OPINION ENTERED: JUNE 28, 2012

CLAIM NO. 201094935

TAWANDA LINDSAY PETITIONER

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

ALCOA/REYNOLDS METALS, INC.
and WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

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

SMITH, Member. Tawanda Lindsay ("Lindsay"), appeals from the January 24, 2012 Opinion and Order on Remand rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), setting out additional findings relating to Lindsay's entitlement to temporary total disability ("TTD") benefits. Lindsay also appeals from the February 20, 2012 Order overruling her petition for reconsideration. On appeal, Lindsay argues the ALJ overlooked/misconstrued controlling

precedent and erred in utilizing an incorrect standard to determine the award of temporary total disability benefits.

Lindsay alleged injuries to her left shoulder occurring on July 22, 2008, January 19, 2009, and September 1, 2009 while employed by Alcoa/Reynolds Metal Co. ("Reynolds"). ALJ Howard E. Frasier, Jr. rendered an Opinion on January 31, 2011 awarding permanent partial disability ("PPD") benefits, three periods of TTD benefits, and medical benefits.

Reynolds appealed the award of TTD benefits and on May 3, 2011, the Board rendered its decision vacating in part and remanding. Relevant portions of the Board's opinion are as follows:

> As an initial matter, we note the January 31, 2011, opinion and order reveals the ALJ determined Lindsay sustained a temporary injury on January 22, 2008, which resolved prior to the injury occurring on January 19, 2009. Because Lindsay did not miss work following the first injury, the ALJ determined Lindsay was not entitled to TTD benefits as a result of the first injury. The ALJ further determined Lindsay sustained an injury on January 19, 2009, and an aggravation of that injury on September 1, 2009, which, in combination with the January 19, 2009, injury, resulted in the need for left shoulder arthroscopy. The ALJ found as follows:
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> > In regard to the injury of January 19, 2009, the

> undersigned finds the Plaintiff's symptoms did not fully resolve prior to the aggravation of September 1, 2009, and her subsequent surgery, based on the medical evidence, and the Plaintiff did not reach MMI until she was released by Dr. Kilambi after her surgery on May 6, 2010.

The first award of TTD benefits about which Reynolds complains runs from February 13, 2009, to July 21, 2009. In the January 31, 2011, opinion and order, the ALJ concluded Dr. Steinbock, "as supported both by the testimony of the Plaintiff and Ms. Mudd, restricted the Plaintiff in her work activities until July 21, 2009." The ALJ, in the February 16, 2011, order ruling on Reynolds' petition for reconsideration, reiterated his reliance on certain restrictions issued by Dr. Steinbock, as testified to by Lindsay and, allegedly, by Mudd, stating as follows: "The undersigned also finds that the work restrictions by Dr. Steinbock did make its way into evidence through the credible testimony by BOTH the Plaintiff and Ms. Mudd." (emphasis in original)

. . . .

In light of the lack of medical evidence from Dr. Steinbock regarding work restrictions from February 13, 2009, through July 21, 2009, this Board believes the ALJ's reliance on Dr. Steinbock's opinions, as recounted in Lindsay's testimony, is misplaced. While it is true *extent of disability* "is not always exclusively a matter of medical testimony," and lay testimony may be relied upon in certain instances

in lieu of medical testimony, questions regarding *work restrictions* and *work releases* must be resolved by medical proof rendered by medical experts. Hush v. Abrams, 584 S.W.2d 48, 50 (Ky. 1979). Mere testimony from a claimant regarding alleged work restrictions from a physician, without the benefit of supporting medical records or off-work slips, is insufficient to establish entitlement to TTD benefits.

That said, in Lindsay's response brief, she points to certain work restrictions rendered Dr. Thomas Loeb in his November 19, 2010, deposition which supports entitlement to TTD benefits from February 13, 2009, through July 21, 2009. Specifically, Lindsay asserts as follows:

> *However, Ms. Lindsay was in fact assigned restrictions during the period of February 13, 2009 [sic] through July 21, 2009 [sic] by the Employer's Independent Medical Examiner, Dr. Thomas Loeb.* Dr. Loeb assessed restrictions of no lifting above chest level and no lifting greater than 20 pounds from waist to chest. (Loeb Depo p. 17).

Clearly, Dr. Loeb, in his report and during his deposition, imposed certain restrictions which have been previously set forth, verbatim. Dr. Loeb's opinions are, somewhat conflicting, since he asserted, in his deposition and report, it was medically appropriate for OPS to release Lindsay to full duty work following the January 19, 2009, injury. Despite noting Dr. Loeb's testimony in the "summary of evidence" section of the January 31,

2011, opinion and order, the ALJ failed to carry out an analysis of entitlement to TTD benefits based on the applicable law and the opinions of Dr. Loeb.[footnote omitted] Further, the one sentence devoted to Dr. Loeb's opinions in the ALJ's February 16, 2011, order ruling on the petition for reconsideration is insufficient, in light of Dr. Loeb's seemingly conflicting testimony on the issue of Lindsay's ability to return to full duty work from February 13, 2009, through July 21, 2009. The ALJ's January 31, 2011, opinion and order clearly indicates the ALJ relied upon the testimony of Lindsay and Mudd regarding Dr. Steinbock's supposed work restrictions during this time period in determining Lindsay's entitlement to TTD benefits from February 13, 2009, through July 21, 2009. The ALJ's analysis of entitlement to TTD benefits started and stopped there.

Lindsay's testimony regarding Dr. Steinbock's alleged work restrictions, without the support of medical records or off-work slips generated by Dr. Steinbock, does not constitute substantial evidence which supports an award of TTD benefits from February 13, 2009, through July 21, 2009. While there certainly appears to be medical evidence of substance in the record in support of the ALJ's award of TTD benefits during the period in question, it is the function of the ALJ to correctly analyze the evidence and determine whether Lindsay is entitled to TTD benefits for the period beginning February 13, 2009, and ending July 21, 2009.

Clearly, the ALJ's reliance on certain evidence he believed to be in the record in awarding TTD benefits for

the period in question is misplaced. Therefore, that portion of the opinion, award, and order granting TTD benefits from February 13, 2009, through July 21, 2009, must be vacated and this matter remanded for a decision on Lindsay's entitlement to TTD benefits during this period based on a correct understanding of the evidence in the record. On remand, the ALJ must set forth an analysis of Lindsay's entitlement to TTD benefits following the January 19, 2009, injury pursuant to applicable law and the medical proof *in the record*. Specifically, the ALJ must make a determination whether Lindsay, following the January 19, 2009, injury and prior to the September 1, 2009, aggravation, was at MMI. If Lindsay was not at MMI, the ALJ must determine whether Lindsay had been released to "customary work" or the work she was performing at the time of the injury as defined by applicable law. Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000); KRS 342.0011(11)(a).

Regarding the second period of TTD benefits following Lindsay's alleged September 1, 2009, injury, October 19, 2009, through May 6, 2010, contested by Reynolds, it sets forth two arguments on appeal. First, Reynolds asserts, there is no evidence in the record indicating on October 17, 2009, the date she was terminated, Lindsay was incapable of performing full duty work. In fact, Reynolds asserts the record indicates restrictions were not imposed until November 12, 2009. Additionally, Reynolds argues Dr. Kilambi's restrictions of one-hand assist, imposed from November 12, 2009, through January 21, 2010, and from February 12, 2010, through May 5, 2010, could have been accommodated by Reynolds since

Mudd testified she could be placed in the position of line spot. Reynolds further asserts the job of line spot would have been a "customary" job for Lindsay. For reasons stated below, we vacate the award of TTD benefits from October 19, 2009, to May 6, 2010, and remand for additional findings.

The record clearly indicates the ALJ's award of TTD benefits beginning on October 19, 2009, is not associated with any medical restrictions but, rather, Lindsay's termination from Reynolds. The record also indicates on October 18, 2009, Lindsay was terminated due to, as Mudd testified, poor attendance. Lindsay testified she was frequently absent from work during the period of time before her termination because of problems with her left shoulder. Lindsay's termination is ultimately irrelevant to the inquiry of her entitlement to TTD benefits following the September 1, 2009, injury. Erroneously, the ALJ, in his January 31, 2011, opinion and order, draw a direct correlation between Lindsay's termination and his award of TTD benefits stating as follows: "If the Defendant had desired to limit the period of time that TTD was applicable, it should have continued to employer [sic] her instead of terminating her employment."

. . . .

A close look at the record reveals the ALJ's "inference" Lindsay's termination was brought about by certain medical restrictions and a lack of accommodation is not supported by evidence in the record. The record clearly reveals on September 1, 2009, the date of Lindsay's third injury, OPS released Lindsay to regular work as

tolerated. Dr. Kilambi's September 24, 2009, report indicates Lindsay was released to regular duty work for at least the "next four to five weeks." Despite the lack of any work restrictions imposed on Lindsay at that time and the lack of any medical evidence indicating a need to make work accommodations, Mudd, testified she preemptively moved Lindsay to a different position on September 19, 2009, on line 6. Lindsay was terminated on October 18, 2009, for poor attendance. Dr. Kilambi's October 28, 2009, medical record, generated after Lindsay's October 18, 2009, termination, indicates "[w]ork restrictions are given." As noted, this medical record does not detail the specific restrictions, and Lindsay failed to provide any documentation revealing the precise nature of Dr. Kilambi's October 28, 2009, work restrictions. The first indication of Dr. Kilambi's specific work restrictions appears on the November 12, 2009, "work restriction statement" from Orthopaedic Associates filed with Lindsay's Form 101. The November 12, 2009, "work restriction statement" indicates Lindsay was restricted to modified/light duty work, "primarily one-handed work (with injured hand assisting on light tasks)."

Thus, based on the medical evidence in the record, there is no support of the ALJ's inference Lindsay's termination on October 18, 2009, coincided with Reynolds' inability to accommodate certain medical restrictions, since absolutely no explicit medical restrictions existed at the time of Lindsay's termination. Should the ALJ determine the medical restrictions set forth in Dr. Kilambi's November 12, 2009, "work

restriction statement" were applicable at the time of Dr. Kilambi's October 28, 2009, medical record indicating "work restrictions are given," the ALJ may state such and initiate an award of TTD on October 28, 2009, after setting forth an appropriate analysis of whether the restrictions would have allowed Lindsay to return to her customary work at Reynolds or the type of work performed at the time of her injury. See Central Kentucky Steel v. Wise, supra.

Likewise, regarding Lindsay's entitlement to TTD following Dr. Kilambi's restrictions on November 12, 2009, the ALJ has not provided any analysis of Lindsay's entitlement to TTD benefits in the context of Dr. Kilambi's November 12, 2009, restrictions and Mudd's testimony regarding the job of "line spot" where Lindsay would have been placed based on her restrictions. We note Dr. Kilambi's November 12, 2009, restrictions did not change until after Lindsay's left shoulder arthroscopic surgery on January 22, 2010. At that time, Dr. Kilambi took Lindsay off of all work for two weeks; afterwards, a February 25, 2010, "work restriction statement" indicates Lindsay was put back on modified/light duty work, "primarily one-handed work (with injured hand assisting on light tasks)." The law is well settled that an ALJ must make sufficient findings of fact and rulings of law to adequately apprise the parties and this Board of the basis of his decision in order to permit meaningful appellate 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). On remand, the ALJ must determine whether

Lindsay could work the line spot job on a full-time basis, based on Dr. Kilambi's November 12, 2009, restrictions, and if so whether that work comprises a return to customary employment or the type of employment Lindsay was performing at the time of the injury. See Central Kentucky Steel v. Wise, supra. Therefore, the ALJ's award of TTD benefits from October 19, 2009, through May 6, 2010, is vacated and this matter is also remanded to the ALJ for additional findings.

On remand, the ALJ must consider the medical evidence in the record in determining Lindsay's entitlement to TTD benefits following Dr. Kilambi's November 12, 2009, restrictions. The ALJ must set forth adequate findings of fact regarding Lindsay's entitlement to TTD benefits during the period from October 19, 2009, to May 6, 2010.

Finally, it is clear from the language of the ALJ's order he determined Lindsay's MMI date, based on Dr. Kilambi's opinions, to be May 6, 2010. However, a review of Dr. Kilambi's medical records reveals Dr. Kilambi did not place Lindsay at MMI until June 1, 2010. Nevertheless, Dr. Kilambi did release Lindsay to full duty work on May 6, 2010. The ALJ is certainly entitled to rely on Dr. Kilambi's opinions regarding Lindsay's ability to return to full duty work on May 6, 2010, and the ALJ is entitled to terminate TTD benefits on that date. However, the language in the ALJ's order must accurately reflect the facts in the record which reveal May 6, 2010, is not the date upon which Lindsay achieved MMI but the date upon which Lindsay was returned to full duty work by Dr. Kilambi. Inquiries pertaining to MMI and a return to employment are

> factually and legally distinct. See Tokico (USA), Inc. v. Kelly, supra; See Central Kentucky Steel v. Wise, supra. Thus, the ALJ's finding regarding the MMI date of May 6, 2010, is vacated and remanded for additional findings and an award, if any, of TTD benefits.
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> Accordingly, those portions of the ALJ's January 31, 2011, opinion and order, and the ALJ's February 16, 2011, order ruling on the petition for reconsideration, awarding TTD from February 13, 2009, to July 21, 2009, and October 19, 2009, through May 6, 2010, are hereby **VACATED** and **REMANDED** for additional findings and an amended opinion and order regarding Lindsay's entitlement to TTD benefits during the two periods in question consistent with the views expressed in this opinion.

Lindsay appealed to the Court of Appeals which affirmed the Board on October 28, 2011. The case was reassigned to ALJ Rudloff who rendered an Opinion and Order on Remand on January 24, 2012. The ALJ's findings were as follows:

> As noted in the Opinion, the defendant's witness, Dora Marie Mudd, testified that the defendant dismissed the plaintiff on October 19, 2009 for poor attendance. The plaintiff missed scheduled appointments at Occupational Physician Services yet left work early to go to the emergency room for pain. On the date of her termination, according to Dr. Kilambi's records, the plaintiff had no work restrictions.
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> On November 12, 2009 Dr. Kilambi restricted the plaintiff to one–handed duty. On December 11, 2009 he added no overhead work. Dr. Kilambi performed surgery on January 22, 2010 and

restricted the plaintiff from all work for two weeks. He then released her to light duty, to resume full duty in March 2010, when he released her from his care.

The defendant assigned the plaintiff to several different assembly line positions, moving her when her duties caused her pain. Ultimately the defendant assigned the plaintiff to "line six." The plaintiff testified that as a new line, line six had many complications. She testified that she was told there was no light duty on line six.

Ms. Mudd testified that working online [sic] six involved threading the machine and pressing a button. She demonstrated by video that the line was at waist height, about three feet off the ground. She testified that the defendant could have accommodated the plaintiff's restrictions, but the plaintiff had been terminated due to poor attendance.

As noted in the opinion, an employee is entitled to TTD benefits while she has not reached maximum medical improvement and she has not reached a level of improvement that will permit a return to employment. *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579, 580–81 (Ky. App. 2004). Based on the medical evidence, the testimony and all the evidence herein, this ALJ finds that although the plaintiff had not reached MMI, she did retain the capacity to perform her usual duties until January 22, 2010. She then had surgery and lost the capacity to work for two weeks. Thereafter, Dr. Kilambi again released her to light duty. This ALJ finds that the plaintiff could have worked at her customary employment

> beginning two weeks after surgery, except that she had been terminated for poor attendance.

Lindsay filed a petition for reconsideration arguing her customary work required repetitive lifting of boxes greater than 20 pounds and repetitive work above shoulder level. She argued the line spotter job was not her customary work. Lindsay requested that the ALJ make additional findings of fact consistent with the Board's opinion.

The ALJ rendered his Order on reconsideration on February 20, 2012, denying Lindsay's petition for reconsideration, and provided in pertinent part as follows:

> The plaintiff argues that the ALJ erred in finding (1) that the job of "line spotter" constituted the plaintiff's customary work;(2) that the defendant had a job available that could accommodate the plaintiff's restrictions, had she not been terminated for cause; (3) that the plaintiff was not entitled to TTD from February 13, 2009 through July 21, 2009 and (4) that the plaintiff was not entitled to TTD from October 28, 2009. The defendant responds that no patent error exists, because the ALJ had considered these questions based on the evidence presented.
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> The ALJ agrees with the defendant. The ALJ had concluded that the available job was a kind of job customary to the plaintiff and that she could have performed that job within the restrictions designated by Dr. Kilambi.

> The ALJ further agrees with the defendant that the plaintiff could have performed this job from February 13, 2009 through July 21, 2009 within the restrictions retroactively suggested by Dr. Loeb. As stated in the Opinion on remand, the ALJ found convincing the testimony of the defendant's witness, Dora Mudd, with regard to the nature and requirements of the line spotter job. This ALJ does not discount ALJ Frazier's finding that the plaintiff was also a credible witness; however, with regard to how the lines [sic] spotter job was performed and whether the defendant could have accommodated the medical restrictions, this ALJ found Ms. Mudd more credible.

On appeal, Lindsay argues the ALJ overlooked/misconstrued controlling precedent and erred in utilizing an incorrect standard to determine the award of TTD benefits. Lindsay notes the Supreme Court, in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), narrowly defined return to employment as customary work for that particular employee or the type of work he was performing prior to being injured. Lindsay notes the Court specifically found it 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. With regard to the February 13, 2009 through July 21, 2009 period, Lindsay notes Dr. Loeb assessed restrictions of no lifting above

chest level and no lifting greater than 20 pounds from waist to chest. Lindsay notes she performed three jobs for Reynolds. The cartoner job required her to repetitively lift at shoulder height. The spooler job required her to repetitively turn wheels at chest and shoulder height. Finally, she notes the warehouse job required her to repetitively stack boxes weighing greater than 20 pounds from the floor to overhead. Lindsay argues Dr. Loeb's restrictions prevented her from performing those jobs. Thus, she concludes her testimony and the restrictions from Dr. Loeb compel a finding of an award of TTD benefits for this period.

With regard to the period from October 19, 2009 through November 11, 2009, Lindsay notes she was restricted by Occupational Physician Services to regular work as tolerated beginning September 2, 2009. On September 24, 2009, Dr. Kilambi noted her difficulties in attempting to perform her customary work. Lindsay attempted to continue working at Reynolds, but her work continued to be repetitive in nature and aggravated her left shoulder condition resulting in absences for medical treatment for which she was terminated on October 18, 2009. Lindsay notes Dr. Kilambi assessed formal work restrictions on October 28, 2009. On November 12, 2009, Dr. Kilambi indicated Lindsay's work restrictions

were primarily one-handed work. Lindsay contends the reasonable inference is that the restrictions Dr. Kilambi articulated on November 12, 2009 were in effect on October 28, 2009. Lindsay contends Dr. Kilambi's restrictions would prevent her from performing her customary work.

Finally, with regard to the November 12, 2009 through May 6, 2010 period, Lindsay notes she was restricted to one-handed duty on November 12, 2009, and on January 28, 2010, Dr. Kilambi restricted her from work. On February 25, 2010, Dr. Kilambi restricted her to primarily one-handed work. On March 25, 2010, Dr. Kilambi restricted her to no overhead work and a maximum lift of 10 pounds and occasional lift of 5 pounds. On May 6, 2010, Lindsay was released to regular duty work. Lindsay argues Dr. Kilambi's restrictions prevent her from performing her customary work and Dr. Kilambi’s, medical opinion, combined with her own and Ms. Mudd’s testimony regarding customary work compel an award of TTD benefits from November 11, 2009 through May 6, 2010.

As the claimant in a workers’ compensation proceeding, Lindsay had the burden of proving each of the essential elements of her cause of action, including entitlement to TTD benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Lindsay was unsuccessful in her burden, the question on appeal is whether the evidence compels a

different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to determining whether the ALJ's findings are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal.

McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). So long as the ALJ's ruling is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We find nothing in the evidence of record which would compel a finding Lindsay is entitled to additional periods of TTD benefits beyond those awarded by the ALJ on remand. The ALJ concluded Lindsay was capable of performing the line spot job and retained the capacity to perform her usual duties until January 22, 2010 when she lost her capacity to work for two weeks due to surgery.

Lindsay's appeal turns upon whether the line spot job can be considered part of her customary work. In her deposition, Lindsay agreed that, in 2008 and 2009, she had worked all the different positions on the line and testified she had "basically worked on all the lines." She also indicated a supervisor could take her from her position to give a worker in another position a break. Ms. Mudd

testified the line spot job involved work in a seated position removing rolls of foil that stacked up on the line and placing the rolls in a bucket. The work could be performed with one hand and the rolls weighed less than one pound. Mudd stated Lindsay would have been paid at the same rate in this job.

The ALJ could reasonably conclude the line spot job was the same type of job Lindsay performed on the lines and was thus "customary" employment. It is readily apparent the job could be performed within restrictions assigned by Dr. Loeb and Dr. Kilambi and required no specialized knowledge or skill that would distinguish it from other jobs on the line. We cannot say the ALJ's finding that, with the exception of the two weeks following surgery, Lindsay was capable of performing her usual duties is clearly erroneous.

The ALJ applied the holding in Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), in reaching his determination. It is clear the ALJ applied the correct standard in reaching his determination. Further, the ALJ understood and followed the Board's directives and performed the proper analysis on remand in reaching a decision regarding the appropriate award of TTD benefits. Significantly, in the first appeal, the Board vacated and remanded with regard to the TTD issue. Implicit in the

Board's decision to vacate and remand rather than reverse and remand is a holding the record contained conflicting evidence to support differing conclusions regarding an award of TTD benefits.

Accordingly, the January 24, 2012 Opinion and Order on Remand and the February 20, 2012 Order on reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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