

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 10, 2014

CLAIM NO. 201176267

THE HARPER COMPANY

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

JOSHUA L. ZURBORG
AND HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. The Harper Company ("Harper") seeks review of the Opinion, Award and Order rendered May 13, 2014 by Hon. Chris Davis, Administrative Law Judge ("ALJ") awarding Joshua Zurborg ("Zurborg") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a work-related

low back injury occurring on August 30, 2011. Harper also seeks review of the Order on Reconsideration rendered June 24, 2014 in which the ALJ corrected a typographical error to reflect a maximum medical improvement ("MMI") date of February 26, 2013 rather than March 26, 2013, and awarding TTD benefits from the date of injury, August 30, 2011, until he attained MMI on February 26, 2013.

On appeal, Harper argues the ALJ erred in awarding TTD benefits from August 30, 2011 to November 27, 2012. Because the period of TTD benefits awarded by the ALJ is supported by substantial evidence, we affirm.

Zurborg filed a Form 101 on May 16, 2012, alleging he injured his "back and extremities" while unloading concrete forms from a truck on August 30, 2011. He attached the emergency room records from Methodist Hospital reflecting he sought treatment on the date of injury. Those records reflect Zurborg complained of low back and testicular pain radiating into his legs while moving concrete forms. After x-rays were taken, Zurborg was diagnosed with thoracic and lumbar strains and prescribed medication. He was discharged with directions to follow up with his primary care physician and released to return to regular duty work on September 2, 2011.

Zurborg testified by deposition on August 14, 2012 and March 5, 2014. He also testified at the final hearing held March 18, 2014. Zurborg was born March 24, 1983 and resides in Crestview Hills, Kentucky. He is a high school graduate and completed two semesters of college. Zurborg testified he was employed as a laborer by Harper on two occasions. His most recent employment with Harper began two weeks prior to the August 30, 2011 accident. During those two weeks, Zurborg testified he set out and picked up caution barrels, shoveled concrete, and moved concrete forms. On August 30, 2011, Zurborg and several other coworkers were unloading heavy concrete forms with a crane mounted to a truck. One of the concrete forms broke free and when Zurborg attempted to stabilize it, he felt a pop in his back, and immediate pain radiating into his legs.

Zurborg was taken to the emergency room at Methodist Hospital. He was prescribed medicine and discharged with instructions he could return to work in three to five business days. His symptoms worsened over the next couple of weeks, and he sought treatment at St. Elizabeth Family Practice in mid to late October. Zurborg was advised he needed an MRI, which was not performed because he could not afford it. He eventually treated with Chambers Medical Group, which prescribed physical therapy

and ordered an MRI. He began treating with Dr. Philip Zaacks of the Mayfield Clinic in late 2012. Dr. Zaacks administered injections and ordered additional physical therapy. Zurborg indicated Dr. Zaacks suggested he visit a pain clinic and released him from his care with restrictions. Zurborg currently experiences low back pain, muscle spasms, testicular pain, difficulty sleeping, and pain and numbness mainly in his left leg.

Zurborg testified he did not return to work following the August 30, 2011 accident, and was fired two days later for reasons unrelated to his work injury. Zurborg indicated he attempted to look for work following his injury but was unsuccessful for a period of time due to his physical condition and his limited work experience in manual labor jobs. He indicated Chambers Medical Group and Dr. Zaacks assigned restrictions prohibiting him from returning to his previous job, and he believed he was physically incapable of returning to the type of work he performed at the time he was injured. Zurborg also admitted he was incarcerated on three occasions following the work injury, from December 12, 2011 to January 9, 2012; March 15 to March 16, 2012; and August 30, 2012 to November 27, 2012. Zurborg confirmed Harper voluntarily paid TTD benefits from November 28, 2012 through March 1, 2013. Zurborg testified

he continued to look for less physically demanding employment. He began working part-time for Donato's delivering pizza on November 4, 2013, earning three hundred dollars a week.

Following the initial emergency room visit on August 30, 2011, the medical records indicate Zurborg next sought treatment with the Chambers Medical Group beginning April 16, 2012. On that date, Dr. Lawrence Jedlicka noted the mechanism of injury, complaints of mid to low back pain radiating into the left leg, testicular pain, numbness of the left thigh, and erectile dysfunction. He noted Zurborg had been unemployed since the injury. After performing an examination, Dr. Jedlicka ordered an MRI, prescribed medication, and referred Zurborg to a chiropractic evaluation and to Dr. Jeffery Fadel. He did not discuss restrictions. An April 18, 2012 lumbar MRI demonstrated degenerative desiccation and broad based annular disc bulges with mild central disc herniations at L3-4, L4-5 and L5-S1, resulting in bilateral recess stenosis and foraminal encroachment at each level, as well as mild spinal stenosis at L3-4. Dr. Erik Simms, D.C., performed a chiropractic evaluation on April 18, 2012 and recommended treatment three times a week, for three weeks. Dr. Simms also noted Zurborg had remained unemployed since the accident. On April 23,

2012, Dr. Jedlicka noted Zurborg was improving, but was still in pain. He also noted "he is working and doing things that he shouldn't do." He diagnosed a lumbar strain, prescribed medication and recommended continuing therapy and home exercises.

Zurborg returned to Chambers Medical Group on May 7, 2012 and was seen by Dr. Fadel. After performing an examination and reviewing the MRI, Dr. Fadel diagnosed a probable herniated disc at L4-5 due to the work injury. He ordered a CT myelogram to confirm his suspicions of a herniated disc. Dr. Fadel did not discuss restrictions. On May 21, 2012, Dr. Fadel ordered an evaluation for pain management.

Harper filed the September 2, 2012 report of Dr. Michael Rozen, who evaluated Zurborg at its request on August 20, 2012. Dr. Rozen diagnosed a herniated lumbar disc with L5-S1 radiculopathy in the left lower extremity and degenerative disc disease at L3-4, L4-5 and L5-S1 with disc desiccation and disc space narrowing. Dr. Rozen opined the herniated disc with L5-S1 lumbar radiculopathy in the left lower extremity was caused by the August 30, 2011 work incident, while the degenerative disc disease was not. Dr. Rozen opined Zurborg had not yet reached MMI, and therefore he was unable to assess an impairment pursuant to the

American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Likewise, Dr. Rozen declined to assign permanent restrictions, but stated "At this point in time I do not feel that he is capable of sustained remunerative employment even in a sedentary capacity and should proceed with additional diagnostic evaluation." He also noted Zurborg does not retain the physical capacity to return to the same type of work he performed at time of injury. Dr. Rozen recommended an EMG/nerve conduction study of his lower extremities and a CT myelogram of his lumbar spine. Depending upon the test results, he opined Zurborg would either be a candidate for epidural steroid injections or a lumbar microdiscectomy.

Zurborg filed the September 12, 2013 discharge summary prepared by Dr. Fadel. After noting Zurborg's treatment and performing an examination, Dr. Fadel diagnosed an aggravation of pre-existing mild degenerative lumbar disc disease from the injury at work. Although he originally thought Zurborg had a herniated disc, a second MRI completed in February 2013 showed only degenerative changes. Dr. Fadel noted Zurborg was asymptomatic prior to his work injury, and is now symptomatic despite injective and physical therapy. Dr. Fadel assessed a 5% impairment rating for the lumbar condition pursuant to the AMA Guides and

restricted him from lifting more than thirty pounds occasionally and to avoid repetitive bending, twisting, crawling and stooping. He also opined Zurborg cannot return to construction type work.

Zurborg also filed the records of Dr. Zaacks reflecting he was treated from October 31, 2012 through February 26, 2013. Dr. Zaacks administered two epidural steroid injections and several trigger point injections. Dr. Zaacks also recommended physical therapy. He stated Zurborg had myofascial pain syndrome, lumbar radiculopathy, lumbar spine degenerative disc disease, leg pain and lumbar pain. A February 26, 2013 lumbar MRI indicated minimal to moderate degenerative changes. The records of Dr. Zaacks do not discuss work restrictions.

Harper filed the November 26, 2013 report of Dr. Rozen, who evaluated Zurborg for a second time on November 13, 2013 at its request. Dr. Rozen diagnosed degenerative disc disease at L3-4, L4-5 and L5-S1, herniated lumbar disc at L4-5 and left leg lumbar radiculopathy L5 nerve root. He opined the L4-5 herniation and L5 lumbar radiculopathy are causally related to the August 30, 2011 injury. Dr. Rozen found Zurborg attained MMI on March 26, 2013 which he mistakenly stated was when the last MRI was performed. Dr. Rozen assessed a 5% impairment rating pursuant to the AMA

Guides. He restricted Zurborg from lifting over thirty pounds, and from repetitive squatting and bending, pulling, pushing or twisting. Dr. Rozen opined Zurborg does not retain the physical capacity to return to the same type of concrete work he was performing at the time of this injury, but is able to participate in sustained remunerative employment in a light to medium PDL Category. Dr. Rozen found no indication for additional medical treatment.

The March 19, 2014 benefit review conference ("BRC") order and memorandum reflects the parties stipulated TTD benefits were paid at the rate of \$734.85 from August 28, 2012¹ through March 1, 2013 for a total of \$9,867.99. It also identified benefits per KRS 342.730 and TTD benefits as contested issues.

In the May 13, 2014 opinion, the ALJ determined Zurborg's work-related low back injury warranted a 5% impairment rating and found the three multiplier applicable. The ALJ found Zurborg attained MMI on the last date he treated with any physician, March 26, 2013. Regarding the entitlement to TTD benefits, the ALJ stated as follows:

As for what date his TTD benefits
should have commenced the undersigned

¹ In its brief to the Board on appeal, Harper states the starting date of TTD benefits noted in the BRC order is erroneous and it actually began paying TTD benefits on November 28, 2012.

believes it is correct to summarize the Plaintiff's argument that his alleged bad conduct and/or incarceration does not deprive him of TTD but that the Defendant's argument is that the Plaintiff has not submitted any medical evidence supporting and award of TTD prior to August 28, 2012.

I believe the Plaintiff is correct in his assertion and analysis. Even if an injured worker is fired for a just cause not directly associated with his work injury, including drug use or possession, said firing does not eliminate or even really affect the employer's duty to pay TTD until such time as the injured worker reaches MMI or returns to work. The Plaintiff reached MMI on March 26, 2013 and thus even if he would have been able to work light, modified or even regular duty prior to that time is immaterial, except in cases where a worker simply refuses to work.

I am not persuaded by the Defendant's argument. They[sic] have pointed out the correct legal principle that an injured worker's testimony alone, without supporting medical evidence, cannot form the basis for an award of TTD. However, it is not necessary that the medical evidence be on-going and repetitive. A subsequent medical report, such as provided by Drs. Fadel and Jedlicka herein can be sufficient. The Workers' Compensation Board Opinion attached, *Alcoa/Reynolds Metals Inc. v. Tawanda Lindsay*, 2010-94935 is not entirely on point as in that claim the Board made a hybrid factual and legal finding that the facts of Dr. Loeb's report did not support an award of TTD. The facts herein are different and as a factual matter an award of TTD is

supported and the undersigned is convinced it is appropriate.

The ALJ awarded PPD benefits, TTD benefits from August 30, 2011 through March 26, 2013 and medical benefits.

Harper filed a petition for reconsideration arguing the date of MMI should be February 26, 2013 since that was the last day he received treatment from Dr. Zaacks, and when the MRI was performed. It also asserted Dr. Rozen's November 26, 2013 report contained a clerical error by identifying the last day of treatment as March 26, 2013, rather than February 26, 2013. Harper also requested the ALJ correct calculations used in determining the amount of PPD benefits. Harper asserted the same arguments it now makes on appeal regarding the appropriate period of TTD benefits. Harper argued the medical evidence supports the conclusion Zurborg was not entitled to TTD benefits prior to August 28, 2012². Importantly, Harper did not request additional findings of fact regarding the appropriate period of TTD benefits. In the order on reconsideration, the ALJ corrected the date of MMI to February 26, 2013 and amended the period of TTD benefits awarded to August 30,

² Again, in its brief to the Board, Harper indicates this date should be November 28, 2012, the day it began voluntarily paying TTD benefits.

2011 through February 26, 2013. The ALJ did not address Harper's argument regarding the period of TTD benefits.

On appeal, Harper first notes it voluntarily began payment of TTD benefits to Zurborg on November 28, 2012. It then notes TTD benefits are payable so long as MMI has not been reached and the claimant has not reached a level of improvement that which would prevent a return to employment. Harper concedes Zurborg reached MMI on February 26, 2013. However, Harper argues Zurborg was not entitled to TTD benefits until November 28, 2012. Harper points to the Methodist Hospital records which indicate Zurborg was released to regular duty work on September 2, 2011. Thereafter, it asserts none of Zurborg's treating physicians assigned work restrictions. Harper also notes Zurborg had been incarcerated for significant periods of time prior to November 27, 2012 which is partly why there is no medical documentation of TTD status. It notes the April 23, 2012 medical note of Dr. Jedlicka contradicts Zurborg's testimony he did not return to work until November 4, 2013. It also points to Zurborg's testimony indicating he would have returned to work with Harper had he not been terminated. Therefore, Harper argues based on the overwhelming and objective medical evidence, Zurborg failed in proving his entitlement to TTD benefits from

August 30, 2011 to November 28, 2012 because he was working at least part of that time and his treating physicians had not restricted him from work.

It is undisputed Zurborg is entitled to TTD benefits throughout the time frame Harper voluntarily paid them beginning November 28, 2012 through the uncontested date he attained MMI on February 26, 2013. The sole issue on appeal is whether the ALJ erred in awarding TTD benefits prior to this period, from the date of injury, August 30, 2011 through November 28, 2012.

As the claimant in a workers' compensation proceeding, Zurborg had the burden of proving each of the essential elements of his 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 Zurborg 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Temporary total disability is the condition of an employee who has not reached MMI following a work-related injury *and* who has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Both conditions must be satisfied for an employee to qualify for TTD benefits. See W.L. Harper Construction Company v.

Baker, 858 S.W.2d 202, 205 (Ky. App. 1993); Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-4 (Ky. 2005). Regarding the second prong, 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. Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 580-581 (Ky. App. 2004); Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005).

We begin by noting our agreement with the ALJ's conclusion a claimant's termination for just cause or subsequent incarceration not directly associated with a work injury does not eliminate or affect his entitlement to, or an employer's duty to pay TTD benefits. The employer is obligated to pay TTD benefits until such time as the injured worker reaches MMI or returns to the work he was performing at the time of injury regardless of the claimant's termination or misconduct resulting in incarceration.

Substantial evidence exists supporting the ALJ's determination Zurborg was temporarily totally disabled from the date of injury on August 30, 2011 through the date he attained MMI on February 26, 2013 is supported by substantial evidence of record. We acknowledge the records

from the Chambers Medical Group and the Mayfield Clinic during the time period in question do not indicate Dr. Jedlicka, Dr. Fadel or Dr. Zaacks imposed restrictions on Zurborg's work activities. Likewise, the same records do not indicate any of the three physicians released Zurborg to regular duty work with no restrictions. In fact, the medical records of Zurborg's treating physicians do not discuss the imposition of restrictions, or lack thereof, at all. Therefore, the medical records of Zurborg's treating physician are of little value on the issue of entitlement to TTD benefits since they do not discuss restrictions.

However, the subsequent September 12, 2013 report prepared by Dr. Fadel constitutes substantial evidence supporting the ALJ's determination Zurborg is entitled to TTD benefits beginning August 31, 2011 through February 26, 2013. In summarizing Zurborg's treatment history, Dr. Fadel noted he became involved with his case in May 2012. He noted Zurborg also treated with Dr. Zaacks, but was subsequently discharged due to lack of improvement and transferred to a chronic pain management physician. Dr. Fadel noted Zurborg had not returned to work at the time of his evaluation. Dr. Fadel assessed a 5% impairment rating for Zurborg's work-related lumbar condition pursuant to the AMA Guides. Dr. Fadel restricted Zurborg from lifting no

more than thirty pounds occasionally and to avoid repetitive bending, twisting, crawling and stooping. He also opined Zurborg could not "return to that type of construction work in my medical opinion." Dr. Fadel's report constitutes substantial evidence upon which the ALJ may rely in awarding TTD benefits from the date of injury until the undisputed time Zurborg attained MMI on February 26, 2013.

Harper's arguments on appeal are unpersuasive in light of the findings provided by its own evaluating physician, Dr. Rozen, who examined Zurborg on August 20, 2012, which is during the time period in question and prior to its voluntary commencement of TTD benefits. In his September 2, 2012 report, Dr. Rozen diagnosed Zurborg with a herniated lumbar disc with L5-S1 radiculopathy in his left lower extremity due to the August 30, 2011 work incident. Dr. Rozen opined Zurborg had not yet reached MMI, and stated "At this point in time I do not feel that he is capable of sustained remunerative employment even in a sedentary capacity and should proceed with additional diagnostic evaluation." He also noted Zurborg does not retain the physical capacity to return to the same type of work being performed at time of injury, and recommended further treatment, including additional diagnostic studies. Upon his second examination of Zurborg on November 13, 2013, Dr.

Rozen found Zurborg attained MMI on the date of his last MRI and assessed a 5% impairment rating pursuant to the AMA Guides. He restricted Zurborg from lifting over thirty pounds, and from repetitive squatting and bending, pulling, pushing or twisting. Dr. Rozen again opined Zurborg does not retain the physical capacity to return to the same type of concrete work he was performing at the time of this injury, but could work in a light to medium PDL Category.

The opinions of Drs. Fadel and Rozen constitute the requisite substantial evidence to support the ALJ's determination. Special Fund v. Francis, supra. We are without authority to reweigh the evidence and to direct a different result in Harper's favor.

Accordingly, the May 13, 2014 Opinion, Award and Order and June 24, 2014 Order on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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