

injured her neck in a car accident in November 2010. Shortly thereafter, Combs began treating with a rheumatologist who diagnosed her with arthritis and fibromyalgia. She is prescribed Citropram, Celebrex and Lyrica to treat her neck, shoulders, elbows, hands and knees. In March 2014, Combs fractured her left shoulder while at home. She returned to her regular job at St. Joseph in June 2014 without restrictions.

Combs began working for St. Joseph on December 11, 2012 as a registered nurse in the operating room. She prepared patients for surgery, moved and positioned them on and off beds and stretchers, transferred them to and from the operating room, and pushed stretchers. She ensured the operating room was sterile and ready for surgery. Combs stated she did “a lot of bending, squatting and crawling underneath sterile fields to hook up equipment, pick up things that fell on the floor, hunting needles that fell on the floor, or don’t know where they’re at and you’re hoping they’re on the floor, sponges, things like that, running and fetching instruments.” Combs assisted in anesthesia, gathered medications, and prepped patients for surgery. Her job required running, walking, bending, squatting and lifting over fifty pounds.

On August 20, 2014, Combs placed a heavy piece of equipment onto a ring basin stand with wheels to move it to another room. As she pushed the stand down the hallway, the wheels caught on a metal strip on the floor causing her to fall forward. She experienced pain in her left shoulder and neck, and was taken to the emergency room at St. Joseph. She and the staff were initially concerned she had reinjured her left shoulder. She subsequently developed symptoms in the right side of her low back. Her left shoulder and neck symptoms dissipated within a month. However, her low back symptoms worsened. Combs later developed pain and burning in the right side of her low back, radiating into her buttocks and right lower extremity. Combs testified she has been prescribed medication and physical therapy. She was eventually referred to a pain management physician, who prescribed pain medication and administered two lumbar injections. Combs does not believe she is physically capable of returning to her former job as an operating room nurse.

After her injury, Combs was taken off work for approximately two days. Teresa Ellis, APRN, then allowed her to return to work with restrictions of no lifting over ten pounds and to avoid stooping, bending, squatting or stairs. Her restrictions were later changed to preclude

lifting of more than five pounds. On October 17 or 19, 2014, Combs was completely restricted from work, and she has not returned to any employment since that time. At her deposition, Combs provided the following testimony regarding her work activities at St. Joseph while on light duty:

> Q: At what job did you perform on light-duty?
>
> A: I performed my job with the exception of the lifting and pulling, the first few hours of my job.
>
> Q: Okay. So you were still working in the operating room?
>
> A: I was working in the operating room, yes. And I -- they would put me with someone.
>
> Q: That would help you with the lifting?
>
> A: Not help me with the lifting as much as I would do, like, the charting, going and getting items that I could lift. If it was over -– I believe my limitation was 10 pounds, nothing over 10 pounds, so if anything was over 10 pounds, I didn’t do it.
>
> Q: Okay. So other than the lifting part, you did you other job duties as a Registered Nurse?
>
> A: I didn’t do any bending, stooping, squatting, crawling. I did not climb any stairs. Those were my limitations.
>
> Q: Okay. So was it mainly charting that you were still doing?

A: I would open up rooms to prepare them for operations, the things that I could do that didn't fall under my limitations.

Q: Okay. And then did you perform that light-duty until you were taken off in October?

A: I did those -- I did the operating room light-duty until October the 1st. And my supervisor decided I could not work in there anymore because Workplace Care, Teresa Ellis, increased my limitations.

Q: Okay. Did you do a different job after October 1st?

A: Employee health had me to come and work in their department, and I gave the flu vaccines and did Fit testing on some of the staff.

Q: Okay. And how long did you do that job?

A: I don't remember exactly how many weeks it was.

Q: Okay. Was that until you were taken off?

A: No, the flu vaccines was over.

Q: Okay.

A: I didn't have anymore to give, and so they -- she put me up in quality department, and I was doing some chart abstraction and data entry.

Q: Okay.

> A: And I did that for a -- I guess a few weeks. And by that time, I was only working six hours a day.
>
> Q: Okay.
>
> A: Five days a week. Because the limitations just kept getting more and more.
>
> Q: Okay.
>
> A: And - - and then she just put me off work.
>
> Q: Did they pay you the same wage rates on light-duty that you had before?
>
> A: Yes, sir.
>
> Q: But did your hours start to decrease?
>
> A: Yes, sir.

At the hearing, Combs provided similar testimony stating she continued to work as an operating room nurse until October 1, 2014, “just not lifting, but I was getting left in rooms without help.” Combs stated she reported to her supervisor she could not do this under her restrictions. While working light duty, Combs was earning the same wages as she did prior to her injury, but worked fewer hours. Combs was completely restricted from work on October 17 or 19, 2014. At the hearing, the parties agreed St. Joseph voluntarily paid TTD benefits from November 19,

2014 through May 7, 2015 at a rate of $768.53 per week, totaling $18,551.58.

In support of her claim, Combs filed the records from St. Joseph and Kentucky One Workplace Center. On August 20, 2014, Combs was taken to the emergency room complaining of left shoulder, neck and upper back pain after a fall at work. Diagnostic studies of Combs' neck and left shoulder were read as normal. Combs was diagnosed with a shoulder sprain, prescribed Zanaflex, and discharged with instructions to return to a few days for a follow-up. Combs was restricted from work until August 22, 2014.

On August 22, 2014, Ms. Ellis diagnosed Combs with a cervical strain, prescribed medication, and released her to return to work with restrictions of no lifting, pushing or pulling over ten pounds. On August 28, 2014, physical therapy was prescribed for Combs' left shoulder and the lumbar strain. In September, Ms. Ellis ordered a lumbar MRI for a strain with radiculopathy. The October 7, 2014 MRI demonstrated multilevel degenerative changes with no evidence of stenosis or fracture. Thereafter, additional physical therapy for Combs' lumbar condition was ordered, and she was last diagnosed with lumbar strain and sprain of unspecified site of shoulder and upper arm.

Combs filed the report of Dr. James Owen, who evaluated her on March 27, 2015. He diagnosed persistent low back pain with non-verifiable radicular symptomatology associated with positive MRI, markedly positive paraspinal muscle spasm and tenderness associated with severe dysmetria. He opined Combs' injuries caused her complaints. He noted Combs has a history of fibromyalgia with some involvement of the low back, but not nearly so severe as until after the August 20, 2014 fall. Dr. Owen stated "the fall is what brought her to disabling reality." Dr. Owen assessed an 8% impairment rating, attributing 7% to the work injury pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment. He opined Combs is at maximum medical improvement ("MMI") if continued pain management is effective. He stated Combs does not have the physical capacity to return to her former job. He restricted Combs from lifting, handling, carrying objects less than 20 pounds, and avoidance of activities requiring recurrent bending, squatting, or stooping.

St. Joseph filed the April 3, 2015 report of Dr. Daniel Primm. He diagnosed Combs with chronic low back pain based upon a review of her medical records and history; multiple chronic joint complaints with diagnosis

of fibromyalgia; work-related soft-tissue strains by history and significant symptom exaggeration. Based upon his examination and review of the medical records, Dr. Primm believed her soft tissue injuries have resolved, and no chronic symptoms or any harmful change to the human organism were produced. Dr. Primm opined the work injury is unrelated to her continued symptoms. He stated Combs had an active condition of chronic multiple musculoskeletal complaints, including chronic low back pain, which preceded the work injury, and for which she was undergoing active treatment for a number of years. Dr. Primm stated Combs is at MMI and did not sustain any permanent impairment due to the August 20, 2014 injury. Dr. Primm stated the August 20, 2014 injury does not warrant further treatment or permanent restrictions.

In the July 28, 2015 opinion, after summarizing the evidence, the ALJ found the August 20, 2014 work accident resulted in a back injury, and she adopted Dr. Owen's opinion the work accident aggravated her prior lumbar condition into disabling reality. She determined Combs is not permanently totally disabled and awarded PPD benefits and medical benefits based upon the 7% impairment rating assessed by Dr. Owen. With regard to TTD benefits, the ALJ first noted the definition found in KRS

342.0011(11)(a), and the analysis required in Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), W.L. Harper Construction Co. v. Baker, 858 S.W.2d 202 (Ky. App. 1993) and Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000). The ALJ then stated as follows:

> The Defendant paid temporary total disability benefits from November 19, 2014 through May 7, 2015 at the rate of $768.53/week. Plaintiff's unrebutted testimony establishes that she did not return to her pre-injury work following the August 20, 2014 injury. Plaintiff worked in a light duty, restricted capacity. She administered flu vaccines and charted. These light duty restrictions precluded Plaintiff from returning to her customary, pre-injury work. The ALJ must determine when Plaintiff reached maximum medical improvement. After careful consideration, this ALJ concludes Plaintiff reached maximum medical improvement on March 27, 2015, the date of Dr. Owen's evaluation. Dr. Primm evaluated Plaintiff approximately a month later, and also found Plaintiff to be at maximum medical improvement. At that juncture Plaintiff was undergoing pain management and received injective therapy for her back. Accordingly, Plaintiff is awarded temporary total disability benefits from August 20, 2014 through March 27, 2015 at the rate of $768.53/week.

St. Joseph filed a petition for reconsideration making the same argument it now asserts on appeal, in addition to other unrelated errors. After correcting the

TTD rate and errors made in the award of PPD benefits, the ALJ stated as follows in the September 4, 2015 order:

> The Defendant argues that Plaintiff is not entitled to TTD benefits from August 20, 2014 through October 18, 2014 because Plaintiff was working in a light duty capacity at that time. The ALJ previously found Plaintiff's light duty restrictions precluded her from performing her customary, pre-injury employment. This portion of the Defendant's petition is a reargument of its case, for which a petition for reconsideration is not proper. This portion of the Defendant's Petition For Reconsideration is denied.

On appeal, St. Joseph argues the ALJ erred in awarding TTD benefits during the time Combs returned to light duty work from August 20, 2014 through October 18, 2014. St. Joseph asserts Combs testified she worked light duty in her same position as an operating nurse, except she did not perform heavy lifting. On October 1, 2014, Combs began administering flu vaccines, performed fit testing, and data entry. St. Joseph argues the ALJ did not perform the correct analysis in awarding TTD benefits since she failed to address whether Combs had returned to the same job she performed at the time of her injury or returned to minimal work. St. Joseph argues it did not create a makeshift job or make Combs perform minimal work. Rather, Combs returned to her operating room nurse position,

performing her pre-injury duties with the exception of heavy lifting. St. Joseph argues the ALJ based the award solely on the fact Combs had not returned to the exact job she performed prior to the injury, which is not the analysis required under case law.

As the claimant in a workers' compensation proceeding, Combs had the burden of proving each of the essential elements of her cause of action, including entitlement to TTD benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Combs was successful in her burden, the question on appeal is whether substantial evidence existed in the record supporting 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 the case *sub judice*, the ALJ did not provide sufficient findings of fact and an explanation which allow for meaningful review of her award of TTD benefits during the period Combs was working light duty. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973); New Directions Housing Authority v. Walker, 149

S.W.3d 354 (Ky. 2004). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, supra.

KRS 342.0011(11)(a) defines temporary total disability as 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." The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d at 205, 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.

In Central Kentucky Steel v. Wise, 19 S.W.3d at 659, the Kentucky Supreme 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.

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 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).
>
> . . .
>
> 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.

Recently, the Supreme Court of Kentucky affirmed the standard for determining an injured worker's entitlement to TTD benefits while on light duty pursuant to Double L Const., Inc. v. Mitchell, supra, and Central Kentucky Steel v. Wise, supra, in Zappos.com v. Sonia Mull, 2014-SC-000462, rendered October 29, 2015 (not to be published), citing to Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015).

In Zappos.com v. Mull, cited for guidance, not authority, the Court stated, "Accordingly, the ALJ must analyze the evidence in the record and determine whether the light duty work assigned to the claimant is not minimal and is work that she would have performed before the work-related injury."

The Court further noted:

> In *Livingood*, the claimant, a forklift driver, could not drive a forklift due to his light duty work restrictions. Instead, while on light duty restrictions he changed forklift batteries, monitored bathrooms for vandalism, and checked to make sure freight was correctly placed around the facility. The ALJ determined that since Livingood had performed those tasks before, the work was not a make-work project, he had returned to employment and was not entitled to TTD benefits. Id. at ___. The ALJ's findings were affirmed by this Court.
>
> In this matter, Mull satisfied the first prong of the TTD benefit test because she had not reached MMI. But, the ALJ did not perform an in depth analysis of the second requirement, whether the light duty work Mull performed was a return to her regular and customary employment. However, despite the lack of an in depth analysis the facts of this matter are relatively clear, and we must agree with the Board that substantial evidence does not support the ALJ's award of TTD.

In this instance, Combs satisfied the first prong of the TTD benefit test because she did not reach MMI until March 27, 2015, the date of Dr. Owen's evaluation, as found by the ALJ. This finding is not disputed, and is supported by substantial evidence. However, the ALJ did not perform a sufficient analysis of the second requirement, whether the light duty work Combs performed from August 20, 2014

through October 18, 2014, was a return to her regular and customary employment.

The ALJ found Combs' only administered flu vaccines and charted during the time period in question, and therefore did not return to her customary, pre-injury work following her August 20, 2014 injury. However, it is unclear if the ALJ is referring to the time period from August 20, 2014 through October 1, 2014 in which Combs testified she returned to her position as operating nurse position, or from October 1, 2014 through October 18, 2014 where she was transferred to different departments to first administer flu shots and fit tests, and then to data entry. The ALJ additionally failed to determine whether this was minimal work, or contained duties performed prior to the date of injury.

At the deposition, Combs testified she returned to her nursing job in the operating room, "with the exception of the lifting and pulling, the first few hours of my job." She would chart, open up rooms to prepare them for operations, lift items within her ten pound restriction, and perform other tasks as long as they fell within her restrictions. Combs stated she would not bend, stoop, squat, crawl, or climb stairs. On October 1, 2014, she was transferred to the Employee Health Department to

administer flu shot and perform fit testing due to her increased restrictions. She was then put in the quality department, performing chart abstraction and data entry. By this time she was earning the same amount of pay, but working fewer hours as a result of her restrictions. On either October 17 or 19, 2014, Combs testified she was restricted completely from work. At the hearing, Combs provided similar testimony stating she continued to work as an operating room nurse until October 1, 2014, "just not lifting, but I was getting left in rooms without help." She was then moved to administer flu vaccinations and fit tests, and then to data entry until October 17 or 19th, 2014.

Based on Combs' testimony, upon which the ALJ solely relied in her determination, we find the analysis insufficient. Therefore, we vacate the award of TTD benefits, and remand to the ALJ for an analysis addressing the entirety of Combs' return to work following her work injury, including her return as an operating room nurse, her transfer to the Employee Health Department, and then to the quality department performing chart abstraction and data entry, and whether these duties qualify as a return to the type of work which is customary for Combs or she had

been performing prior to being injured pursuant to Wise, Helms, and Mitchell.

Accordingly, the July 28, 2015 Opinion, Award and Order and the September 4, 2015 order on petition for reconsideration by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED IN PART AND VACATED IN PART.** This claim is **REMANDED** for entry of an amended decision in conformity with the views expressed herein.

ALL CONCUR.

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