Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 17, 2014

CLAIM NO. 201089366

UNIVERSITY OF KENTUCKY PETITIONER

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

LORIE R. LEECH
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
REVERSING IN PART
AND REMANDING

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

RECHTER, Member. The University of Kentucky ("UK") appeals from the November 21, 2013 Opinion and Order and the December 19, 2013 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). UK argues the ALJ erred in awarding Lorie

Leech temporary total disability ("TTD") benefits from the date she returned to work until she reached maximum medical improvement ("MMI") because she had returned to work. Because the ALJ erred as a matter of law, we reverse and remand this claim for entry of an order finding Leech was not entitled to TTD benefits following her return to work.

Leech testified by deposition on August 21, 2013 and at the hearing held October 22, 2013. Leech began working as a nurse for UK in July of 2007. She earned $28.50 per hour and was scheduled to work forty hours per week, but was also on call to work additional hours. Leech sustained strain injuries to her cervical and thoracic spine on May 4, 2010 while working in radiology and wearing a heavy lead apron for several hours. She testified she missed seven or eight days, then returned to work with light duty restrictions.

In October 2010, Leech was moved to a position at the UK Markey Cancer Center ("Markey") as a floor nurse. The work was lighter because she did not have to wear the lead apron. Leech earned the same hourly rate at Markey. However, she worked three twelve hour shifts and was not on call; thus, she worked fewer hours than she had in radiology. Leech worked in this position "with no issue" until she received a letter suspending her while UK

determined what to do with her employment. She last worked at Markey in July 2011.

The parties stipulated TTD was paid from May 12, 2010 to May 27, 2011. Given the limited nature of the issue before us, a summary of the medical evidence considered by the ALJ is unnecessary.

The ALJ determined Leech reached MMI on May 5, 2011. He based this conclusion upon Leech's testimony and evidence from Dr. Gregory Snider. The ALJ awarded TTD benefits from May 12, 2010 to May 5, 2011.

UK filed a petition for reconsideration, which the ALJ denied, explaining:

> The award of temporary total disability benefits to the plaintiff in the original Opinion and Order was based upon the plaintiff's sworn testimony that after her injuries on May 4, 2010, the defendant moved her to a lighter job and that she began making less money. Dr. Snider stated that at the time of his examination of the plaintiff on May 5, 2011 she had reached maximum medical improvement. In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court stated that it would not be reasonable to terminate temporary total disability benefits to an employee when the employee is released to perform lighter work, but not the type of work that is customary or that the employee was performing at the time of his injury. In the original Opinion and Order, based upon the plaintiff's sworn testimony as covered in detail

> above, and Dr. Snider's persuasive and compelling medical report, which is covered in detail above, I made and again [make] the factual determination that the plaintiff is entitled to recover from the defendant temporary total disability benefits from May 12, 2010 to and including May 5, 2011.

On appeal, UK argues the ALJ erred in awarding TTD benefits during Leech's continuing employment. UK notes Leech's testimony establishes she only missed seven or eight days of work following the injury, then returned to full-time employment as a nurse. Although she changed to a lighter duty position at Markey, she continued to work full time until July 2011 after having reached MMI.

TTD is the condition of an employee who has not reached MMI following a work-related injury *and* who has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Both conditions must be satisfied for an employee to qualify for TTD benefits. Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-4 (Ky. 2005). The Court of Appeals characterized the second requirement broadly, explaining TTD benefits must cease when "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." W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993).

However, the Kentucky Supreme Court later provided a more narrow interpretation of KRS 342.0011(11)(a), requiring not just a return to *any* employment or "minimal work." Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000). In order to terminate TTD on this basis, the employee must be able to return to work "that is customary or that he was performing at the time of his injury." Id. Considering both of these slightly different definitions, this Board has affirmed the denial of TTD benefits where the claimant has not returned to the exact same employment, but has returned to work "for which he had training or experience." Woodall Construction v. Gregory, WCB 201200929 (June 14, 2013).

Here, the ALJ awarded a period of TTD benefits extending from May 12, 2010 through May 5, 2011, the date Dr. Snider placed Leech at MMI. UK does not contest the ALJ's finding that Leech reached MMI on May 5, 2011. However, the evidence is uncontradicted Leech worked for UK as a nurse during most of the period TTD benefits were awarded. Nothing in the record indicates the position was a "make work" job; rather, it was work for which Leech had training and experience. Although she testified the work at Markey was lighter, primarily because she did not have to wear the lead apron, she worked three twelve hour shifts

per week earning $28.50 per hour. Thus, Leech was earning $1026.00 per week in comparison to the stipulated average weekly wage of $1098.24 at the time of her injury. Clearly the post injury work at UK does not constitute “minimal” employment. Even though Leech may not have attained MMI, she was not precluded from performing her customary work as a registered nurse. Because substantial evidence does not support a conclusion Leech was incapable of performing work for which she had training or experience, and because she in fact performed such work during the period TTD benefits were awarded, the ALJ’s award of TTD benefits is reversed.

Accordingly, the November 21, 2013, Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge, and the December 19, 2013 Opinion and Order on Reconsideration are **REVERSED IN PART**. This claim is **REMANDED** for entry of an amended opinion, award, and order in conformity with the views expressed herein.

ALL CONCUR.

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