Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 28, 2014

CLAIM NO. 200870062

UNITED PARCEL SERVICE, INC. PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

ANTHONY A. WOODS
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

* * * * * *

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

ALVEY, Chairman. United Parcel Service ("UPS") seeks review of the opinion, order and award rendered August 15, 2013 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") awarding Anthony Woods ("Woods") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits and medical benefits. UPS also seeks

review of the September 20, 2013 order overruling its petition for reconsideration.

On appeal, UPS argues the ALJ erred in basing the award of PTD benefits, in part, on Woods' psychiatric condition since he has not yet attained maximum medical improvement ("MMI"). UPS also argues the ALJ erred in commencing PTD benefits on the date of injury since Woods continued to work intermittently and received TTD benefits for all periods he was not working up through and past April 23, 2012, the date he attained MMI. Because the ALJ's determination of permanent total disability is in accordance with the law and is supported by substantial evidence, we affirm. However, we vacate and remand for additional findings regarding the appropriate duration of PTD benefits.

Woods filed a Form 101 on February 10, 2011 stating he injured his "back and ribs" on October 8, 2008 in a "tug wreck" while working as a utility driver for UPS. Woods attached the January 13, 2011 office note of Dr. Steven Glassman from Norton Leatherman Spine Center who diagnosed spondylolisthesis at L4-5, and recommended "TLIF at L4-5." The claim was bifurcated to address whether Woods' lumbar condition is causally related to the October 8, 2008 work event. In a November 18, 2011 opinion, order and award of interlocutory relief, the ALJ found the lumbar

condition causally related to the work accident for which UPS received due and timely notice. He also found Woods was temporarily totally disabled from August 11, 2010 through December 7, 2010 and from January 15, 2011 through the present. The ALJ awarded Woods TTD and medical benefits during those time periods. He placed the claim in abeyance until Woods attained MMI. The Board dismissed UPS' appeal of the November 18, 2011 interlocutory opinion on April 24, 2012 because it was not final and appealable. Subsequently, the claim was removed from abeyance on September 21, 2012. In addition, the Form 101 was amended to include an alleged psychological injury.

Woods testified by deposition on April 1, 2011 and on January 28, 2013. He also testified at the September 20, 2011 hearing and the final hearing held June 24, 2013. Woods was born on December 22, 1976 and resides in Louisville, Kentucky. He graduated from high school and attended college, but never earned a degree. Prior to working for UPS, Woods was employed in food service at Kentucky Kingdom. He began working for UPS in October 1999. At the time of his October 8, 2008 injury, Woods had been working for four or five years as a utility driver driving a tug and occasionally operating a K-loader. Woods connected 2,300 pound dollies to the tug's hitch, lifted and loaded

cans onto dollies, and drove them to various locations. Woods also assisted in lifting boxes off planes. His job required frequent standing, pulling, bending and sitting, and lifting up to one hundred pounds.

On October 8, 2008, Woods testified the tug he was operating was struck by a much larger one. He experienced pain throughout his left side, including his lower back, and experienced hot flashes. He was taken to BaptistWorx, which then sent him to the emergency room the same day. He was informed he had a broken rib and was referred to Dr. Ellen Ballard who took x-rays and prescribed medication. Woods testified he returned to light duty work for a month after the accident, but was again taken off work in November 2008. Dr. Ballard released him to regular duty work on March 9, 2009.

Woods continued to perform his regular job as a utility driver until August 11, 2010, when his primary care physician, Dr. Isabelita Wijangco, took him off work due to his low back condition. While he worked from March 2009 to August 2010, Woods testified his low back pain worsened, causing him to seek treatment with Dr. Wijangco. He also experienced radiating pain, numbness and tingling primarily in his left leg. Dr. Wijangco eventually referred him to Dr. Guarnaschelli, who in turn referred him to pain

management with Dr. Collis. After a series of failed epidural injections, Dr. Wijangco referred Woods to Dr. Steven Glassman who performed a lumbar fusion on April 12, 2011. Woods testified he briefly returned to work from December 2010 to January 2011, attending only training courses. Dr. Glassman restricted him from work in January 2011 and Woods has not returned to work since.

At the January 28, 2013 deposition and June 24, 2013 final hearing, Woods testified he last treated with Dr. Glassman in January 2012. Woods stated Dr. Glassman never released him to return to work. He also stated Dr. Glassman had referred him to Dr. Gregory Singleton, a psychiatrist, for treatment of depression. Woods testified his depression began following the April 2011 fusion surgery and Dr. Singleton saw him from September to December 2011. He prescribed medication, which provided some relief. Woods testified Dr. Singleton also kept him off work. Woods testified he no longer treats with Dr. Singleton because his private health insurance “got cut off” in January 2012 and workers’ compensation has refused payment.

Woods testified he experiences daily, constant back pain which goes “up and down my back and goes through my legs - - everything” and worsens with physical activity. Because he often experiences numbness in his legs, Woods

uses a cane on a daily basis. He has difficulty sleeping, performing household chores, sitting or standing for prolonged periods of time, and driving long distances. He testified at length regarding his mental status, describing how his depression has affected his life and children. Woods only takes over-the-counter Ibuprofen since he currently does not see Drs. Glassman or Singleton. Woods is interested in resuming treatment with Drs. Glassman and Singleton, and would also like to pursue pain management.

Woods testified he has not been released to return to work by either Drs. Glassman or Singleton. He understands his restrictions as “no work, no type of lifting, no anything, nothing - - I can’t do what I was doing.” He has been advised to avoid repetitious work, bending, twisting and turning and not lift above his head or shoulders. Based on his restrictions and current condition, Woods feels he could not return to his pre-injury work activities at UPS and is totally disabled.

Medical records were filed documenting the treatment Woods received following the October 8, 2008 accident, including those of BaptistWorx and Dr. Ballard indicating Woods received medical care primarily for a tenth rib non-displaced fracture from October 8, 2008 through April 2009.

UPS filed Dr. Wijangco's treatment records dating back to 1993. The records indicate Dr. Wijangco treated Woods off and on in 2002, 2005 and 2007 for depression. Woods returned to Dr. Wijangco on August 11, 2010, complaining of low back pain secondary to the October 2008 work accident. Dr. Wijangco ordered a lumbar MRI and treated Woods conservatively with pain medications and physical therapy. She referred Woods to Dr. Guarnaschelli, pain management and eventually to Dr. Glassman to address his continuing low back symptoms. Dr. Wijangco also noted Woods complained of depression stemming from his inability to work.

Both parties filed Dr. Glassman's records. On January 13, 2011, Dr. Glassman noted the history of low back pain with radiating symptoms into Woods' left leg since the work accident. Dr. Glassman diagnosed spondylolisthesis at L4-5 and performed a "TLIF at L4-5" on April 12, 2011. In follow-up notes on August 25, 2011, December 22, 2011, and April 23, 2012, Dr. Glassman noted Woods' difficulty with ambulation and activities of daily living, as well as continued complaints of pain. He referred Woods for a psychological consult due to his depression and anxiety, and also for pain management. In an August 16, 2012 letter, Dr. Glassman stated "Woods has reached [MMI] as of his last

office visit with me on April 23, 2012. I referred him for pain management. We did not perform disability ratings."

Woods also filed the records of Dr. Singleton, from the University of Louisville Psychiatric Group for treatment from August 2011 through December 2011, which are largely illegible. However, they indicate Woods complained of depressive symptoms since his 2008 injury, and particularly since his April 2011 surgery. Dr. Singleton diagnosed a major depressive disorder, single episode – severe; a back injury; and pain. He treated Woods with medication.

UPS filed the August 24, 2011 report of Dr. Michael Best who diagnosed a healed left tenth rib fracture resulting from the work accident and found Woods had attained MMI. Dr. Best assigned a 0% impairment rating for the rib injury pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") and stated he could return to his usual job without permanent restrictions. Dr. Best also diagnosed a pre-existing pars interarticularis defect/ spondylolysis with Gill fragment of the L4 lamina secondary to a 2002 football injury. Likewise, Dr. Best opined Woods' fusion surgery and current low back pain are causally due to

the effects from the football injury and are unrelated to the work injury.

UPS filed the December 27, 2012 report of Dr. Robert Baker, who evaluated Woods' physical injuries at its request following the ALJ's November 2011 interlocutory opinion. He agreed with Dr. Glassman's opinion Woods reached MMI on April 23, 2012. Pursuant to the AMA Guides, Dr. Baker assessed a 20% impairment rating for the lumbar spine condition and 0% for the rib condition. Dr. Baker declined to recommend additional treatment for the back injury. Dr. Baker permanently restricted Woods from repetitive lifting or twisting, particularly in a bent over position, and no lifting more than twenty-five pounds. He stated the above restrictions prevent Woods from performing the essential functions of a tug driver.

UPS filed the February 11, 2013 psychiatric report by Dr. Daniel Garst. He noted the October 8, 2008 work injury and persistent complaints of back pain radiating into his left leg, as well as Woods' depressive symptomology. Dr. Garst diagnosed recurrent major depressive disorder, half of which he attributed to the October 8, 2008 work accident and half to other non-work-related stressors. He stated Woods' psychiatric condition was pre-existing but not active, and produced no impairment either before or

following his work accident. Pursuant to the 5th and 2nd Editions of the AMA Guides, Dr. Garst assessed a 0% psychiatric impairment rating and found Woods retains the ability to return his regular job with UPS. He recommended Woods receive psychiatric treatment including medications and possible psychotherapy, half of which is related to the work accident.

UPS also filed the January 28, 2013 vocational report of Luca Conte, Ph.D. He concluded Woods would be capable of learning and performing occupational tasks in both the semi-skilled and unskilled sectors of the labor market and would be a candidate for vocational rehabilitation. Based upon the restrictions assigned by Dr. Baker, Dr. Conte acknowledged Woods would be unable to return to his former job at UPS. However, Woods would be capable of competitive employment in the sedentary and light sectors of the labor market. Dr. Conte concluded Woods could sustain remunerative employment in the competitive economy and would therefore not meet the definition of permanent total disability.

Woods filed the June 28, 2011 report and March 18, 2013 addendum of Dr. Warren Bilkey. In the June 2011 report, Dr. Bilkey noted the October 8, 2008 work accident and subsequent treatment. Dr. Bilkey diagnosed a blunt

injury to the trunk with a left 10th rib fracture, resolved. He also diagnosed a lumbar strain injury, aggravation of degenerative disc disease of the lumbar spine. He noted Woods had been diagnosed with spondylolisthesis and had undergone L4-5 decompression and fusion surgery. Dr. Bilkey related the above diagnoses to the October 8, 2008 work injury. He specifically found the Woods' lumbar condition work-related, but he had not yet reached MMI since he was only two months post fusion surgery. In the March 18, 2013 addendum, Dr. Bilkey noted he reviewed additional records of Dr. Glassman. He opined Woods had attained MMI since more than one year had elapsed since his April 12, 2011 surgery. He assessed a 23% impairment rating pursuant to the AMA Guides for the lumbar condition, all attributable to the October 8, 2008 work injury.

The June 24, 2013 benefit review conference order reflects the parties stipulated TTD benefits were paid at a rate of $320.79 per week from November 26, 2008 to March 8, 2009; August 11, 2010 to December 7, 2010; and January 15, 2011 to February 28, 2013 for a total of $48,074.05. The parties identified contested issues of benefits per KRS 342.730, unpaid or contested medical expenses, credit for overpayment of TTD benefits, and TTD benefits as contested issues.

In the August 15, 2013 opinion, order and award, the ALJ thoroughly reviewed Woods' testimony, as well as the medical evidence. The ALJ found Woods reached MMI regarding his lumbar condition on April 23, 2012 and was therefore overpaid TTD benefits by UPS. "In regards to the Plaintiff's argument that he is not at [MMI] as a result of his psychological condition, that argument is moot based on the fact that he will be awarded [PTD] benefits." The ALJ found Woods is permanently totally disabled due to his work-related injuries and stated as follows:

> The next issue for determination is entitlement to benefits pursuant to KRS 342.730. In this instance there had been two physicians who have assessed the Plaintiff a functional impairment rating as a result of his lumbar spine condition. Even though the Plaintiff has not been assessed [sic] functional impairment rating for his psychological condition, the Defendant Employer has conceded that Plaintiff does in fact suffer from psychological problems as a result of his physical injuries incurred on October 8, 2008, and therefore he shall be awarded medical benefits for treatment of the same pursuant to KRS 342.020.
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> In regards[sic] to the Plaintiff's lumbar spine condition, Dr. Baker assessed the Plaintiff to [sic] 20% functional impairment rating, pursuant to the Fifth Edition of the AMA Guides, and Dr. Bilkey has assess[sic] the Plaintiff a 23% functional impairment rating, based on the Fifth Edition of the AMA Guides. Both doctors have

assessed the Plaintiff[sic] restrictions that would prevent him from returning to work for UPS and UPS has conceded that Plaintiff would be entitled to application of the three-time multiplier pursuant to KRS 342.730 (1)(c)(1).

UPS argues that the Plaintiff is a young individual, of at least average intelligence, has two years of college, and is capable of gainful employment within his restrictions. Therefore they[sic] argue that his benefits should be limited to a 20% permanent partial disability award with application of the three-time multiplier. Mr. Woods argues that as a result of his work-related injury, and residual lumbar spine, and psychological problems, that he is permanently and totally occupationally disabled.

KRS 342.0011 (11)(c) defines permanent total disability as meaning, "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury."

In the case of *Ira Watson Department Stores vs. Hamilton*, 34 SW 3d 48 (KY 2000), the Supreme Court stated the some[sic] of the principles set forth in the case of *Osborne vs. Johnson*, 432 SW 2d 800 (KY 1968) must be considered when determining whether or not an individual is permanently and totally disabled. The Court stated in total disability claims when determining whether or not an individual is incapable performing any work, medical assessments remains only one of the many elements to be considered along with such things as individuals[sic] own testimony, vocational testimony, and physiological testimony.

In addition, an individualized determination must be made of what a worker is and is not able to do after recovering from a work injury; such a determination necessarily includes consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact and also includes consideration of the likelihood that the particular worker will be able to find work consistently under normal employment conditions. *McNutt Construction vs. Scott*, KY 40 SW 3d 854 (KY 2001).

The Plaintiff has presented very credible testimony. The Plaintiff was employed with UPS since 1999, and had hoped on working himself into management prior to his October 8, 2008, work-related incident. As a result of his injuries and subsequent surgery, the Plaintiff testified that he suffers from debilitating pain and depression and anxiety that worsens his pain. In addition, the Plaintiff testified that he must ambulate with a cane and has difficulty in performing activities of daily living. When the Plaintiff performs any physical exertion he pays for it and must rest for several hours or a day. The Plaintiff does not feel capable of returning to work for the Defendant Employer or for that matter working in any capacity. It is readily apparent from viewing the Plaintiff at the Final Hearing that he is suffering from severe emotional and psychological problems for which he needs treatment and is suffering from debilitating chronic pain. The Plaintiff is a very credible and believable witness.

Therefore, in this specific instance, when you compare the Plaintiff's present

> situation to the mandates announced by the Supreme Court in the case of *Osborne vs. Johnson*, Supra., that the Plaintiff is permanently and totally occupationally disabled. While the Plaintiff may get better in the future with aggressive treatment, especially aggressive psychiatric treatment, to reach a point where he is able to rejoin the workforce, the Administrative Law Judge does not believe that in the Plaintiffs[sic] present condition he is able to work in any capacity.

The ALJ awarded TTD benefits from November 26, 2008 to March 8, 2009; August 11, 2010 to December 7, 2010; and January 15, 2011 to April 23, 2012, with UPS taking credit for benefits previously paid and recouping any overpayment of TTD benefits as to duration. The ALJ awarded PTD benefits commencing on October 8, 2008 and continuing for so long as Woods is so disabled with UPS receiving a credit for benefits previously paid. Medical benefits were also awarded and Woods was referred for a vocational rehabilitation evaluation.

UPS filed a petition for reconsideration requesting additional findings clarifying whether Woods is permanently totally disabled "due to the Plaintiff's physical condition regarding his lumbar spine, the Plaintiff's psychiatric condition, or a combination of the two." If the ALJ determines Woods is permanently totally disabled due to his psychiatric condition alone or in part,

UPS requested the award be withdrawn, TTD benefits be reinstated, and the claim placed in abeyance while Woods receives additional treatment. In the alternative, UPS requested the award be corrected to commence PTD benefits on April 24, 2012, since Woods continued to work off and on following the accident and was paid TTD benefits until he reached MMI on April 23, 2012. The ALJ overruled UPS' petition by order dated September 20, 2013, stating as follows:

> The undersigned Administrative Law Judge, in making the determination that the Plaintiff was permanently and totally disabled based the decision on a combination of the Plaintiff's physical and psychological problems. It was readily apparent at the time of the Final Hearing that Plaintiff was suffering from psychological issues that needed to be addressed; that as a result of his combined physical injuries and subsequent surgeries and his current psychiatric condition, that he was permanently and totally disabled.
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> The undersigned Administrative Law Judge does not believe the[sic] placing this claim in abeyance, reinstating TTD benefits, and allowing the Plaintiff to receive psychiatric treatment is necessary as the injury occurred more than 4 years ago and had been subject to intensive litigation since that time. The Administrative Law Judge finds the Plaintiff is not temporarily or totally disabled as a result of his psychological condition as there is no proof in the record indicating as such. In addition, should the Plaintiff

> receive the appropriate psychiatric care and his condition improved, then the Defendant/Employer may move to Re-open this claim to reduce the Plaintiff's benefits pursuant to KRS 342.125.
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> The undersigned Administrative Law Judge further finds that the Plaintiffs[sic]f benefits were commenced at the proper time in line with the mandates of *Walmart Stores Inc. vs. Sweasy,* 295. S.W.3d 835 (Ky. 2009).

On appeal, UPS again argues the ALJ erred in awarding PTD benefits rather than placing the claim in abeyance pending further psychiatric care and reinstating TTD benefits until Woods reaches MMI from his psychiatric condition. It argues it was an abuse of discretion and an error as a matter of law to award PTD benefits despite understanding "Woods needed psychiatric treatment which he was not seeking and had not received in close to two years" and his "depression was better when he was in active treatment." UPS also argues the ALJ improperly placed the burden on it to prove Woods was not permanently totally disabled. UPS also argues the ALJ erred in commencing PTD benefits on October 8, 2008, since Woods continued to intermittently work and was paid TTD benefits for the periods he did not work until he achieved MMI on April 23, 2012.

Woods, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including the extent of his disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Woods was successful in that burden, the question on appeal is whether there is substantial evidence of record to support 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).

The crux of this appeal concerns whether the ALJ's determination of permanent and total disability is supported by substantial evidence. Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky.

1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We find the ALJ's determination Woods is permanently totally disabled is in accordance with the Kentucky Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, supra. Taking into account Woods' age, education and past work experience, in conjunction with his post-injury physical status, the ALJ was persuaded due to the effects of the work-related injury, he is totally disabled. While UPS introduced evidence expressing a different point of view, the ALJ's determination is sufficiently supported by the record. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb his decision on appeal. *See* KRS 342.285; Special Fund v. Francis, supra.

In the opinion and award, as well as the order on reconsideration, the ALJ heavily relied upon Woods' testimony in determining he is permanently and totally disabled due both to his physical injuries and psychological condition. Woods testified at length regarding his physical and mental conditions due to the October 8, 2008 accident on several occasions, including the final hearing. Woods also felt based upon his restrictions and current limitations, he could neither return to his job as a utility driver nor perform any work activities on a sustained basis, and is totally disabled.

We emphasize Woods' testimony regarding his post-injury ability to work and his level of pain is substantial evidence, as an injured worker's credible testimony is probative of his ability to labor post-injury. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000).

The ALJ also noted the restrictions and impairments assessed by Drs. Bilkey and Baker regarding Woods' lumbar spine. Dr. Baker assessed a 20% impairment rating and restricted Woods from repetitive lifting or twisting, particularly in a bent over position, and no lifting more than twenty-five pounds. Dr. Bilkey assessed a similar 23% percent impairment rating. The above testimony and opinions constitute substantial evidence supporting a determination of permanent total disability in accordance with Ira A. Watson Department Store v. Hamilton, supra. Although the ALJ could have again placed the claim in abeyance pending further psychiatric treatment, he instead decided to award PTD benefits noting UPS is free to file a motion to reopen should Woods receive psychiatric care and his condition improves. The ALJ acted well within his discretion and we will not disturb his decision.

Although we find the ALJ did not err in finding Woods entitled to PTD benefits, we vacate the award and

remand for additional findings regarding the appropriate commencement date. In the opinion, the ALJ commenced the award of PTD benefits on October 8, 2008, the date of injury. In the order on reconsideration, the ALJ reiterated the October 8, 2008 commencement date by relying upon Walmart Stores Inc. vs. Sweasy, 295 S.W.3d 835 (Ky. 2009). UPS argues PTD benefits should not begin until April 24, 2012, when Woods reached MMI, since he continued to work on and off following the accident and was paid TTD benefits for all periods until he attained MMI.

Sweasy is not determinative in this situation as it deals only with the onset date of permanent partial disability benefits. Gunderson v. City of Ashland, 701 S.W.2d 135, 136-137 (Ky. 1985) stands for the proposition when regular employment is not available in the kind of work a claimant is customarily able to perform, he may be found totally disabled despite the fact limited work was made available due to the generosity of the employer. Our courts have repeatedly held a return to employment following an injury, whether full-time or part-time, does not necessarily constitute a return to "work" for purposes of KRS Chapter 342 and, under certain circumstances, an employee can be permanently totally disabled and immediately entitled to indemnity benefits even though he or she continues to be

gainfully employed. *Cf.* Gunderson v. City of Ashland, supra; R.C. Durr Co., Inc. v. Chapman, 563 S.W.2d 743 (Ky. App. 1978); Yocom v. Yates, 566 S.W.2d 796, 797 (Ky. App. 1978). The measure in such circumstances is the claimant's post-injury earning capacity based on normal employment conditions, as opposed to actual wages received, and whether the work was "undistorted by such factors as business boom, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his [or her] handicaps." Gunderson v. City of Ashland, 701 S.W.2d at 136.

Based upon the above referenced law and specific facts of this claim, the ALJ's award of PTD benefits beginning on October 8, 2008, requires further explanation. Following the work accident, Woods testified he worked light duty for approximately one month before being restricted completely from work in November 2008. Dr. Ballard subsequently returned Woods to regular duty without restriction on March 9, 2009. Woods testified he continued to perform his regular job as a utility driver despite a worsening of his low back and leg symptoms until August 11, 2010, when Dr. Wijangco took him off work. Woods also testified he returned to work for a short period from December 2010 to January 2011, but only took re-

certification or training classes during this time period. He was again taken off work by Dr. Glassman in January 2011 and Woods has not returned to work since. Likewise, the parties stipulated Woods was paid TTD benefits from November 26, 2008 to March 8, 2009; August 11, 2010 to December 7, 2010; and January 15, 2011 to February 28, 2013. The ALJ found Woods attained MMI on April 23, 2012 and awarded UPS a credit for overpayment of TTD benefits from April 24, 2012 to February 28, 2013.

Based upon the testimony and stipulations, the ALJ must set forth an analysis consistent with the pertinent case law explaining why PTD benefits were awarded during the periods Woods returned to work for UPS. In other words, the ALJ's analysis must go beyond the standard analysis required for an award of PTD benefits when a claimant has not returned to employment following an injury. This necessarily encompasses an analysis of whether the claimant's employer made special accommodations or whether Woods made a Herculean effort to work during the period in question. *See* Gunderson v. City of Ashland, supra. On remand, the ALJ must support the award of PTD benefits during the periods Woods returned to work with sufficient findings of fact and conclusions of law.

Accordingly, the ALJ's award of PTD benefits is **AFFIRMED**. However, the determination of October 8, 2008 as the onset of such benefits in the August 15, 2013 opinion, order and award, and the September 20, 2013 order overruling its petition for reconsideration reaffirming this award are **VACATED**. This claim is **REMANDED** to the ALJ for additional findings and entry of an amended opinion and award consistent with the views expressed herein.

ALL CONCUR.

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