Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 26, 2014

CLAIM NO. 201285293

TOYOTA MOTOR MANUFACTURING KENTUCKY, INC. — PETITIONER

VS. **APPEAL FROM HON. STEPHEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

JASON TUDOR
and HON. STEPHEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE — RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Toyota Motor Manufacturing Kentucky, Inc. ("Toyota") appeals from the March 28, 2014 Opinion, Award and Order and the May 20, 2014 Order rendered by Hon. Stephen G. Bolton, Administrative Law Judge ("ALJ"), awarding Jason Tudor ("Tudor") permanent partial disability

benefits, temporary total disability ("TTD") benefits, and medical benefits. Toyota argues the claim is barred by the statute of limitations, the ALJ erred in awarding TTD benefits from May 12, 2010 to September 15, 2010, and erred in enhancing the permanent partial disability benefits by the three multiplier. We disagree and affirm.

Tudor filed his claim on May 18, 2012 alleging he sustained a low back injury on March 23, 2010 as a result of cumulative trauma. He also alleged a sudden onset of low back pain on December 23, 2010, and continued back pain and repeated cumulative trauma with onset on April 16, 2012. Tudor alleged the injuries produced disc herniations at L4-5 and L5-S1.

Tudor testified by deposition on July 6, 2012 and at the hearing held January 28, 2014. At the time of his March 2010 injury, Tudor was working on the Trim II A1-220 "process" which involved various jobs, including installing brakes, gas pedals, and master cylinders, and attaching brake lines and wiring. On March 23, 2010, Tudor was pulling and routing wires when he felt a strain, pulling and tightness in his back. He reported the incident to his group leader who completed a report of injury and sent him to Internal Health Services ("IHS"). IHS placed him on restrictions, ordered physical therapy at the plant, took

him off the line at work, and sent him to a chiropractor. In his deposition, Tudor indicated he did not perform any actual work for more than two weeks following this injury. He had to report for work, but mainly just “stood around” while he was on restricted duty. At the hearing, Tudor indicated he would report to Mickey Payne for his daily assignment. He did not have a regular assignment. At times, he would be placed at the end of the line to check brake tubes, pull pieces of plastic off cars, or be placed in a pit to check for leaks. Tudor stated there was no similarity between the production line work he performed at the time of injury and the work he was assigned while on restricted duty. This period of restricted duty lasted until Dr. Maria M. Reyes released Tudor to return to work without restrictions on September 28, 2010.

Tudor reinjured his back on December 23, 2010, when his back “locked up” while performing the master cylinder job. He reported the injury and was sent to IHS. Tudor was placed on restrictions, sent home, and directed to see his chiropractor. The factory was on shutdown the following week. When he returned to work following the shutdown, Tudor was on 100% restricted duty. He was paid his full wages for showing up and doing assignments from January through April or May 2011. Dr. Steven P. Kiefer

and IHS placed him on the I.P. line because he could not perform his previous tasks. This line is a stand-up job involving routing wires and “shooting” nuts, bolts and screws. Tudor testified he was never informed by Toyota’s medical personnel that he had disc herniations. Instead, he was told he had some disc bulging.

Jennifer Lyons, senior claims representative at Mitsui Sumitomo Marine Management (“MSMM”), testified by deposition on May 1, 2013. MSMM is the third party administrator for Toyota, which is self-insured. Lyons indicated she did not initially see Tudor’s file because he did not miss work and his case was processed as a medical-only file. A first report of injury is filed if an employee misses two or more days of work. Lyons did not believe she was required to file a first report in instances where a worker shows up and is paid wages, even though he or she is not at maximum medical improvement and unable to perform the type of work done at the time of injury. Therefore, because Tudor reported no lost time, no first report was filed.

Lyons further testified the March 23, 2010 claim was denied as barred by the statute of limitations. The December 23, 2010 claim was denied as not work-related. The April 16, 2012 claim was denied and a first report of

injury was filed for that injury because it could not be determined that work was the proximate cause of Tudor's complaints. Lyons acknowledged Tudor initiallymissed a few days, and later a week and a half due to the 2012 injury, but no first report of injury was filed.

The bulk of the medical evidence consisted of IHS records. Tudor was initially treated at the Toyota clinic on May 12, 2010 for low back pain. Dr. Reyes diagnosed sprain/strain of the back. She assigned restrictions of no bending greater than thirty degrees or repetitive twisting at the waist, and no lifting, pushing or tugging greater than ten pounds. These restrictions remained unchanged until August 30, 2010. X-rays taken on June 11, 2010 revealed minimal disc space narrowing at L4-5 and L5-S1. In July 2010, Dr. Reyes obtained MRI results, which revealed disc herniations at L4-5 with mild abutment of the descending L5 nerve roots and a disc protrusion at L5-S1. Dr. Reyes did not change the diagnosis of back sprain/strain, and there is no indication Tudor was informed of the herniations. Tudor was released to return to regular duty on September 14, 2010.

Following the December 23, 2010 injury, Tudor was placed on restrictions of no lifting, pushing or tugging greater than two pounds, no line paced activity, and

sit/stand as needed. On March 3, 2011, Dr. Jessa Peace assigned indefinite restrictions of no repetitive getting in and out of cars with twisting at the waist. Tudor was released for regular duty on August 29, 2011 and returned to restricted duty on November 1, 2011 through January 6, 2012. Tudor was taken off work for several days in April, 2012. On April 27, 2012, Tudor was directed to work one hour of regular duty followed by one hour of restricted duty for one week then return to regular duty.

Tudor submitted the July 8, 2010 MRI report of Lexington Diagnostic Center & Open MRI revealing disc herniations at L4-5 and L5-S1.

Dr. Steven P. Kiefer treated Tudor on August 13, 2010 on referral from Dr. Reyes. Dr. Kiefer stated an MRI revealed a central annular tear and some disc bulging. He diagnosed degenerative disc disease which may have flared up in the heavy work setting. He saw Tudor again on January 7, 2011 and placed him on light duty. On February 18, 2011, Dr. Kiefer recommended Tudor be moved to a different line or activity to allow him to heal.

Dr. John J. Guarnaschelli performed an independent medical evaluation ("IME") on August 13, 2012. He indicated Tudor had "a painful lumbar disk entity" and mechanical low back pain with clinical and radiographic

evidence of multilevel lumbar spondylosis and degenerative changes. The initial MRI revealed lumbar disc abnormalities at L4-5 and L5-S1. He opined the initial onset of symptoms beginning on March 23, 2010 represented an exacerbation of a pre-existing dormant condition with subsequent re-injury. He found no pre-existing active condition. He advised Tudor to avoid extremes of heavy lifting, repetitive bending, or overhead work. Dr. Guarnaschelli assigned a 5% impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

After a thorough recitation of the evidence and the arguments of the parties, the ALJ found Tudor had relied upon the representations of the in-house medical system and was apparently misinformed as to the true nature of his injury. As a result, he was not compelled to aggressively seek outside opinions. The ALJ indicated he believed this case is governed by Toyota Motor Manufacturing Inc. v. Czarnecki, 41 S.W.3d 868 (Ky. App. 2001) wherein the Court of Appeals held the statute of limitations was tolled where IHS had informed the employee his condition had resolved. The ALJ noted that here, unlike in Czarnecki, Tudor had not been informed his condition had resolved. Rather, Tudor was not informed

that he suffered from two possibly herniated discs, a condition Toyota was aware of in July, 2010. The ALJ observed that, had Tudor received a timely referral and other appropriate medical treatment, he may not have suffered the subsequent exacerbations of the condition. Based upon the failure of the IHS physicians to disclose to Tudor the full extent of his injury, the provision of full employment tailored to his restrictions, and continous treatment by Dr. Reyes and temporary chiropractic relief, the ALJ determined Tudor was lulled into believing he was improving. The ALJ noted Tudor was not informed he might be eligible for workers' compensation benefits. Rather, he was informed his symptoms were not work-related.

The ALJ also found Tudor performed minimal activities while under restrictions from Dr. Reyes following the March 2010 injury. Tudor's testimony was uncontradicted that Toyota never hired workers in the competitive labor market to perform these activities. The ALJ determined Tudor was temporarily totally disabled as defined in KRS 342.0011(1)(a), yet Toyota failed to file reports with the Department of Workers' Claims as required by KRS 342.040(1). Accordingly, the ALJ ruled the failure to file the reports tolled the statute of limitations.

The ALJ further determined Tudor sustained an injury as defined by the Act on March 23, 2010, with subsequent cumulative exacerbations caused by his work. He awarded permanent partial disability benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. Finally, the ALJ determined Tudor was entitled to TTD benefits from May 12, 2010 through September 15, 2010, and from December 24, 2010 until April 1, 2011. The ALJ determined Tudor was not engaged in "legitimate employment" for these periods. Toyota's petition for reconsideration raising essentially the same arguments it makes on appeal was denied by order dated May 20, 2014.

On appeal, Toyota first argues Tudor's claim is barred by the statute of limitations. Toyota argues it had no obligation to file a first report of injury because Tudor did not miss more than one day of work prior to the expiration of the two year statute of limitation. Although he had periods of flare-ups, he was placed on restricted duty and continued to work on a regular and sustained basis. Toyota also takes issue with the ALJ's factual determination that Tudor was misinformed about his diagnosis by physicians at IHS. It argues this determination is erroneous, and not a proper basis to equitably toll the statute of limitations.

Next, Toyota argues the ALJ erroneously awarded TTD benefits from May 12, 2010 to September 15, 2010, and from December 24, 2010 until April 1, 2011. It notes the purpose of TTD benefits is to replace lost wages during the healing process. Because Tudor had no lost wages during the periods in question and was engaged in suitable employment for which he had training, he is not entitled to TTD benefits.

Because the TTD and statute of limitations issues are intertwined, we will first address the TTD issue. TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court of Kentucky established how the statutory definition is to be interpreted and applied in determining the duration of any appropriate award of TTD benefits. In Wise, the employer argued KRS 342.0011(11)(a) required termination of TTD benefits as soon as an injured worker is released to perform any type of work. Relying upon the plain language of KRS 342.0011(11)(a), the Supreme Court held "[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." Id. at 659. Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

Following the March 23, 2010 injury, Tudor was not performing his usual or customary employment. He had no actual position but rather performed whatever tasks his supervisor could come up with for several weeks. He clearly was incapable of performing the type of work he was doing when he was injured. Substantial evidence supports the ALJ's conclusion Tudor was entitled to TTD benefits from May 12, 2010 through September 15, 2010.

Toyota is correct that Tudor was not absent from work and thus the reporting requirement of KRS 342.038 was not triggered. However, this case turns upon the reporting requirements of KRS 342.040. That provision requires an employer who fails to make TTD payments when due to notify the Commissioner. Toyota believes the reporting requirements of KRS 342.040 are not triggered and it is not required to file a first report of injury if it chooses to keep an employee on restricted duty and pay wages in excess of the TTD benefit amount. The statute refers to benefits being payable when disability exceeds seven days.

Certainly the absence from work as a result of an injury is evidence of disability. However, an individual who has not reached a level of improvement that permits a return to his customary or usual employment is under a disability. If that disability extends for more than seven days, TTD benefits are payable, triggering the employer's responsibility to notify the commissioner pursuant to KRS 342.040(1). Toyota's failure to notify the commissioner of its refusal to pay TTD benefits resulted in Tudor not receiving notice of his right to prosecute his claim. The ALJ correctly determined the statute of limitations is tolled by the failure to notify the Department TTD benefits were not being paid.

The ALJ also believed the statute of limitations should be tolled for equitable reasons, a conclusion which Toyota also challenges. In Czarnecki, the claimant was told by the employer's in-house physician that her "injuries had resolved" prior to the 1996 injury which was the basis of her claim. Id. at 872. Under those limited facts, the Kentucky Court of Appeals determined that an employer "is bound by the statements of the physicians it employs to tend its workers, and that [the claimant] was entitled to rely on the judgment of the [in-house] physicians when she elected not to file a claim prior to

the 1996 injury." Id. Because the in-house physician employed by Toyota was involved in advising the claimant that she was "fully healed," the Court held, as a matter of equity, that the applicable statute of limitations under KRS 342.185 was tolled. Id.

In this case, IHS staff led Tudor to believe he had bulging discs resulting from non-work-related causes. Despite possession of the MRI results indicating disc herniations, there is no evidence Tudor was properly informed by the IHS staff of his true condition. The facts of the present case are sufficient for the ALJ to find the equitable remedy of tolling the statute of limitations was warranted. Even if we were to conclude the ALJ drew improper inferences from the evidence regarding Tudor being lulled into thinking he did not need to file a claim or that the misdiagnosis resulted in his not seeking outside treatment, such would constitute harmless error since the violation of KRS 342.040 reporting requirements alone was a sufficient basis to toll the statute of limitations.

For its final argument, Toyota contends the ALJ erroneously awarded the three multiplier and failed to perform an appropriate analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). We do not believe a Fawbush analysis is required in this instance, and ALJ

Bolton's application of the three multiplier found in KRS 342.730(1)(c)1 was not in error. The record contained substantial evidence that Tudor was not capable of performing the type of work he performed at the time of the injury. Here, the wage information does not establish a return to work at an average weekly wage equal to that earned at the time of Tudor's injury. At the time of the hearing, Tudor was earning a greater hourly wage than that earned at the time of the injury. However, there is insufficient evidence to establish he was earning the same or greater average weekly wage. Significantly, the average weekly wages stipulated for the December 2010 and April, 2012 injuries are less than the average weekly wage at the time of the March 2010 injury. A Fawbush analysis is only required where the facts establish both KRS 342.730(1)(c)1 and 2 could apply. In this instance, a Fawbush analysis was not required, and the determination of the application of the three multiplier will not be disturbed.

Accordingly, the March 28, 2014 Opinion, Award and Order and the May 20, 2014 Order rendered by Hon. Stephen G. Bolton, Administrative Law Judge, are **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I agree with the majority decision regarding the statute of limitation being tolled by Toyota's actions pursuant to Toyota Motor Manufacturing v. Czarnecki, 41 S.W.3d 868 (Ky. App. 2001). I also agree the subsequent determination of entitlement to TTD benefits tolls the applicable statute of limitations. Likewise, I agree the KRS 342.038 reporting requirement was not triggered. Therefore, the reporting requirement of KRS 342.040 was likewise not triggered.

However, merely because it is subsequently determined an injured worker is entitled to TTD benefits, such determination cannot be retrospectively applied to determine the employer violated the reporting requirements of a statute. While I agree with the result in this case, I disagree with the retrospective inference Toyota violated the reporting requirements of the statute. In all other respects, I concur.

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