

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: November 9, 2018

CLAIM NO. 201568271

BRYAN TRENT

PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE**

UPS and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

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

* * * * *

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

ALVEY, Chairman. Bryan Trent (“Trent”) appeals from the Opinion and Order Dismissing rendered July 10, 2018 by Hon. Jane Rice Williams, Administrative Law Judge (“ALJ”). Trent and UPS, his employer, stipulated he sustained a work-related right shoulder injury on September 17, 2015. The ALJ dismissed Trent’s claim for additional temporary total disability (“TTD”) benefits for a period from September

18, 2015 through November 20, 2015 when he was performing Temporary Alternative Work (“TAW”), and found he is not entitled to an award of permanent partial disability (“PPD”) benefits. However, the ALJ failed to make a determination that Trent in fact sustained a right shoulder injury on September 17, 2015. Likewise, the ALJ did not make a determination regarding Trent’s entitlement to medical benefits, nor did she make a determination that he was entitled to TTD benefits from November 21, 2015 through August 1, 2016, which was voluntarily paid by UPS. Trent also appeals from the August 1, 2018 order overruling his petition for reconsideration.

On appeal, Trent argues the ALJ erred in dismissing his right shoulder injury claim, and in refusing to award the requested additional TTD benefits while he was placed on TAW. Regarding the ALJ’s determination that Trent is not entitled to an award of PPD benefits, we affirm. Regarding the ALJ’s denial of TTD benefits from September 18, 2015 to November 20, 2015, we also affirm. However, we vacate the ALJ’s decision, in part, and remand for a determination of whether Trent sustained a work-related right shoulder injury, a determination regarding entitlement to TTD benefits while he recovered from shoulder surgery, and for a determination of entitlement to medical benefits pursuant to KRS 342.020.

Trent filed a Form 101 on May 3, 2017, alleging he injured his right shoulder on September 17, 2015 while carrying materials in the course of his job duties as a feeder driver for UPS. The Form 104 employment history form indicates Trent worked as a truck driver and as a carpenter. He later testified he has engaged in farm labor.

Trent testified by deposition on June 20, 2017, and at the hearing held May 17, 2018. He was born on November 4, 1968, and is a resident of Nelson County, Kentucky. Trent is a high school graduate, a certified carpenter, and holds a CDL. He began working as a temporary employee for UPS on May 14, 2010, and became a permanent employee September 16, 2010. His only work for UPS has been as a feeder driver, which consists of driving trucks, as well as moving and cleaning trailers. Trent denied having any right shoulder problems prior to September 17, 2015, although he had multiple other problems including thyroid issues, gout, right carpal tunnel surgery, and a previous low back surgery.

On September 17, 2015, Trent was cleaning debris, which included bands/straps, cardboard, and pallets from a trailer. While attempting to remove a pallet from a trailer, a strap wrapped around it and became entangled with other pallets. This caused his right upper extremity to jerk, and he experienced a pop at the top of his right shoulder, causing immediate right arm pain and weakness. He attempted to remove another pallet, but could not lift it with his right hand. He then attempted to drive, and could not release the brake with his right hand or shift gears due to right arm weakness. He reported the incident to his supervisor, and he was sent to U. S. Healthworks where he was advised to treat with heat and ice. He also took over-the-counter Ibuprofen or Tylenol. He testified that treating with heat worsened his condition.

The day after the accident, he was placed on TAW, which consisted of watching television and talking with co-workers who were on break. He later followed up with Dr. Ryan Krupp, an orthopedic surgeon, who eventually

performed right rotator cuff surgery. He continued on TAW until November 20, 2015, when UPS acknowledged he was going to have right shoulder surgery. He underwent surgery on February 28, 2016.

Trent returned to his feeder driver position after Dr. Krupp released him on August 1, 2016, and he continues to work in that position for UPS. He testified he earns more per hour now than he did at the time of the injury. He also testified he believes he will be able to continue to perform this job, but he has occasional cramps, or “charley horses” in his bicep and scapula.

In support of his claim, Trent filed Dr. Krupp’s October 21, 2015 office note. Dr. Krupp noted Trent’s one-month history of right shoulder pain from an injury he sustained while moving a pallet. He noted the history of a strap on a pallet getting caught, which caused the injury. Dr. Krupp noted an MRI revealed a right rotator cuff tear. Trent complained of right shoulder pain, decreased range of motion, and weakness. He noted Trent’s co-morbidities of hypertension, hypothyroid, gout, previous spinal fusion, cholecystectomy and a previous right carpal tunnel release. He diagnosed Trent with a right shoulder high grade partial thickness rotator cuff tear, impingement, biceps tenosynovitis, labral tear, and mild arthritis. He prescribed Flexeril and Voltaren, and recommend surgery. He restricted Trent to no lifting, pushing or pulling greater than two pounds.

Trent also filed Dr. Jules Barefoot’s July 25, 2017 report. Dr. Barefoot examined Trent at his attorney’s request. He noted Trent’s history of injury and surgery, consistent complaints of pain over the anterior aspect of the right shoulder, loss of strength and mobility in the right shoulder, and persistent tenderness. He

diagnosed Trent as status post right shoulder arthroscopy with rotator cuff repair, subacromial decompression and arthroplasty, debridement of the labral tear, chondroplasty, and biceps tenodesis. Dr. Barefoot assessed a 5% impairment rating pursuant to the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). He found Trent had reached maximum medical improvement (“MMI”), and restricted him to lifting no more than eighty pounds on a maximum occasional basis, and not over fifty pounds on a frequent basis. He also stated Trent is unable to work above shoulder level.

In addition to the October 21, 2015 note from Dr. Krupp, UPS filed his records from November 8, 2015, the February 18, 2016 surgery, June 22, 2016, and August 1, 2016. UPS also filed the records from John Hupp, P.A., who followed up with Trent on March 3, 2016, March 29, 2016, and May 10, 2016. The records outline Trent’s treatment with Dr. Krupp, including surgery, and his progress afterward. On August 1, 2016, Dr. Krupp found Trent had reached MMI from his injury and surgery. He found Trent did not qualify for a permanent impairment rating pursuant to the AMA Guides. He released Trent to return to unrestricted work on August 3, 2016. Dr. Krupp did not treat Trent after August 1, 2016.

A benefit review conference (“BRC”) was held on April 9, 2018. The BRC order and memorandum reflects the issues preserved for determination included benefits per KRS 342.730 and duration of TTD benefits. It is also noted the BRC Order and Memorandum contains no stipulation regarding whether Trent retains the capacity to return to the type of work performed at the time of the injury, although it is acknowledged he testified he in fact returned to the same job.

The ALJ issued the Opinion and Order Dismissing on July 10, 2018. The ALJ acknowledged the parties stipulated Trent sustained a work-related injury on September 17, 2015. She also acknowledged UPS paid Trent TTD benefits at the rate of \$773.61 per week from November 20, 2015 through August 2, 2016, and noted UPS had paid \$28,795.20 in medical expenses on Trent's behalf.

However, the ALJ made no determination regarding whether Trent in fact sustained a work-related injury. She likewise made no determination regarding Trent's entitlement to TTD benefits during the period paid by UPS, nor did she address his entitlement to medical benefits. The ALJ relied upon Dr. Krupp's opinion in determining Trent is not entitled to an award of PPD benefits. She specifically referenced Dr. Krupp's determination that Trent did not qualify for an impairment rating pursuant to the AMA Guides. The ALJ then performed the appropriate analysis pursuant to Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000); Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004); Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005); and Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016) in determining Trent is not entitled to TTD benefits from September 18, 2015 through November 20, 2015.

Trent filed a petition for reconsideration requesting the ALJ to set aside her decision. He argued there is evidence supporting an award of PPD benefits based upon a 5% impairment rating. Trent also argued he is entitled to an award of TTD benefits during the period from the date of the accident until he left work for the surgery. The ALJ denied the petition for reconsideration in an order issued August 1, 2018.

On appeal, Trent again argues the ALJ erred in relying upon Dr. Krupp's opinions in denying his request for an award of PPD benefits. He also argues the ALJ erred in failing to award an additional period of TTD benefits.

As the claimant in a workers' compensation proceeding, Trent had the burden of proving each of the essential elements of his cause of action, including entitlement to an additional period of TTD benefits, and an award of PPD benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Trent was unsuccessful in his burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as that which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable based on 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky.

2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Trent has essentially asked this Board to re-weigh the evidence, reverse the ALJ's determination, and require her to enter an award of PPD benefits based upon Dr. Barefoot's opinions, as well as an additional period of TTD benefits while he was placed on TAW. It is not the function of this Board to re-weigh the evidence. Whittaker v. Rowland, supra. The ALJ provided thorough summaries of the medical opinions and articulated her reasoning for finding the opinions of Dr. Krupp most persuasive in reaching her determination.

Dr. Krupp's opinion constitutes substantial evidence supporting the ALJ's findings, and a contrary result is not compelled. The ALJ's findings are more than sufficient to apprise the parties of the basis for her decision. While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, she is not

required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of her reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Based upon the foregoing, the ALJ's determination regarding Trent's entitlement to income benefits will not be disturbed. We likewise determine the ALJ performed the appropriate analysis in finding Trent is not entitled to an additional period of TTD benefits during the period he was placed on TAW.

That said, this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). The ALJ made no specific finding that Trent sustained a work-related injury, although based upon the evidence, there appears to be no dispute this occurred on September 17, 2015. Although this may be inferred by the stipulations by the parties, the voluntary payment of medical benefits, and the fact he underwent right shoulder surgery, the ALJ must specifically make such a determination. We also note the ALJ failed to make a finding regarding Trent's entitlement to TTD benefits for the period voluntarily paid by UPS from November 2015 through August 2016. Despite the acknowledgement UPS voluntarily paid TTD benefits to Trent, the ALJ must make a finding regarding his entitlement to such benefits. The only analysis provided by the ALJ in her decision was for the period from September 18, 2015 through November 20, 2015, not for the subsequent period until he reached MMI as determined by Dr. Krupp.

We likewise determine the ALJ failed to make a finding regarding the compensability of medical expenses. The parties stipulated that UPS paid for medical treatment on Trent's behalf, which the ALJ acknowledged in her summary of stipulations. However, the ALJ made no finding regarding his entitlement to such benefits. In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. Therefore, the absence of an impairment rating does not preclude the ALJ, on remand, from awarding future medical benefits.

In this instance, the ALJ made no finding regarding Trent's entitlement to medical treatment pursuant to KRS 342.020. Therefore, we vacate the dismissal of Trent's claim, and remand for the ALJ to make a finding regarding whether he is entitled to medical benefits, including his entitlement to future medical benefits pursuant to FEI Installation, Inc. v. Williams, *supra*. We direct no specific result or outcome, and the ALJ may make any determination on this issue supported by the evidence.

Accordingly, the July 10, 2018 Opinion and Order Dismissing, and the August 11, 2018 order on petition for reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is hereby **REMANDED** for a finding of a work-related injury, and a determination of Trent's entitlement to the TTD benefits already paid and medical benefits pursuant to KRS 342.020.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

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