Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 11, 2013

CLAIM NO. 201298149

UNITED PARCEL SERVICE, INC. PETITIONER

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

CAELA HELMS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. United Parcel Service, Inc. ("UPS") appeals from the May 6, 2013, opinion and order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") determining Caela Helms ("Helms") sustained a work-related right knee injury and awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced pursuant to KRS 342.730(1)(c)1 and

medical benefits. UPS also appeals from the June 17, 2013, opinion and order on reconsideration overruling its petition for reconsideration. On appeal, UPS challenges the duration of the ALJ's award of TTD benefits.

In the Form 101, Helms alleged she injured her right leg when she was pinned between a van and a dolly. Helms also alleged she suffered from post-traumatic stress due to the injury. There is no dispute Helms sustained a significant leg injury on January 4, 2012, while working as a package handler for UPS.

Helms testified at her January 18, 2013, deposition that on the day of the injury she had gotten out of a work van to load an aircraft. She explained that another UPS employee driving a tug hit the van which caused her body to be pinned between the van and a dolly. The tug hit the van approximately three more times after her leg was pinned between the van and the dolly. Helms testified her job included loading aircrafts which involved a lot of bending and lifting of items weighing up to seventy pounds. She also operated tugs and various equipment. Helms worked Sunday through Thursday from 2:00 p.m. to 7:00 p.m. daily. During her employment at UPS, Helms had also worked at Elder Care for Families ("Elder Care") every Friday from 7:00 a.m. to 3:00 p.m. and every other Sunday from 7:00

a.m. to 11:00 a.m. earning $8.50 an hour. Helms' last day of work for Elder Care was on Christmas Day 2011.

In September 2012, Helms obtained employment with Delta Global Services ("Delta") as a driver working on the ramp at Standiford Field. She explained this entailed "marshaling aircrafts," "paperwork for the aircrafts," and loading and unloading the aircrafts. Helms works for Delta every Friday from 7:00 a.m. to 5:00 p.m. and a "couple of hours in the morning" Monday through Thursday before going to work for UPS.

Helms was off work from January 4, 2012, until August 15, 2012, and was paid TTD benefits through August 12, 2012. Helms testified she returned to work at her regular job on August 15, 2012, "with accommodations." She explained she is not comfortable being around or moving dollies. Her supervisor allows her to rest if her leg hurts or she feels she has been standing too long. Helms estimates she rests approximately ten to fifteen minutes at least once a day during her shift. Helms testified she has not been able to completely perform her previous job duties. Helms explained that since she returned to work she is "a lot more anxious" which makes it more difficult for her to work. She believes the injury has physically slowed her down. As a result of the injury she has

problems with balance and is unable to walk for a long period of time. She is unable to squat without pain. Helms acknowledged that except for the accommodations, her job duties are the same as they were on January 4, 2012. Before the injury almost daily she “drove dollies with a tug.” Since the injury she is not comfortable performing this task. Helms testified she can no longer lift seventy pounds and estimated the maximum she has been able to lift since the injury is forty-five pounds. Concerning the difference in her physical capabilities since the injury, Helms explained as follows:

> Q: So the job that you’re doing now at UPS, it doesn’t sound like it’s a whole lot like the job you were doing before. What exactly do they have you doing?
>
> A: I still physically put containers in planes and push them back. I still drive belt loaders and K-loaders, but as far as lifting heavier packages or moving dollies, I don’t do that anymore.
>
> Other people in my crew will – are very accommodating to not letting me do it.

Helms did not undergo surgery. However, she saw plastic surgeons weekly because her right leg was so severely bruised. She sees a dermatologist quarterly to check for skin cancer. Helms testified she has no feeling in the back side of her leg and this loss of sensitivity

extends from the back of her knee into her foot. She also experiences tingling upon touch and numbness in this area approximately twice a day. Helms underwent physical therapy at Frazier Rehabilitation. Helms sought and is receiving psychological counseling.

At the April 25, 2013, hearing, Helms testified in addition to sustaining a large laceration of her leg she also broke her leg. She still experiences tingling and numbness as well as pain. Helms testified she is surprised she has not been fired because she is still unable to lift seventy pounds which she characterized as one of the major job requirements. She is still unable to work around dollies. Helms continues to be treated for post-traumatic stress and anxiety. Helms acknowledged she is under no work restrictions and explained the crew members and her supervisor perform all of the work involving dollies. Currently, she is not taking medication and is earning an average weekly wage ("AWW") which is equal to or greater than what she was making at the time of the injury. Helms denied missing any work with UPS or Delta and having plans to stop working at either job. At the conclusion of the hearing, the parties stipulated an AWW of $443.37 based on her dual employment and there had been an underpayment of TTD benefits of $59.00 per week.

Concerning Helms' entitlement to TTD benefits, the ALJ entered the following findings of fact and conclusions of law:

> KRS 342.0011(11)(a) defines "temporary total disability" to mean 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.
>
> Based on the sworn testimony of the plaintiff and the persuasive medical report from Dr. McEldowney, I make the factual determination that the plaintiff was temporarily totally disabled from January 5, 2012 to and including January 4, 2013, at which time she reached maximum medical improvement, and that the plaintiff is entitled to recover temporary total disability benefits from the defendant and its workers' compensation insurance carrier for that period of time.

Although the ALJ does not specifically state he relied upon the impairment rating assessed by Dr. Anthony McEldowney, it is clear from his subsequent analysis and the award that he found Dr. McEldowney's impairment rating of 16% to be more credible. Further, in conducting the requisite analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ relied upon the testimony of Dr. McEldowney and Helms to determine enhancement by the three multiplier pursuant to KRS 342.730(1)(c)1 was appropriate. Based on the stipulated AWW, the ALJ awarded TTD benefits

of $295.58 from January 5, 2012, to January 4, 2013, and PPD benefits of $141.87 beginning January 4, 2012, and continuing for 425 weeks.

Helms filed a petition for reconsideration asserting the opinion contained a typographical error as the ALJ stated payment of PPD benefits commenced on January 4, 2012. Helms asserted the award of PPD benefits should have commenced on January 5, 2013, when the award of TTD benefits ended.

UPS also filed a petition for reconsideration contending the award of PPD benefits should commence on January 4, 2013, instead of January 4, 2012. UPS also asserted that as a matter of law the ALJ's award of TTD benefits cannot extend beyond August 14, 2012, since Helms "improved to the point where she could return to employment on August 15, 2012." It posited since TTD benefits were paid through August 12, 2012, Helms would only be entitled to two days of TTD benefits. Consequently, UPS asserted the award of PPD benefits should commence on August 15, 2012.

In the June 17, 2013, opinion and order on reconsideration the ALJ amended the award to reflect the award of PPD benefits shall begin on January 5, 2013, and shall continue for 425 weeks thereafter. With respect to

UPS' argument regarding when the award of TTD benefits should terminate, the ALJ stated the May 6, 2013, opinion and order discussed all the contested issues raised by the parties in the benefit review conference order. With the exception of the amendment concerning the commencement date of the award of PPD benefits, the opinion and order was reaffirmed.

On appeal, UPS asserts, despite the ALJ's acknowledgement there is a two prong test for determining an award of TTD benefits, the ALJ only addressed the first prong finding Helms did not reach maximum medical improvement ("MMI") until January 4, 2013. It argues the ALJ never addressed Helms' testimony she went back to work at her regular position making a greater AWW. UPS emphasizes that in its petition for reconsideration it requested the ALJ address this oversight and the ALJ refused. In anticipation of Helms relying on Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) and arguing she did not return to her customary work between August 15, 2012, and January 4, 2013, UPS argues the facts in Central Kentucky Steel v. Wise, supra, are "grossly inapplicable" to the facts in the case *sub judice*. UPS argues by her own admission, Helms returned to her same job making a greater AWW. Further, Helms was working for an

additional employer, Delta. UPS insists no argument can be made Helms did not return to her customary work as she admits it was the same job "with only minor accommodations made by her co-workers." UPS concludes by arguing as follows:

> As Helms was back to work at UPS earning a greater average weekly wage from August 15, 2012 through January 4, 2013 and was also earning more money weekly at the subsequent employer Delta than she had been earning at pre-injury concurrent employer Elder Care during this period of time, there is no purpose in awarding her additional TTD benefits for that time period. This would clearly be a windfall for the Respondent.
>
> A result in which the claimant would receive TTD benefits while she is back to work in her regular position earning a greater average weekly wage than at the time of the injury and is working for a subsequent employer in a second job as a marshaller would be absurd.

UPS seeks remand with directions to award TTD benefits through August 14, 2012, with the award of PPD benefits to commence on August 15, 2012.

Temporary total disability means the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Generally, the duration of an award of TTD benefits may be ordered only

through the earlier of those two dates. Case law establishes that a "return to employment" does not mean a return to "any type of work" or "minimal work." KRS 342.0011(11)(a); Central Kentucky Steel v. Wise, supra. A "return to employment" means the claimant is capable of returning to work that is "customary" or work that he or she was "performing at the time of [the] injury." Central Kentucky Steel v. Wise at 659.

In the May 6, 2013, opinion and order the ALJ determined, based on the opinion of Dr. McEldowney, Helms attained MMI on January 4, 2012. Concerning Helms' entitlement to TTD benefits, the ALJ should have then engaged in an analysis as to whether Helms had "returned to employment," as defined in Central Kentucky Steel v. Wise, supra, at any point between August 15, 2012, through January 4, 2013. In the case *sub judice*, in awarding TTD benefits, the ALJ determined when Helms attained MMI but did not determine the point at which Helms had reached a level of improvement that would permit a return to employment. In awarding TTD benefits from January 4, 2012, through January 4, 2013, the ALJ must make a determination Helms had not reached MMI and during this period had not reached a level of improvement that would permit a return to employment as defined herein. The ALJ did not make such

a determination in the opinion and order. In its petition for reconsideration, UPS pointed out an award of TTD benefits terminates upon obtaining MMI or a return to employment. It asserted since Helms had returned to employment on August 15, 2012, TTD benefits should terminate on August 14, 2012. Although UPS did not request additional findings of fact, we believe the issue of the ALJ's failure to engage in the requisite analysis was sufficiently preserved for review. Further, as a matter of law the ALJ was required to engage in the two prong analysis in determining whether an award of TTD benefits was appropriate.

In the June 17, 2013, opinion and order on reconsideration, the ALJ declined to address UPS' argument. Thus, the ALJ failed to engage in the requisite analysis, as required by the statute and applicable case law, regarding an award of TTD benefits. Therefore, the award of TTD benefits must be vacated and remanded to the ALJ for additional fact-finding.

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland

Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). However, as we lack fact-finding authority, the ALJ must provide the basis for any award of TTD benefits utilizing the criteria set forth in the statute and applicable case law.

Since there is no dispute Helms was entitled to TTD benefits through August 14, 2012, the ALJ must determine whether as of August 15, 2012, or any time thereafter Helms returned to work that is customary or work she was performing at the time of the injury.

Accordingly, those portions of the May 6, 2013, opinion and order awarding TTD benefits and the June 17, 2013, opinion and order on reconsideration reaffirming the award of TTD benefits are **VACATED**. This matter is **REMANDED** to the ALJ for rendition of an amended opinion and order

containing additional findings of fact as to Helms' entitlement to TTD benefits from and after August 14, 2012, in conformity with the views expressed herein.

ALL CONCUR.

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