Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 24, 2016

CLAIM NO. 201386934

VOITH INDUSTRIAL SERVICES INC PETITIONER

VS. **APPEAL FROM HON. STEPHANIE KINNEY, ADMINISTRATIVE LAW JUDGE**

ASTIN GRAY
HON. STEPHANIE KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
VACATING IN PART
AND REMANDING
* * * * * *

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

RECHTER, Member. Voith Industrial Services, Inc. ("Voith") appeals from the November 16, 2015 Opinion, Award and Order and the February 7, 2016 orders on reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ") awarding Astin Gray ("Gray") temporary total disability ("TTD"), permanent partial disability ("PPD")

and medical benefits. Voith argues the ALJ erred in awarding TTD benefits, in enhancing PPD benefits by the three multiplier, in finding the claim for sleep apnea compensable, and in applying the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). For the reasons set forth herein, we affirm in part, vacate in part and remand.

Gray testified by deposition on June 19, 2015 and at the hearing held September 16, 2015. Gray performed janitorial services for Voith at a Ford plant. Gray's duties included cleaning a panel beneath robots with Purge solvent, pulling trash, cleaning restrooms, and mopping and sweeping floors. On April 4, 2013, he lifted a trash bag that contained rags saturated with Purge and inhaled the fumes. The saturated rags should not have been in the trash container. Gray felt dizzy with a burning in his mouth and throat. On April 6, 2013, Purge and another chemical were spilled on the floor and Gray was directed to clean up the spill. He again experienced symptoms of headache and dizziness and had to leave the room.

Gray was taken off work from August 1 through 28, 2013. He returned to work and was placed in the main building. His duties included sweeping, mopping, pulling

cardboard and cleaning restrooms. Gray never returned to work in the paint area.

Gray continues to experience shortness of breath and pain in his chest when he inhales dust while sweeping. He has to use his rescue inhaler on a daily basis. He believes he is unable to work in the paint area of the plant due to the presence of fumes from the chemicals, but feels he is capable of performing janitorial work in the main building. Gray denied any breathing problems prior to April 2013, or any prior diagnosis or symptoms of sleep apnea.

Justin Berry, facility manager for Voith at the Ford plant, testified at the hearing. Work in the paint area involved paint booth cleaning, janitorial services, mopping floors, and office cleaning. When Gray was transferred to the main building, his work involved sweeping, cardboard removal, and trash bag removal. The position was a regular job and was not specially created for Gray, and is similar to the position in the paint area. He indicated Gray’s job performance is very good. Berry expected that the position would continue and there were no anticipated layoffs for the area.

Gray submitted treatment records from Baptist Worx. On April 8, 2013, Gray complained of low chest and upper abdomen burning, headaches, shortness of breath, and coughing after inhaling fumes from trash at work. Gray had mild epigastric tenderness on examination and spirometry showed a "questionable quality restrictive breathing pattern." Gray was diagnosed with GERD symptoms and cough, etiology unknown but possibly secondary to inhalation injury.

Gray submitted the May 21, 2013 report of Dr. Miriam Reyes who performed pulmonary function testing. Gray had an FEV1 of 67.26% of predicted, indicating a moderate restriction. Gray's post dilation FEV1 revealed a moderately severe restriction.

Gray submitted treatment records from Dr. Scott Kellie. On July 31, 2013, Gray complained of shortness of breath and wheezing after periods of exertion. Dr. Kellie diagnosed shortness of breath, asthma, reactive airway dysfunction syndrome ("RADS"), cough, and wheezing symptoms.

Gray submitted the report of Dr. Warren Bilkey who performed an independent medical evaluation on February 24, 2015. Dr. Bilkey diagnosed inhalation exposure injury

at work on April 4, 2013, asthma, and RADS. Dr. Bilkey opined these diagnoses are due to the April 4, 2013 exposure injury and assigned a 20% impairment rating for asthma pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Bilkey indicated there was no evidence of a sleep condition prior to the work injury. He also assigned a 3% impairment rating for sleep apnea pursuant to the AMA Guides, resulting in a combined 22% impairment rating. Dr. Bilkey further advised Gray should avoid any further exposure to the chemical that led to the condition, and opined he is precluded from performing the full scope of his pre-injury work duties.

Voith submitted the treatment records and reports and the July 28, 2015 deposition of Dr. Douglas Lotz. Dr. Lotz evaluated Gray on April 15, 2014. Spirometry showed some improvement from prior studies. Dr. Lotz diagnosed well-controlled allergic rhinitis and moderate persistent occupational asthma. Regarding the cause of these diagnoses, Dr. Lotz stated:

> I will tell you, with his relative minimal report of rhinitis symptoms or nasal symptoms and the relative paucity of allergens on testing, I – I'm even more convinced that his symptoms are

> being directly attributed to or caused by the exposures at work.

Dr. Lotz felt Gray was physically capable of returning to his customary work. He should minimize exposure to known chemical irritants such as Purge or use an air purifying respirator.

Based upon the opinions of Drs. Bilkey, Kellie, and Lotz, the ALJ determined Gray suffers from occupational asthma, reactive airways dysfunction syndrome and sleep apnea as a result of a work injury on April 4, 2013. The ALJ found further exposure to Purge on April 6, 2013 was an aggravation of the condition that manifested on April 4, 2013 and he did not suffer additional injury. The ALJ noted Gray did not suffer from any breathing condition or sleep apnea prior to the exposure to Purge solvent. The ALJ found Gray reached maximum medical improvement ("MMI") on April 15, 2014. The ALJ noted Gray was restricted from working from August 1, 2013 until he returned to work on restricted duty from August 28, 2013 until April 15, 2014 in a building where Purge was not used. The ALJ held he was not performing his customary pre-injury job duties, since the pre-injury job required daily exposure to Purge. Thus, the ALJ awarded TTD benefits from August 1, 2013 through April 15, 2014. The ALJ adopted the 10% impairment

rating assessed by Dr. Lotz for Gray's breathing limitation and the 3% impairment assessed by Dr. Bilkey for the sleep disturbance related to sleep apnea which produced a 12% combined whole person impairment rating pursuant to the combined values chart in the AMA Guides. The ALJ made the following findings regarding the three multiplier:

> . . . After a careful review of the evidence the ALJ concludes Plaintiff cannot perform the essential job duties that Plaintiff's pre-injury position required. Plaintiff continues to perform janitorial tasks, but can no longer be exposed to Purge solvent. This is evidenced, not only by Plaintiff's testimony, but by the emergency room visit following his additional exposure to the chemical. If Plaintiff comes in contact with this chemical, his breathing condition is significantly exacerbated. Dr. Kellie and Dr. Bilkey have opined Plaintiff should not be exposed to this chemical. Dr. Lotz echoed this recommendation as well, and indicates Plaintiff should not be exposed to the Purge solvent.

Voith filed a petition for reconsideration requesting additional findings regarding the period of TTD benefits and the appropriate multiplier and requesting a Fawbush analysis.

By order dated February 7, 2016 the ALJ granted in part and denied in part Voith's petition. Regarding the Fawbush analysis, the ALJ noted Gray's job as a janitor

requires daily exposure to various chemicals and cleaning supplies which compromise his pulmonary functioning and sweeping causes bouts of wheezing. His breathing deficits force him to take frequent breaks and he must use inhalers. He experiences these symptoms despite placement in a different area of the plant. Based upon Gray's continuing pulmonary symptoms and limitations, the ALJ found it unlikely Gray will continue to earn a wage equivalent to or greater than his pre-injury earnings into the indefinite future. Regarding the period of TTD benefits, the ALJ found as follows:

> It is uncontroverted that Plaintiff did not return to his pre-injury position in the paint room. Prior to the work injury, Plaintiff worked only in the paint room, and was continuously exposed to Purge. This was Plaintiff's customary work. Following the work injury, Plaintiff was transferred to a different building, and performed tasks wherein he was not exposed to Purge in accordance with Dr. Kellie's work restrictions. As such, the ALJ's prior award of TTD benefits from August 1, 2013 through April 15, 2014 will not be disturbed.

On appeal Voith argues Gray is not entitled to TTD benefits during the period he returned to performing janitorial work in a different building at Ford. Gray performed the same duties in a different location. Thus

the employment must be viewed as his customary employment. Gray was not performing light duty work, nor was he performing minimal or "make work" jobs upon his return to work. At best, Voith contends Gray is entitled to TTD benefits only from August 1, 2013 to August 30, 2013 when he was not working.

We must vacate the ALJ's decision regarding the period of TTD benefits. In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an 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 the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that "[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. To be entitled to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury.

In Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court recently clarified when TTD is appropriate in cases where the employee returns to modified duty. The Court stated:

> As we have previously 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 [of work] that is customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

In awarding TTD benefits, the ALJ seems to have relied exclusively upon the fact Gray was no longer working in the Purge area. We do not believe under the analysis described in Tipton, this circumstance alone would support an award of TTD benefits. Rather, Tipton requires an analysis that focuses on the job duties performed during the period of light duty work, not the job duties the worker was incapable of performing. Therefore, we remand this claim and the ALJ is requested to analyze the duties Gray performed during the period of light duty work, and determine whether this work constitutes a return to customary employment; that is, work for which he has the experience, training and education.

Voith argues Gray is not entitled to the three multiplier because he is able to and currently is performing the essential functions of his customary work. Additionally, Voith questions the adequacy of the ALJ's Fawbush analysis.

An analysis pursuant to Fawbush requires three essential findings of fact. First, the ALJ must determine whether a claimant can return to the type of work performed at the time of injury. Second, the ALJ must also determine whether the claimant has returned to work at an AWW equal

to or greater than his pre-injury wage. Third, the ALJ must determine whether the claimant can continue to earn that level of wages for the indefinite future. In Adkins v. Pike County Board of Education, 141 S.W.3d 387 (Ky. App. 2004), the Court explained the Fawbush analysis includes a “broad range of factors”, only one of which is the ability of the injured worker to perform his pre-injury job.

In making a determination regarding the applicability of KRS 342.730(1)(c)1, the ALJ must "analyze the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether he retains the physical capacity to return to those jobs." Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004). While Gray returned to performing janitorial services, his inability to work in the paint area environment satisfies the first prong of the Fawbush analysis. Working in the presence of Purge solvent was a requirement of the work performed at the time of the injury. He also returned to his pre-injury wage, thus satisfying the second prong.

On reconsideration, the ALJ adequately addressed the third prong, the ability to earn the same or greater wage for the indefinite future. The standard for the

decision is whether the injury has permanently altered the worker's ability to earn an income. *See* Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006). The ALJ noted work in the main building had initially resulted in a decrease in earnings from that earned in the paint area. Gray's work as a janitor requires daily exposure to various chemicals and cleaning agents which compromise his pulmonary functioning. The routine task of sweeping causes Gray to experience bouts of wheezing and his breathing deficits force him to take frequent breaks at work. The difficulty with performing a basic janitorial task such as sweeping clearly impacts Gray occupationally. The continued pulmonary symptoms and limitations identified by the ALJ provide a reasonable basis for the ALJ to conclude Gray is unlikely to continue to earn a wage equal to or greater than the pre-injury earnings for the indefinite future.

Finally, Voith argues the ALJ should have dismissed the claim for work-related sleep apnea. Voith contends the medical science does not support such a finding. Dr. Lotz, a specialist in immunology, testified there is no medical or scientific literature showing a correlation between allergies or asthma and sleep apnea.

He identified many non-work-related causes for sleep apnea including weight, diet and medications. Voith questions Dr. Bilkey's qualification to offer an opinion on causation of the sleep apnea and contends his opinion is not scientifically reliable.

Gray had the burden of proving each of the essential elements of his cause of action, including causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he 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).

Gray's testimony and the opinions of Dr. Bilkey constitute substantial evidence supporting the ALJ's determination his sleep apnea is causally related to his exposure while working for Voith. Dr. Bilkey noted Gray had no history of sleep disturbance prior to the work incident. He unequivocally stated he found the diagnosis resulted from the work injury. Medical experts are

permitted to draw conclusions as to causation based upon the relationship of symptoms to the environment or the elimination of other possible factors when determining causation. Dr. Lotz did not determine the cause of the condition. Rather, he merely identified other possible causes of sleep apnea in the general population.

Voith's arguments concerning Dr. Bilkey's qualifications may only be directed to the weight to be given the evidence. It is not the Board's role to re-weigh the evidence; the ALJ alone determines the character and quality of the proof. Square D v. Tipton, 862 S.W.2d 308 (Ky. 1993). Furthermore, an objection to an expert's qualification to testify as to a given subject must be raised at the time the proof is offered into evidence. The administrative regulations governing the practice of workers' compensation claims provide that the testimony of a physician "shall be admitted into evidence without further order if an objection is not filed." *See* 803 KAR 25:010, Section 10(6)(a). Because there was no objection to the admission of Dr. Bilkey's report into evidence, the ALJ was free to afford that evidence whatever weight she deemed appropriate. If, as here, the ALJ's findings are

supported by substantial evidence, then the Board may not disturb those findings.

Accordingly the November 16, 2015 Opinion, Award and Order and the February 7, 2016 orders on reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge are hereby **AFFIRMED IN PART, VACATED IN PART AND REMANDED** for additional findings and entry of an amended decision consistent with the views expressed herein.

ALL CONCUR.

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