

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 31, 2014

CLAIM NO. 201385916

TOMMY SPEARS

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

KOKOSING CONSTRUCTION CO.
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, & REMANDING

* * * * *

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

ALVEY, Chairman. Tommy Spears ("Spears") appeals from the Opinion, Award, and Order rendered April 16, 2014 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), awarding him temporary total disability ("TTD") benefits and medical benefits for a temporary cervical strain injury sustained while working for Kokosing Construction Company

("Kokosing") on April 3, 2013. The ALJ awarded TTD benefits "from the time [Spears] left work until Dr. James Powell released him to return to work without restrictions on May 30, 2013" and medical benefits through May 30, 2013. No petition for reconsideration was filed.

On appeal, Spears argues the ALJ erred in finding he did not sustain a permanent injury and impairment as a result of the work injury. Spears argues the ALJ erred in relying upon the record of Dr. Powell in determining he reached medical maximum improvement ("MMI") on May 30, 2013. Spears asserts he attained MMI on July 30, 2013, and therefore should have been awarded TTD benefits and medical benefits through at least that date. We affirm the ALJ's finding of a temporary cervical injury because it is supported by substantial evidence and no contrary result is compelled. However, we vacate and remand for the ALJ to conduct a proper and complete analysis regarding the attainment of MMI, and the duration of Spears' entitlement to TTD benefits and medical benefits.

Spears filed a Form 101 on September 16, 2013 alleging he injured his "spine and head" on April 3, 2013 when a large rock was loaded onto a truck he was operating. The Form 104 work history indicates Spears worked for

Kokosing as an equipment operator from September 2012 through May 2013.

Along with the Form 101, Spears filed a motion for interlocutory relief, requesting income and medical benefits. Spears' September 1, 2013 affidavit was attached, in which he described the mechanism of injury and subsequent treatment. He stated he stopped working for Kokosing on May 9, 2013 due to severe pain. Spears attached medical records and correspondence with a claims examiner for Kokosing's insurance carrier also indicating Spears last worked on May 9, 2013.

Spears testified by deposition on January 9, 2014 and at the hearing held February 27, 2014. Spears was thirty-five years old at the time of the hearing. His employment history consists entirely of working as an equipment operator. For Kokosing, a highway construction company, he operated a bulldozer and a rock truck. On April 3, 2013, Spears was operating a rock truck when a large rock was accidentally dropped into the truck bed causing him to be severely shaken. Spears experienced immediate pain in his neck and back, and could not complete his shift. He was taken to the emergency room by his supervisor. Following a CT scan, Spears was prescribed medication and discharged. Spears testified Kokosing initially sent him to a massage

therapist, which worsened his symptoms. Kokosing then sent him to physical therapy, which provided some relief. Eventually, Spears treated with Mr. David Belleville, a physician's assistant at King's Daughters Medical Group. He saw Dr. Powell, a neurosurgeon, on one occasion. Spears was also prescribed medication from a pain management physician. Spears testified he has continued pain in his neck and shoulders for which he takes Ibuprofen, Tylenol and uses Icy Hot patches. Spears testified he is unable to return to operating a rock truck in his current condition.

Spears returned to light duty work at Kokosing a day or two after the April 3, 2013 accident. At his deposition, Spears stated he initially sat in his truck for three days doing nothing. Thereafter, he hauled fuel, delivered parts and provided rides to coworkers using his personal vehicle. At the hearing, Spears testified at one point he was asked to operate a dozer but had to stop after half a shift due to his pain. He returned to his previous light duty tasks where he essentially sat in his truck, hauled fuel and delivered parts. Spears testified he voluntarily resigned from his job with Kokosing because he could no longer perform even the light duty tasks due to his increasing pain.

Although he could not recall the exact date, Spears stated he voluntarily left Kokosing in May 2013. He stated the date could have been May 9, 2013, the date reflected in his motion for interlocutory relief. Spears testified he did not work again until September 2013 due to his pain and inability to move.

Spears testified he continued to treat with Mr. Belleville, who ordered physical therapy and prescribed medication. The treatment "helped a lot" and Spears was released to return to work by Mr. Belleville at the end of August 2013 or beginning of September 2013. Spears began working at Louisa Construction in September 2013 operating an excavator. Spears indicated his current job operating an excavator is easier because he is not bounced around like he was in the cab of the rock truck.

Paul Youst ("Youst"), a foreman for Kokosing, also testified at the hearing. His testimony is largely consistent with that provided by Spears. However, Youst disputes Spears' version of his departure from Kokosing. Youst testified Spears advised him he was going home because he felt guilty sitting around on light duty while others were working.

In support of his claim, Spears filed the treatment records from King's Daughters Medical Center. The

records indicate Spears first saw Mr. Belleville on April 24, 2013 complaining of right shoulder and neck pain following the April 3, 2013 work accident. Spears was diagnosed with work-related cervical strain, left trapezius spasm and right scapular strain. Mr. Belleville treated Spears conservatively with physical therapy and medication. He placed Spears on modified duty and assigned various restrictions. On May 22, 2013, Mr. Belleville noted an MRI report reflected multilevel degenerative changes with no comment about true herniations. Mr. Belleville noted Dr. Paula Larsen performed a repeat examination, which was normal. Mr. Belleville stated Spears sustained a jarring injury to the cervical spine with continued cervical pain, occipital headache and right scapular pain. Mr. Belleville continued to treat Spears conservatively through August 2013, and continued to restrict him to sedentary/administrative work duties throughout his course of treatment which ended August 6, 2013.

Kokosing filed the May 30, 2013 note of Dr. Powell, who evaluated Spears upon referral by Mr. Belleville. Dr. Powell performed an examination and observed minimal paraspinal muscle spasm, and no motor, sensory or reflex abnormalities. Dr. Powell observed facetogenic and discogenic changes in the neck due to

Spears' use of tobacco products for which he advised cessation. Dr. Powell found Spears, "merely has a strain or sprain . . . and has let the neck get progressively weaker, causing secondary nerve root entrapment and associated headaches." Dr. Powell provided Spears with a long-term exercise program. He opined Spears could return to work without interruption and released him from his care.

Kokosing filed the July 30, 2013 report and August 6, 2013 Form 107-I of Dr. David Jenkinson, who evaluated Spears at its request on July 30, 2013. In the July 30, 2013 report, Dr. Jenkinson reviewed the medical records and performed an examination. He noted a May 14, 2013 cervical MRI demonstrated multi-level degenerative changes with no disc herniation or neurologic compression. He noted a June 28, 2013 right shoulder MRI was normal and a June 28, 2013 thoracic MRI revealed minor degenerative changes with no disc herniation or neurologic compression. Dr. Jenkinson found additional treatment, including a referral to pain management, continued physical therapy and medication, unreasonable and unnecessary for his April 3, 2013 injury. He noted Spears' subjective complaints of pain were not supported by any objective abnormality and all imaging studies were negative. He further noted the examination was normal. Dr. Jenkinson opined Spears is capable of returning

to his former employment or similar occupation without permanent restriction and requires no additional treatment due to the April 3, 2013 injury.

Dr. Jenkinson diagnosed Spears with a history of a possible minor sprain or strain of the left side of his neck, which had resolved. He stated Spears' injury caused his complaints. He stated a causal relationship could only be determined by the history provided by Spears. He stated there was no objective abnormality to support a causal relationship between Spears' symptoms and the alleged injury. Dr. Jenkinson assessed a 0% impairment and stated Spears attained MMI on July 30, 2013. He again stated Spears retains the physical capacity to return to operating heavy equipment and he would not assign restrictions.

Spears filed the November 18, 2013, Form 107-I report of Dr. James Owen, who examined him on November 14, 2013 at his request. Dr. Owen diagnosed persistent cervical strain/sprain with degenerative disk and joint disease; and persistent scapular trigger point with probable muscle and/or myofascial strain/sprain. Dr. Owen stated Spears' injury caused his complaints. Dr. Owen assessed a 5% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides the Evaluation of Permanent Impairment. Dr. Owen noted Spears had reached MMI at the time of his

examination. Dr. Owen opined Spears retains the physical capacity to return to his former employment and advised him to avoid activity which cause marked exacerbation of the cervical spine.

The ALJ determined Spears is not entitled to permanent income benefits pursuant to KRS 342.730. She noted while Spears sustained a cervical strain as a result of the work event, he did not meet his burden of proving a harmful change to a human organism. She also found Spears reached MMI by May 30, 2013, the day he was evaluated and released to return to work without restriction by Dr. Powell. The ALJ found Spears entitled to TTD benefits from the time he left work until Dr. Powell placed him at MMI on May 30, 2013. After reviewing the statutory and case law regarding TTD benefits, the ALJ stated as follows in support of her determination:

The employer may have accommodated Plaintiff, allowing him to present to work without requiring him to perform his regular job but he was not returned to full duty by a physician until Dr. Powell did so on May 30, 2013. While the employer may have allowed him to remain at work doing almost nothing, the law does not require him to sit at work and do little or no work just to preclude his award of TTD. For this reason, Plaintiff is entitled to a brief period of TTD from the time he left work through the date Dr. Powell placed him at MMI.

In a footnote, the ALJ stated "the date Plaintiff left work, his last day working for Defendant Employer, is not a part of the record but should be easily ascertained by the parties." Therefore, the ALJ awarded Spears TTD benefits "from the time he left work until Dr. Powell released him to return to work without restrictions on May 30, 2013" and "medical benefits to treat the temporary strain through May 30, 2013." No petition for reconsideration was filed by either party.

On appeal, Spears first argues the ALJ erred in finding his work injury did not result in permanent impairment noting he regularly sought medical treatment from the day of his injury through the end of July 2013 in an effort to recover and return to work. Spears also argues it was unreasonable for the ALJ to conclude he reached MMI on May 30, 2013, and the medical evidence compels an award of TTD benefits through at least July 30, 2013. He points to the fact he received additional testing and treatment subsequent to Dr. Powell's release on May 30, 2013, and both Drs. Jenkinson and Owen found he attained MMI at a later date, July 30, 2013 and November 14, 2013 respectively. Spears argues the medical evidence compels a

finding of an MMI date of July 30, 2014.¹ Likewise, Spears argues the ALJ erred in awarding medical benefits only through May 30, 2014, and at the very least should have been awarded medical benefits through July 30, 2014, the time he stopped actively obtaining treatment.² Spears concluded the facts and medical testimony, excluding Dr. Powell's, support a finding he had not reached MMI and did not have resolution of his temporary condition until July 30, 2012 and therefore erred in awarding TTD benefits and medical benefits through only May 30, 2012.³

As the claimant in a workers' compensation case, Spears bore the burden of proving each of the essential elements of his cause of action, including extent and duration of disability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Spears was unsuccessful in his burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, to compel a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so

¹ We assume July 30, 2014 is a typographical error, and Spears intended to state July 30, 2013.

² Again we assume this is a typographical error, and Spears intended to state 2013.

³ Again we assume this is a typographical error, and Spears intended to state 2013.

overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

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).

No petition for reconsideration was filed. Therefore, on questions of fact, this Board is limited to a determination of whether substantial evidence contained in

the record supports the ALJ's conclusion. Stated differently, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

Dr. Jenkinson's opinions constitute the requisite substantial evidence in the record supporting the ALJ's determination Spears' work accident resulted in a temporary cervical strain not warranting a permanent impairment rating or an award of permanent partial disability benefits. As noted above, Dr. Jenkinson diagnosed Spears with a history of a possible minor sprain or strain of the left side of his neck, which had resolved. He found Spears' pain complaints were not supported by any objective findings since all imaging studies had been negative and he had an essentially normal examination. He likewise found nothing to objectively support a causal relationship between Spears' symptoms and the alleged injury. Dr. Jenkinson assessed a 0% impairment rating for Spears' cervical condition. Dr. Jenkinson's opinions constitute substantial evidence supporting the ALJ's determination, and no contrary result is compelled.

Likewise, we find the ALJ could find Spears entitled to TTD benefits and limited medical benefits for his cervical strain injury pursuant to Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001) and FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007). Since the rendition of Robertson v. United Parcel Service, supra, this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are payable. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses

that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Id. at 286.

Substantial evidence exists in the record, in particular the opinions of Drs. Jenkinson and Powell, which support the ALJ's determination Spears is entitled to TTD benefits and medical benefits only, and no contrary result is compelled.

With that said, we must vacate and remand the claim for a proper determination and analysis regarding when Spears attained MMI and the correct period of TTD benefits. 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).

We begin by finding the May 30, 2013 note of Dr. Powell does not constitute substantial evidence supporting a determination of MMI, although for different reasons than those advocated by Kokosing. 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). After taking a history and performing an examination, Dr. Powell found facetogenic and discogenic changes in the neck due

directly to his use of tobacco products and advised cessation. He stated further:

These changes, however, were not aroused by his injury. He merely has a strain or sprain. However, the real problem was easily demonstrated to the patient on his physical examination. I had him simply lean his head back against a wall after he forward-flexed without any difficulty, his chin down to his chest. I put one finger against his forehead and he could not lift it off the wall, i.e., he has a strain or sprain and has let the neck get progressively weaker, causing secondary nerve root entrapment and associated headaches.

I have given him a long-term home exercise program to rebuild his neck. If he does not do this, the neck will only get worse with time and he will continue to use his neck as an excuse to cease working other jobs. If he provides constant care to his neck, it will most likely improve with time and degenerative changes will be further eliminated, especially if he ceases tobacco use.

In my opinion, he can return to work as desired without interruption.

He will be released for p.r.n follow-up.

In the May 30, 2013 note, Dr. Powell did not offer an opinion regarding whether Spears had attained MMI for his work-related cervical sprain/strain. In fact, Dr. Powell's note indicates Spears' cervical condition had not stabilized, but had rather deteriorated due to a lack of effort. Therefore, Dr. Powell strongly urged Spears to

engage in a long-term home exercise program. He further indicated Spears' commitment to the recommended exercise program would determine whether his neck condition would continue to worsen or improve over time, especially if he ceased tobacco use. Therefore, as a matter of law, the May 30, 2013 opinion of Dr. Powell does not support a finding of MMI.

On remand, the ALJ is instructed to determine when Spears' reached MMI from his temporary cervical sprain/strain based upon the remaining evidence in the record. Dr. Jenkinson opined Spears reached MMI on July 30, 2013 and stated he could return to his former employment without restrictions. Dr. Owen opined Spears was at MMI at the time of his examination, on November 18, 2013, and likewise found Spears retained the physical capacity to return to his former employment. The records from King's Daughters Medical Center indicate Spears continued to receive conservative treatment until at least August 6, 2013. Although the records are silent regarding when he reached MMI, Mr. Belleville continued to restrict Spears to sedentary/administrative duty through at least August 6, 2013. In its brief on appeal, Kokosing advocates July 30, 2013 as the appropriate MMI date.

The Board likewise vacates the ALJ's determination Spears "is entitled to [TTD] benefits from the time he left work until Dr. Powell placed him at [MMI] on May 30, 2013." Temporary total disability means "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). The above definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), 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 Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed both prongs of KRS 342.0011(11)(a) must be met before a claimant is entitled to TTD benefits. We have already addressed the first prong of this two part test as

referenced above, directing the ALJ to determine the date Spears reached MMI for his temporary cervical strain/sprain. Regarding the second prong, the Kentucky Supreme Court 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.” Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000). The release must be viewed in light of the employee’s prior work activities. Until MMI is achieved, the 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 injury. Id.

While reciting the appropriate statutory and case law outlined above, the ALJ performed an inadequate analysis in determining the duration of TTD benefits. We have already addressed the ALJ’s determination regarding MMI. With regard to the second prong of the two part test, the ALJ made conflicting statements when she stated “while the employer may have allowed him to remain at work doing almost nothing, the law does not require him to sit at work and do little or no work just to preclude his award of TTD benefits. For this reason, Plaintiff is entitled to a

brief period of TTD from the time he left work through the date Dr. Powell placed him at MMI."

Following the April 3, 2013 work accident, Spears was placed on light duty. During this time, Kokosing had him initially sit in a truck for several days. Thereafter, he hauled fuel, delivered parts and provided rides to coworkers using his personal vehicle until he voluntarily quit his job in May 2013. This testimony was confirmed by Youst, Spears' foreman at the time of the accident. Pursuant to Central Kentucky Steel, if the ALJ believes Spears remained at work following the work accident doing almost nothing, i.e., performing minimal duties, and had yet to attain MMI, Spears would be entitled to TTD throughout the period he remained at work.

On remand, the ALJ is directed to perform the two pronged analysis pursuant to Magellan Behavioral Health, supra and Central Kentucky Steel, supra, in determining the duration of TTD. This shall include an analysis for the time period following the April 30, 2013 work accident through the time he continued to work, as well for the time period following his voluntary departure from Kokosing.

The analysis shall also include a specific finding of when Spears voluntarily left his job with Kokosing. In her opinion, in a footnote on page nine, the

ALJ stated "the date Plaintiff left work, his last day of working for Defendant Employer, is not part of the record but should easily be ascertained by the parties." This is a finding of fact to be determined by the ALJ, not the parties.

We also note the record, although scant, provides evidence of when Spears left Kokosing. In support of his Motion for Interlocutory Relief filed simultaneously with the Form 101, Spears filed an affidavit dated September 1, 2013 in which he stated "I tried to work as long as I could, but the pain was so severe, I had to stop working on May 9, 2013." Spears attached medical records and correspondence with a claims examiner with Kokosing's insurance carrier also indicating Spears last worked on May 9, 2013. During his deposition, he testified he last worked in May 2013, and the date could have been May 9, 2013. At the hearing, Spears agreed he was out of work from the middle of May until sometime after Labor Day. The ALJ's statement in the footnote on Page 9 of her opinion, "the date Plaintiff left work, his last day working for Defendant Employer, is not part of the record but should be easily ascertained by the parties" is insufficient and not a finding of fact.

Finally, we vacate the ALJ's award of limited medical benefits since it is based upon an improper MMI date of May 30, 2013. On remand, once the ALJ makes a determination of MMI in accordance with this opinion, she must make an award of medical benefits supported by the evidence.

Accordingly, the April 16, 2014 Opinion, Award, and Order by Hon. Jane Rice Williams, Administrative Law Judge, is hereby **AFFIRMED IN PART, VACATED IN PART**, and the claim is **REMANDED** to the ALJ for an amended opinion in conformity with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON GRETCHEN N GULLETT
128 SHOPPERS PATH
PRESTONSBURG, KY 41653

COUNSEL FOR RESPONDENT:

HON A STUART BENNETT
PO BOX 2150
LEXINGTON, KY 40588

ADMINISTRATIVE LAW JUDGE:

HON JANE RICE WILLIAMS
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601