

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 30, 2014

CLAIM NO. 200993094

T & E MILLER, LLC
D/B/A MR. TRANSMISSION

PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE**

MIKE NEWTON
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

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

* * * * *

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

ALVEY, Chairman. T&E Miller, LLC, d/b/a Mr. Transmission ("Mr. Transmission") appeals from the Opinion and Award rendered July 22, 2014 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), awarding Michael Newton ("Newton") temporary total disability ("TTD") benefits,

permanent partial disability ("PPD") benefits and medical benefits. Mr. Transmission also seeks review of the orders on the petitions for reconsideration rendered August 28, 2014. On appeal, Mr. Transmission argues the ALJ erred in relying upon Dr. Craig Roberts' assessment of impairment since it was rendered prior to Newton attaining maximum medical improvement ("MMI"). For the foregoing reasons, we agree. The ALJ's decision is affirmed in part, vacated in part, and remanded.

Newton filed a Form 101 on May 16, 2011 alleging he was injured on March 20, 2009 and June 30, 2009 while working for Mr. Transmission as a mechanic. On March 20, 2009, Newton alleged he injured his right shoulder, arm, elbow, wrist and hand while working on a transmission using a pry bar. He also alleged he was diagnosed with carpal tunnel syndrome ("CTS") on June 30, 2009. Newton also alleged a psychological injury.

Newton testified by deposition on August 3, 2011 and at the hearing held May 23, 2014. Newton, who is right hand dominant, began working for Mr. Transmission in July 2008. Newton testified that on March 20, 2009, he was manipulating two pry bars to install an exhaust pipe when he heard a pop in his right shoulder. He experienced immediate pain from his right shoulder, down his right arm, and into

his wrist and fingers. He sought medical treatment the following day with Dr. Stewart Spalding, who took x-rays, prescribed pain medication, and restricted him to one-handed duty. Dr. Spalding referred Newton to Kleinert Kutz Hand Care Center. An EMG/NCV study was done on June 30, 2009, which showed right CTS. Newton was referred to Dr. Richard Dubou and Dr. David Rouben. After reviewing a right shoulder MRI, Dr. Rouben referred Newton to Dr. G. Jeffery Popham. Dr. Popham performed three surgeries on his right shoulder in January 2010, November 2010 and February 2013. After the third procedure, Newton testified his right shoulder is better, but he still experiences symptoms. Dr. Popham released Newton from his care in August 2013.

Newton testified he still experiences pain in his shoulder and states he can only lift fifteen to twenty pounds with the right arm. He experiences spasms throughout his right arm and into his wrist, as well as numbness and tingling in two of the fingers on his right hand. He also indicated his right arm begins to burn and feels heavy if he holds it overhead for a period of time. Newton also testified about the psychological toll his work injuries have caused him.

Newton did not return to work for Mr. Transmission after the March 20, 2009 work accident. Following the third

surgery, Newton worked for approximately three weeks driving a tow motor for Penske Cross Dock, but stopped due to his shoulder symptoms. At the time of the hearing, Newton testified he had been working part-time for two weeks at Tom's Automotive doing small maintenance jobs, oil changes and brake work.

Voluminous medical records were filed by the parties documenting Newton's right upper extremity treatment. On March 21, 2009, Newton complained to Dr. Spalding of right hand and wrist tightness, pain and weakness. Newton was referred to Kleinert Kutz Hand Care Center and treated there on several occasions from April 14, 2009 to July 7, 2009. A June 30, 2009 EMG/NCV study supported a diagnosis of right CTS. Newton underwent a course of physical therapy and was restricted from using his right arm. On July 7, 2009, Newton was diagnosed with biceps tendonitis, CTS and lateral epicondylitis. Newton was referred to a shoulder surgeon and another hand specialist for a second opinion. Newton treated with Dr. Dubou on three occasions from August to October 2009 for his CTS and elbow complaints. He was prescribed medications and home exercises were recommended.

Newton briefly treated with Dr. Rouben for his right shoulder complaints. After noting the October 2, 2009

right shoulder MRI confirmed a high-grade tear of the subscapularis muscle and a partial tear of the supraspinatus tendon, Dr. Rouben restricted Newton from work and referred him to Dr. Popham.

Dr. Popham treated Newton for his right shoulder from December 2009 to August 2013. Dr. Popham performed a right shoulder arthroscopy with debridement, subacromial decompression and rotator cuff repair on January 22, 2010. Newton continued to experience shoulder complaints despite the surgery and post-operative physical therapy. Subsequently, Dr. Popham performed a second procedure on Newton's right shoulder on November 12, 2010. After a period of recovery, on March 31, 2011, Dr. Popham noted Newton reached MMI. He recommended vocational retraining and continuing oral medication for right shoulder pain. Dr. Popham noted no additional surgery was indicated at that time. He restricted Newton from repetitive overhead use and lifting over twenty pounds with his right arm. Thereafter, Newton treated with Dr. Popham on a monthly basis and continued to complain of shoulder pain. Despite Newton's ongoing pain, Dr. Popham noted on January 12, 2012, he was still at MMI and unlikely to improve in the future.

Dr. Popham ordered another right shoulder MRI due to Newton's ongoing shoulder complaints, which was performed

on March 16, 2012. Dr. Popham determined the MRI showed a full thickness upper border subscapularis tear with progression since his previous MRI, and partial thickness tear of the infraspinatus and supraspinatus tendons. On March 29, 2012, Dr. Popham recommended surgery and opined it was related to the original work injury of March 20, 2009.

Mr. Transmission filed a medical dispute on May 16, 2012, challenging the work-relatedness and necessity of the recommended third surgery, and Dr. Popham was added as a party. The claim was bifurcated to address the work-relatedness and compensability of the recommended surgery.

In an Interlocutory Opinion and Award rendered November 21, 2012, the ALJ found Dr. Popham most convincing and determined the recommended surgery was reasonable, necessary and causally related. The ALJ ordered Mr. Transmission to pay for the recommended treatment for Newton's right shoulder condition, and found it liable for all reasonable and necessary medical expenses for treatment of the right shoulder injury. The ALJ placed the claim in abeyance pending MMI from the surgical procedure and awarded Newton TTD benefits from the date of surgery until MMI was achieved or he could return to his usual and customary work.

On February 1, 2013, Dr. Popham performed a right shoulder arthroscopy with extensive bursectomy and

debridement, subacromial decompression, suscapularis tendon repair, and biceps tendesis. Following a course of physical therapy and follow-up care, on August 29, 2013, Dr. Popham opined Newton had reached MMI, and returned him to full duty work without restriction. He prescribed Norco for occasional pain and advised Newton to follow-up as needed. The ALJ removed the claim from abeyance on December 9, 2013.

Prior to the November 21, 2012 Interlocutory Opinion, each party submitted multiple reports. Mr. Transmission filed the May 20, 2011 and October 2, 2011 reports of Dr. Mark Gladstein, the May 11, 2012 report of Dr. Michael Moskal, and the March 27, 2012 psychiatric report of Dr. Douglas Ruth. It also filed the October 20, 2011 vocational report of Dr. Ralph Crystal.

Newton filed the June 16, 2011 psychological report of Dr. Greg Perri. Newton also filed the January 26, 2012 report of Dr. Roberts which was prepared following Newton's first and second shoulder procedures, but prior to Dr. Popham's recommendation for a third shoulder procedure performed in February 2013.

In the January 26, 2012 report, Dr. Roberts indicated he reviewed the medical records, including the treatment records of Dr. Popham from December 3, 2009 to December 1, 2011. Dr. Roberts diagnosed "right shoulder

partial rotator cuff tear with impingement syndrome and labral tear partial biceps tendon tear which required surgery x 2 with residual right shoulder rotator cuff dysfunction and post traumatic arthrofibrosis" due to the March 20, 2009 work-related injury. Dr. Roberts found Newton had attained MMI. Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Roberts assessed a 10% impairment rating for loss of shoulder motion and a 3% impairment rating for pain, yielding a 13% impairment rating for Newton's shoulder condition. Dr. Roberts opined Newton's injuries were permanent and restricted him from overhead work, repetitive reaching or carrying, and lifting greater than ten pounds. Dr. Roberts stated Newton "will require future medical treatment including periodic physician visits, diagnostic imaging, and right shoulder arthroscopy in the future."

In an April 14, 2012 supplement, Dr. Roberts stated he agreed with Dr. Gladstein's diagnosis of work-related lateral epicondylitis, but opined it was not ratable. Dr. Roberts stated Newton's CTS "as confirmed by EMGs are the result of his March 20, 2009, work-related injury based on the information I have available to me." Dr. Roberts assessed a 6% impairment rating for the CTS

pursuant to the AMA Guides. After combining the 13% impairment rating for the shoulder condition and the 6% impairment rating for the CTS, he determined Newton had an 18% impairment rating pursuant to the AMA Guides. Dr. Roberts opined Newton requires additional medical treatment including periodic physician's visits, diagnostic imaging, and right carpal tunnel release in the future. He did not believe Newton needed elbow surgery. Dr. Roberts did not reconsider or reassess the impairment rating for the shoulder condition after the 2013 surgery.

Dr. Popham prepared an MMI and Permanent Impairment Determination form subsequent to the third shoulder surgery, on September 26, 2013. It reflects Newton attained MMI on August 29, 2013. Dr. Popham assessed a 7% impairment rating pursuant to the AMA Guides, and stated Newton does not have any work restrictions. Dr. Popham recommended oral medications for pain, and possible additional physical therapy. No other physician rendered an opinion regarding impairment or restrictions following the December 21, 2012 Interlocutory Opinion and the February 1, 2013 shoulder surgery.

The May 23, 2014 benefit review conference order and memorandum identified the following contested issues: benefits per KRS 342.730, work-relatedness/causation of the

CTS and psychological injuries only, unpaid or contested medical expenses, injury as defined by the Act (psychological and CTS), exclusion for pre-existing disability/impairment (psychological only), TTD, out of network treatment, and MMI for the time between the last two TTD periods.

In the July 22, 2014 Opinion and Award, the ALJ incorporated all previous records and depositions summarized in the interlocutory opinion. He then summarized the evidence, including Dr. Popham's updated records subsequent to the third surgical procedure. The ALJ did not summarize the MMI and Permanent Impairment Determination Form prepared by Dr. Popham on September 26, 2013.

Regarding Newton's psychological condition, the ALJ found the opinions of Dr. Ruth most persuasive. In accordance with Dr. Ruth's opinions, the ALJ determined Newton sustained a 2% psychological impairment rating pursuant to the AMA Guides, 2nd Edition, due to the work injury. He noted Newton is not prohibited by the psychological condition from returning to the same type of work he performed before the work injury.

The ALJ then noted Dr. Tuna Ozyurekoglu of Kleinert Kutz Hand Care Center, diagnosed right CTS which was confirmed by EMG studies. He stated Dr. Roberts related

Newton's CTS to the work injury. Based upon the opinions of Dr. Roberts and Dr. Ozurekoglu, the ALJ found Newton's CTS constituted a work-related injury.

Regarding benefits pursuant to KRS 342.730, the ALJ found the reports of Dr. Roberts most persuasive and stated as follows:

19. The ALJ therefore finds, based upon the opinion of Dr. Roberts that the Plaintiff has a whole person impairment of 18% and that he reached maximum medical improvement as of the date of Dr. Roberts Examination on January 26, 2012. When the impairment assessed by Dr. Roberts is added to the psychological impairment previously found, the Plaintiff's combined whole person impairment is 20%. The ALJ so finds.

20. Dr. Roberts has also restricted the Plaintiff from any overhead work or repetitive reaching, lifting, or carrying greater than 10 pounds. This restriction is consistent with the Plaintiff's own statements that he can no longer perform overhead work and the facts that demonstrate that he has not returned to any such work despite earning less money in his subsequent jobs. The ALJ therefore finds based upon the Plaintiff's testimony and the opinions of Dr. Roberts that the Plaintiff does not retain the ability to return to the same type of work.

The ALJ determined Newton reached MMI on January 26, 2012 and was underpaid TTD benefits. He noted the parties stipulated Mr. Transmission voluntarily paid TTD benefits

from March 21, 2009 to August 6, 2010; August 19, 2010 to October 12, 2011; and February 1, 2013 to September 12, 2013 for a total of \$75,694.28.

The ALJ awarded TTD benefits from March 3, 2009 through January 26, 2012, and thereafter PPD benefits based upon a 20% impairment rating commencing on January 27, 2012. The ALJ also awarded medical expenses as may be reasonably required for the cure and relief from the effects of the work-related injury.

Both parties filed petitions for reconsideration. Newton requested the ALJ amend the commencement date of his PPD benefits to the date of injury, March 2, 2009, and suspend PPD benefits during the periods of TTD benefits already paid. Newton also requested a specific finding regarding compensability of outstanding bills from the Injured Workers' Pharmacy.

Mr. Transmission filed a petition for reconsideration arguing, as it does on appeal, the ALJ erred in relying upon Dr. Roberts' assessment of impairment for Newton's shoulder condition since it was rendered over two years previously and did not take the third shoulder surgery into consideration. Mr. Transmission requested the ALJ amend his opinion to find Newton sustained a 7% impairment rating due to his shoulder condition in

accordance with Dr. Popham's uncontroverted impairment rating rendered after the third surgery. For the same reasons, Mr. Transmission also argued the ALJ erred in finding the three multiplier applicable. Mr. Transmission also requested the ALJ perform an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). Mr. Transmission argued the ALJ erred in finding Newton's CTS causally related to the work event and in failing to address the out-of-network billings of Injured Workers' Pharmacy.

On August 28, 2014, the ALJ sustained Newton's petition and amended the award to reflect the PPD benefits commence on the date of injury, March 2, 2009. The ALJ also found Mr. Transmission and/or its insurance carrier responsible for all reasonable and necessary pharmaceutical medical expenses, particularly the past medical expenses from Injured Workers' Pharmacy. On the same date, the ALJ denied in part and sustained in part Mr. Transmission's petition. The ALJ made the same finding regarding the outstanding pharmaceutical medical expenses, but did not address Mr. Transmission's arguments relating to the reliance upon Dr. Roberts' opinions.

On appeal, Mr. Transmission argues the ALJ erred in relying upon Dr. Roberts' 18% impairment rating. It

states Dr. Roberts' opinions were rendered before the ALJ's November 21, 2012 Interlocutory Opinion, in which he determined the third surgical procedure was compensable and Newton had not attained MMI. Subsequently, Newton in fact underwent the third shoulder surgery on February 1, 2013.

Mr. Transmission points out no additional evidence from Dr. Roberts or any other physician, other than Dr. Popham, was offered after the interlocutory opinion and third shoulder procedure. The only evidence of permanent impairment submitted after Newton attained MMI from the third shoulder surgery came from Dr. Popham on September 6, 2013, who assessed a 7% impairment rating. Mr. Transmission argues Dr. Roberts' assessment of impairment failed to comport to the AMA Guides, which states an impairment cannot be permanent until the clinical findings indicate the attainment of MMI. In this instance, the interlocutory opinion establishes Newton had not reached MMI with regard to his shoulder. Mr. Transmission requests the Board vacate the ALJ's finding on the issue of permanent impairment for Newton's physical injury and remand the claim with instructions to "enter an Award based upon the only valid alternative rating contained in the record, Dr. Popham's 7% assessment."

As the claimant in a workers' compensation proceeding, Newton had the burden of proving each of the essential elements of his cause of action, including extent and duration of disability. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Newton was successful in his 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

At the outset, we find substantial evidence exists to support the ALJ's determination Newton sustained right CTS and psychological trauma due to the work event of March 20, 2009, each warranting a permanent impairment rating. The ALJ found the psychiatric opinions of Dr. Ruth most persuasive. In his March 27, 2012 report, Dr. Ruth diagnosed Newton with depression due to his loss of employment stemming from the March 20, 2009 work event. Should Newton not pursue further treatment or it is determined he has attained MMI, Dr. Ruth assessed a 2% impairment rating for his work-related depression pursuant

to the AMA Guides, 2nd Edition. He also determined psychiatric restrictions unnecessary. Dr. Ruth's opinions constitute substantial evidence supporting the ALJ's determination regarding Newton's psychiatric condition and impairment, and therefore will not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Likewise, the ALJ's determination Newton's CTS constitutes an injury as defined by the Act and is work-related is supported by substantial evidence. As noted by the ALJ, Newton's CTS was confirmed by EMG studies on two occasions on June 30, 2009 and August 22, 2011. Dr. Ozyurekoglu diagnosed CTS based upon his examination and diagnostic studies. In his April 14, 2012 report, Dr. Roberts opined Newton's CTS is the result of his March 20, 2009 work injury. Therefore, the diagnostic studies, the treatment records of Dr. Ozyurekoglu, and the report of Dr. Roberts constitute substantial evidence supporting the ALJ's determination Newton sustained an injury as defined by the Act in the form of CTS, and is work-related. Special Fund v. Francis, supra.

The ALJ relied on the opinion of Dr. Roberts in assessing an impairment rating for Newton's physical injuries. In the April 14, 2012 report, Dr. Roberts assessed a 6% impairment rating for the CTS pursuant to the

AMA Guides. The ALJ's reliance on Dr. Roberts' impairment rating for Newton's CTS constitutes substantial evidence and will not be disturbed on appeal.

With that said, we vacate and remand regarding the ALJ's analysis of Newton's shoulder impairment. We begin by observing the ALJ failed to make a specific finding of whether Newton's shoulder injury is related to the March 20, 2009 work event. While the ALJ determined the third shoulder surgery recommended by Dr. Popham was reasonable, necessary and work-related in the November 21, 2012 Interlocutory Opinion, his determinations there were not final and appealable and were not adopted or incorporated in the final opinion. Therefore, before the ALJ can engage in an analysis regarding entitlement to benefits pursuant to KRS 342.730, he must first make a specific finding of whether Newton sustained a shoulder injury due to the March 20, 2009 work event and state the evidence upon which he relied in making this determination. While we acknowledge substantial evidence indeed exists to support a finding of a work-related shoulder injury, the Board cannot assume such finding was made by the ALJ. Therefore, we vacate and remand the claim to the ALJ for a determination of whether Newton sustained a right shoulder injury as defined by the Act due to the March 20, 2009 work event.

Assuming Newton sustained a compensable shoulder injury, the ALJ erred in relying upon the January 26, 2012 opinions of Dr. Roberts in determining Newton reached MMI on January 26, 2012 and in his assessment of impairment for his right shoulder condition. In the July 22, 2014 opinion, the ALJ found Newton reached MMI on the date of Dr. Roberts' examination on January 26, 2012. MMI has been defined by the Supreme Court of Kentucky, and "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). The Court also found "the need for additional treatment does not preclude a finding that a worker is at MMI." Id. at 776. In that case, the Court was not convinced the evidence compelled the ALJ to determine the physician relied upon by the ALJ prematurely rated impairment or that conflicting evidence was more credible. Id.

Here, Dr. Roberts found Newton had attained MMI regarding his work-related shoulder injury at the time of his January 26, 2012 examination, and assessed a 13% impairment rating pursuant to the AMA Guides. Subsequently, Newton's treating physician recommended a third surgical procedure for his right shoulder injury after an MRI revealed additional tears, which was challenged by Mr.

Transmission. The ALJ rendered an interlocutory opinion on November 21, 2012 finding the proposed shoulder surgery reasonable, necessary and work-related. The ALJ placed the claim in abeyance pending MMI from the surgical procedure and awarded Newton TTD benefits from the date of surgery until MMI is achieved or he can return to his usual and customary work. The surgery was subsequently performed on February 1, 2013, and his treating physician determined he reached MMI on August 29, 2013. Dr. Roberts' did not re-evaluate Newton following his third surgery.

We find by virtue of the November 21, 2012 interlocutory order and resultant February 1, 2013 shoulder surgery, Newton could not have reached MMI from his right shoulder condition until after his last surgery. By finding in favor of Newton regarding the compensability of the shoulder surgery in the interlocutory opinion, the ALJ also determined he had not attained MMI from his shoulder injury. Therefore, Dr. Roberts' opinion Newton had attained MMI at the time of his January 26, 2012 evaluation, rendered prior to the interlocutory opinion and third surgery, could not be relied upon in determining Newton's impairment rating. On remand, the ALJ is instructed to determine when Newton reached MMI from his last shoulder surgery based upon the evidence in the record.

For similar reasons, we also determine the ALJ erred in relying upon Dr. Roberts' assessment of impairment for his shoulder condition since it was rendered prematurely. Section 2.4 of the AMA Guides provide "[a]n impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of [MMI]." Likewise, "[i]mpairment is considered to be permanent 'when it has reached maximum medical improvement (MMI), meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment.'" Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 217 (Ky. 2006)(*citing* to the AMA Guides, page 2, §1.2).

Dr. Roberts' assessment of permanent impairment for Newton's shoulder injury does not constitute substantial evidence since it was rendered prematurely. Dr. Roberts assessed a 13% impairment rating for Newton's shoulder injury on January 26, 2012. Within approximately two months of that opinion, Newton's treating physician recommended a third shoulder procedure based upon a new MRI obtained in March 2012. After the ALJ found the third surgery compensable in the November 2012 Interlocutory Opinion, Newton indeed underwent the third surgical procedure performed by Dr. Popham on February 1, 2013. Based upon the

events which occurred following the rendition of Dr. Roberts' January 26, 2012 opinion, it cannot support a finding Newton's shoulder condition is permanent. Although evidence in the record supports a finding of a shoulder injury, the evidence relied upon by the ALJ does not demonstrate Newton achieved MMI from his shoulder condition, which is a prerequisite to assessing a permanent impairment rating.

We also note in his brief before the ALJ, Newton requested the ALJ award PPD benefits for his shoulder injury based upon the 7% impairment rating assessed by Dr. Popham on September 26, 2013, and not upon the 13% impairment rating assessed by Dr. Roberts. Second, the ALJ did not summarize the September 26, 2013 MMI and Permanent Impairment Determination form prepared by Dr. Popham in the July 22, 2014 opinion. The ALJ failed to address this issue in the August 28, 2014 order on reconsideration despite Mr. Transmission's request.

Therefore, we vacate and remand for the ALJ to reconsider the issue of Newton's permanent partial disability, if any, relating to his shoulder condition after he achieved MMI.

We additionally vacate and remand the claim for a proper determination and analysis regarding entitlement of

TTD benefits and to correct a typographical error appearing in the award section of the July 22, 2014 opinion and August 28, 2014 order on reconsideration. This Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

KRS 342.0011(11)(a) defines TTD as the condition of an employee who has not reached MMI from and injury and has not reached a level of improvement that would permit a return to employment. This definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

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 657, 659 (Ky. 2000), the Supreme Court further explained:

"[i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she 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, 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.

TTD is a factual finding in which the ALJ is called upon to analyze the evidence presented and determine the date the injured employee either: 1) reaches MMI; or 2) attains a level of improvement such that he is capable of returning to gainful employment. KRS 342.0011(11); W.L.

Harper Const. Co., Inc. v. Baker, supra; Central Kentucky Steel v. Wise, supra. Generally the duration of an award of TTD may be ordered only through the earlier of those two dates. Thus, an award of TTD benefits means the employee has not reached MMI and has not attained a level of improvement which would permit the employee to return to the type of work that is customary or that she was performing at the time of the injury.

In the July 22, 2014 opinion, the ALJ acknowledged Mr. Transmission voluntarily paid Newton TTD benefits from March 21, 2009 through August 6, 2010; August 19, 2010 through August 3, 2011; and February 1, 2013 through September 12, 2013, for a total of \$70,155.68. The ALJ then found "in accordance with the foregoing that the Plaintiff reached [MMI] on January 26, 2012, and that there has consequently been an underpayment of [TTD] benefits." The ALJ awarded Newton TTD benefits from March 3, 2009 through January 26, 2012.

The ALJ failed to provide any analysis regarding Newton's entitlement to TTD subsequent to January 26, 2012. We have already determined the ALJ cannot rely upon January 26, 2012 as the date Newton attained MMI since he subsequently underwent a third surgical procedure on February 1, 2013 pursuant to an interlocutory order

rendered November 21, 2012. Likewise, the opinion does not address whether Newton attained a level of improvement enabling him to return to gainful employment. Significantly, the parties stipulated TTD benefits were paid from February to September, 2013. Therefore, the ALJ's analysis and findings fall short of what is required. The claim is vacated and remanded to the ALJ for a proper analysis and findings to determine the appropriate period of TTD benefits.

Finally, the "Award" section in both the July 22, 2014 opinion and August 28, 2014 order on reconsideration contain a typographical error regarding the date of injury. In the July 22, 2014 opinion, the ALJ awarded TTD benefits from "March 3, 2009" through January 26, 2012. In the August 28, 2014 order on reconsideration, the ALJ order the date of commencement of PPD benefits be amended to "reflect the Plaintiff's date of injury of March 2, 2009. . ." It is undisputed Newton's date of injury is March 20, 2009. Therefore, on remand, the ALJ is directed to correct the award section to reflect the correct date of injury as March 20, 2009.

Accordingly, the Opinion and Award rendered July 22, 2014 and the August 28, 2014 orders on petition for reconsideration, by Hon. Jonathan R. Weatherby,

Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART.** This claim is **REMANDED** for further findings to determine whether Newton sustained a right shoulder injury as defined by the Act due to the March 20, 2009 work event, when he reached MMI from such injury, whether it warrants a permanent impairment rating following the attainment of MMI, and an award of the appropriate period of TTD benefits and PPD benefits, in conformity with the views expressed herein.

ALL CONCUR.

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