

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 6, 2019

CLAIM NO. 201753467

CLIFFVIEW RESORT

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

PEGGY FOX
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Cliffview Resort (“Cliffview”) appeals from the July 24, 2019, Opinion and Award and the August 22, 2019, Order of Hon. John B. Coleman, Administrative Law Judge (“ALJ”). The ALJ awarded Peggy Fox (“Fox”) permanent partial disability benefits beginning on December 10, 2017, interrupted by the award of temporary total disability (“TTD”) benefits from December 11, 2017, through January 2, 2019. He also awarded medical benefits for the work-related injuries to the

left shoulder, cervical spine, and lumbar spine. The ALJ further determined Cliffview is not responsible for the payment of medical expenses associated with Fox's cervical fusion surgery due to her failure to adhere to the mandates of KRS 342.020 and 803 KAR 25:190.

On appeal, Cliffview asserts Dr. John Gilbert's medical opinions concerning the cause of Fox's cervical spine condition cannot comprise substantial evidence. Thus, the ALJ erred by relying upon his opinions. Cliffview also argues the award of TTD benefits through January 2, 2019, the date upon which Dr. Gilbert opined Fox achieved maximum medical improvement ("MMI") for her work-related injuries, is erroneous.

BACKGROUND

Fox's Form 101 alleges she sustained work-related injuries to multiple body parts on December 10, 2017, in the following manner: "Slipped on ice and fell in the basement entrance at work injuring her neck, left side, ribs, arm, elbow, hip and stomach."

On May 31, 2018, Fox filed a Motion to Amend her Form 101 in order to include injuries to her left shoulder and lower back. Fox's motion was sustained by order dated June 15, 2018.

Fox was deposed on June 15, 2018. She began working for Cliffview in April 2017 as a housekeeper. As to whether she experienced any non-work-related injuries to her neck, she testified as follows:

A: My neck hurts me, or it did hurt me, but it's not an injury. I didn't hurt myself.

Q: You had some pain, in other words, before December 10th of 2017?

A: Yes.

Q: What do you mean by it wasn't an injury. You just –

A: I didn't injure myself.

Q: Okay. You just had some pain and you're not really sure why?

A: Yeah. I just had pain in my neck.

She described the injurious event occurring on December 10, 2017:

A: Well, upon arriving at work, I started walking down the ramp to the basement. And as I approached two cars – well, a car and a truck – as I started between them to reach the porch to the door, I slipped on ice and fell on my left side.

Q: When you say left side, you mean you turned like completely to the left and fell onto your left arm, or were you kind of at an angle, or what do you remember?

A: One of my feet, I can't remember which one, as I was stepping on – I guess it was the foot that stepped on the ice first.

Q: Uh-huh (affirmative response).

A: And we were on a ramp, like at a grade, on blacktop. The foot slid and it – I don't remember which one, but the other foot went behind me. I guess it stayed on the blacktop.

Q: Uh-huh (affirmative response).

A: It was stable and it yanked me down. And as I went, it was kind of like the splits and a twist and I fell down.

Q: Okay.

A: I cracked my elbow on the blacktop and I kept sliding, my shoulder extended above my head.

Q: Okay.

A: And the rib cage just smacked the ground and my hip.

Fox acknowledged she was taking Gabapentin and Naproxen before her fall. She has not returned to work for Cliffview since her fall.

Fox also testified at the January 22, 2019, hearing. She described the specific tasks she was charged with performing for Cliffview at the time of her injury:

A: Cleaning cabins and lodge rooms, which consisted of making beds, cleaning windows, vacuuming, mopping, sweeping, dishes. Just, pretty much, the whole upkeep of the cabins and the lodge rooms.

Q: What was the heaviest task you generally had to do?

A: Carrying the linens. There were big bags of linens.

Q: How heavy do you think they weighed?

A: I'd say between thirty and fifty pounds.

Q: Okay. And, that was a regular course of your job?

A: Yeah.

Fox eventually underwent neck surgery. She described the neck symptoms she experienced before the surgery as compared to after: "The neck symptoms before was a lot of pain and the right arm numbness and, after the surgery, the pain is getting a lot better. I still a [sic] have a numbness. It's – it's partially down the right arm now. The pain is, like, from the elbow down now."

Fox recounted her neck problems prior to her work-related fall:

A: Well, I had popping and cracking in my neck and they did an MRI and they said it was just mild degenerative changes, arthritis.

Q: Okay. So, in other words, as far as you know, you didn't – you had never injured your neck before you fell?

A: Well, the MRI showed negative.

Q: Sure. In other words, you never – you never in the past had something fall or you – you...

A: No.

Q: Just as an example, a motor vehicle accident or something where you were like, wow, I think I might've hurt my neck.

A: No.

...

Q: Okay. Who – so, which doctor was it that read the MRI and then told you that you – that he thought you had some arthritis? Do you remember?

A: The radiologist? Is that what you mean?

Q: In other words, did you – did you take your MRI results to an orthopedist or Dr. Gay or somebody and they looked at it?

A: Dr. Gay. He read the results.

Q: Okay. And, - and, it was his opinion that you had some arthritis?

A: Yeah.

Fox introduced Dr. Gilbert's January 2, 2019, Form 107. Significantly, in the "History" section under "Prior Spinal Injuries," he noted the following:

None other than she had a little bit of neck problem in August 2017. She had an MRI, she says ordered by Dr. Gays [sic] that was negative. It resolved and she said she was essentially asymptomatic at the time of this injury. She had followup imaging after her injury and failed conservative treatment [sic] had a standard surgery for a problem. She says she is still considering surgery on her

shoulder. She has not had expensive treatment to her back. Her other medical problems include asthma and COPD.

After performing a physical examination and medical records review,

Dr. Gilbert set forth the following diagnosis:

Cervical postsurgical syndrome, status post anterior cervical decompression fusion at C5-C6 with persistent neck pain, cervical radiculopathy with pain, numbness and weakness, muscle spasms, left shoulder pain and aggravation of degenerative joint disease and strain/sprain with tenderness, decreased range of motion and weakness in her left shoulder that interferes with function. Lumbar pain and lumbar radiculopathy. Lumbar strain/sprain and aggravation of degenerative disc disease, spondylosis, muscle spasms, decreased range of motion and burning pain radiating into the hips.

Regarding causation, Dr. Gilbert opined the work-related event on December 10, 2017, caused Fox's injuries. He assessed a 42% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. He opined Fox achieved MMI on January 2, 2019. Dr. Gilbert also opined Fox is unable to return to the type of work she was performing at the time of her injury and recommended sedentary duty.

Several of Dr. William Gay's records were filed in the record by Cliffview. Since the ALJ summarized these records extensively in his decision, we see no need to provide a separate summary.

The August 14, 2018, Benefit Review Conference Order and Memorandum lists the following contested issues: work-related injury, TTD benefits paid, medical expenses unpaid or contested, physical capacity to return to the type of

work performed at the time of injury, and permanent income benefits per KRS 342.730 including multipliers.

The July 24, 2019, Opinion and Award contains the following “analysis and conclusions:”

Causation, Work-relatedness and Prior Active?

The defendant mainly contests this case on the issue of whether the cervical spine condition, surgery and impairment are causally related to the work event or instead, prior active conditions for which the plaintiff simply continued treatment. The defendant relies heavily on the notes of Dr. Gay who did treat the plaintiff for complaints of pain in the cervical spine and upper extremities for several months prior to the work event. However, the plaintiff admits to having prior problems in her neck, but denies any prior accident. When asked at her deposition what hurt at the time of the accident she replied, “My neck, my shoulder, my ribs.” The deposition continued on page 19 and she indicated after being asked, “of all the body parts you just mentioned or just ---” and she replied, “Yes. Except for the lower back, they missed that one.” Later, on page 26 she was asked how her symptoms had changed. She indicated that her ribs had gotten better and her hip was about the same but that her neck, back and shoulder had gotten worse. The medical evidence on the issue of the neck is very confusing. As pointed out above, the notes of Dr. Gay are difficult to decipher, but it does appear to the undersigned that the plaintiff had pre-existing cervical pain, which did get worse after the work event. To the undersigned, the inclusion of the notes from Dr. Gay following the work incident confirm the plaintiff’s credible testimony that the event caused a worsening of her cervical pain as well as pain in her left upper extremity, ribs, hip and lower back. The statement is confirmed by the physical therapy record and the treating physician’s records of May 23, 2018 wherein the physician reported she had worsening neck pain with right arm pain with rotation of the neck down the bicep, which was becoming an issue as well. At that time, the focus turned from the left shoulder to the cervical spine as the culprit for the plaintiff’s condition. Initially, Dr. Hughes assessed the plaintiff with a 5%

impairment due to a prior active condition. However, he explained that the plaintiff's condition had gotten worse after the event. Unlike Dr. Gilbert, Dr. Stephens and Dr. Primm felt that the fusion surgery was the result of the natural progression of the plaintiffs [sic] pre-existing degenerative disc disease rather than the arousal of the pre-existing degenerative disc disease. However, the diagnostic studies performed prior to the work event revealed only mild degenerative disc disease. In fact, Dr. Primm noted the degenerative disc disease were not out of the ordinary for someone of the plaintiff's age. To the undersigned, this gives credibility to the plaintiff's assertion that her prior neck pain was made worse by the work event and that that work event resulted in the cervical fusion being performed as opined by Dr. Gilbert. Therefore, I am persuaded that the work event led to the fusion surgery of the cervical spine. I am convinced that the event arouse [sic] pre-existing degenerative conditions in the lumbar and cervical spine as well as the left shoulder, which are compensable under McNutt Construction/First General Services v. Scott, 40 SW3d 854 (Ky., 2001).

I am equally convinced that the plaintiff did have a prior active impairment to the cervical spine as noted by Dr. Hughes. I am convinced that prior active impairment was 5% under the AMA Guidelines, as he opined in March 2018, prior to the fusion surgery. The plaintiff clearly had symptoms for which treatment was being rendered prior to the work event. Therefore, her condition was symptomatic and impairment ratable as required in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007).

While the plaintiff may have had an active impairment to her cervical spine at the time of her work event, she is nevertheless entitled to benefits based upon the impairment resulting from the work injury and the need for surgery based upon the medical opinion of Dr. Gilbert. As a general rule, all of the injurious consequences that flow from a work related physical injury and that are not attributable to an unrelated cause are compensable. Beech Creek Coal Company v. Cox, 237 SW2d 56 (Ky., 1951). Further, under Derr Construction Company v. Bennett, 873 S.W.2d 824 (Ky. 1994), an employer can be held responsible for a

worsening or progression of a pre-existing active condition as the result of a work injury. Had the work related fall not led to the surgery and increased impairment, the plaintiff would have only been entitled to temporary benefits for the cervical condition under Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001).

Permanent Total Disability?

The plaintiff herein argues she has been rendered permanently and totally disabled as the result of his work related injury. In City of Ashland v. Stumbo, 461 SW3d 392 (Ky. 2015), the Kentucky Supreme Court laid out a five-step analysis, which the ALJ must utilize in determining entitlement to permanent total disability. Initially, the ALJ must determine if the claimant suffered a work related injury. Next, the ALJ must determine what, if any, impairment rating the claimant has. Third, the ALJ must determine what permanent disability rating the claimant has. Then the ALJ must make a determination that the claimant is unable to perform any type of work. (In making this determination, the ALJ must state with some specificity the factors that were utilized in making the conclusion the claimant is permanently and totally disabled). The ALJ must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. See Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky., 2000). Finally, the ALJ must determine that the total disability is the result of the work injury.

In this instance, I find the plaintiff did sustain work related injuries to her neck, lower back, left shoulder and ribs in the course and scope of her employment with the defendant when she slipped and fell on ice on December 10, 2017. Next, the ALJ must determine the plaintiff's impairment rating is attributable to that event. I am convinced from the evidence given by Dr. Stephens that the plaintiff's cervical impairment is 25%. Of that 25% impairment, the plaintiff had a 5% pre-existing active impairment as opined by Dr. Hughes, leaving a 20% compensable medical impairment for the cervical condition. I am also convinced by the opinion of Dr. Stephens that the plaintiff has a 5% impairment for her

lumbar spine injury, which must be added to the 20% compensable cervical impairment. When the Combined Values Chart of the AMA Guides is utilized, a 24% impairment is calculated. Based upon the opinions of Dr. Primm and Dr. Stephens, I am not convinced the plaintiff has shown entitlement to a medical impairment for her left shoulder tendinitis and impingement syndrome. While Dr. Gilbert and Dr. Hughes did assess impairment for the left shoulder, both Dr. Primm and Dr. Stephens are orthopedic surgeons who have opined that the plaintiff does not currently have a medical impairment. Further, Dr. Primm pointed out that Dr. Gilbert did not set forth his range of motion findings in order to make the 10% calculation of impairment for the left shoulder. Additionally, the ALJ notes that no impairment was assessed for the healed rib fractures. As such, I find the plaintiff has a 24% medical impairment directly resulting from the work injury of December 10, 2017.

The third step in the analysis requires the ALJ to determine the plaintiff's permanent disability rating. Under KRS 342.730 (1) (b), a 24% impairment carries a multiplication factor of 1.15, resulting in a 27.6% permanent disability rating.

The fourth step in the analysis requires the ALJ make a determination as to whether the plaintiff is unable to perform any type of work. In this instance, I note that the plaintiff is only age 50 and she has a GED. She has shown that she is capable of learning different types of work, having worked not only as a housekeeper, but also as a deli worker, grocery cashier and a seamstress. Dr. Gilbert indicated that the plaintiff should be under restrictions to avoid lifting greater than 20 pounds or repetitively using her left arm. He also recommended against overhead work with the left arm as well as tasks that involve repetitive bending and twisting of the lower back. He felt she was capable of performing sedentary work. Given these restrictions, along with the plaintiff's age education and work experience, I am convinced that she is able to perform sedentary work as noted by Dr. Gilbert. Therefore, I do not find that she meets the definition of permanent total disability as noted above. Instead, she is entitled to an award of permanent partial disability benefits based upon her 27.6% permanent disability rating.

Permanent Partial Disability?

The plaintiff has a 27.6% permanent partial disability rating under KRS 342.730 (1) (b). The restrictions placed upon her by Dr. Gilbert would not allow her to return to her job as a housekeeper for the defendant, which required her to lift as much as 50 pounds as well as regularly bend and lift with both her upper extremities. Therefore, she is entitled to the 3X multiplier under KRS 342.730 (1) (c) 1. The resulting permanent partial disability rate is \$148.83 per week.

Temporary Total Disability?

Temporary total disability is defined in KRS 342.0011(11)(a) as the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement, which would permit a return to employment. It is a two-part test. Magellan Health v. Helms, 140 SW 2d 579 (Ky. App. 2004). In this instance, the plaintiff was placed at maximum medical improvement by Dr. Gilbert on January 2, 2019. Prior to that time, she had not reach [sic] maximum medical improvement or a level of improvement that would allow her return to her customary occupation. Therefore, she is entitled to temporary total disability benefits from December 11, 2017 through January 2, 2019. Based upon her average weekly wage of \$269.62, the temporary total disability rate is \$179.75.

Compensability of Medical Expenses?

It is the employer's responsibility to pay for the cure and relief from the effects of an injury or occupational disease, all medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may be reasonably be required at the time of the injury and thereafter during disability... KRS 342.020. An employer is liable for medical expenses with a claimant suffers impairment – a harmful change in the human organism – due to a work related injury, even if the impairment does not rise to the level of a permanent disability. F E I Installation Inc. v. Williams, 214 S. W. 3d 313 (Ky. 2007).

Here, the plaintiff is entitled to reasonable and necessary medical treatment for injuries to the cervical spine, lumbar spine, left shoulder and ribs as the result of her traumatic work injury of December 10, 2017. However, the plaintiff sought treatment for the cervical injury through a third-party without consulting the carrier for the work injury. Clearly, the plaintiff and the medical provider are required to seek preauthorization through the workers' compensation carrier under 803 KAR 25:190, if they intended the compensation carrier to be responsible for the medical treatment. This would have allowed the carrier to avail itself of the utilization review process. Further, the medical provider has other obligations under KRS 342.020 (to submit a statement of services within 45 days). The law is clear that where a provider failed to submit such a statement without reasonable grounds the medical bills shall not be compensable under 803 KAR 25:096 Section 6. Therefore, the defendant must be relieved of the expenses associated with the plaintiff's cervical fusion surgery. The defendant must remain responsible for future reasonable and necessary medical expenses.

Cliffview's petition for reconsideration asserted the same arguments it now makes on appeal. In the August 22, 2019, Order, the ALJ denied Cliffview's petition as a re-argument of the evidence.

ANALYSIS

Cliffview first asserts the ALJ erred by relying upon Dr. Gilbert's opinions regarding causation, specifically with respect to the cervical spine injury, since he had an inaccurate understanding of Fox's pre-existing neck problems. Cliffview implicates Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004) in its argument. We affirm on this issue.

The claimant has the burden of proving each of the essential elements of her claim, including demonstrating she sustained a cervical spine injury as defined by the Act. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Fox was successful in

proving she sustained a permanent injury and permanent disability to her cervical spine, among other body parts, as a result of the work accident. Thus, Cliffview has the burden on appeal to show substantial evidence does not support the ALJ's determination. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We are not convinced Cepero is applicable in the case *sub judice*. Cepero was a case in which the claimant selectively failed to disclose to certain physicians a significant injury he sustained to his left knee while performing martial arts approximately three prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than one month up to three months. The physician upon whom the ALJ relied in awarding benefits was one who was not informed of this prior history by the employee and had no other apparent means of becoming so informed, and every physician who was adequately informed of the prior injury opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury.

There is nothing akin to Cepero in the case *sub judice*. First, Fox testified she did not sustain an acute injury to her neck prior to the work injury. She testified at both her deposition and the hearing, her neck hurt and she did not know why. This can certainly be distinguished from the facts in Cepero in which the claimant sustained an acute injury to his left knee that rendered him in a wheelchair for at least a month.

Second, despite Cliffview's assertions to the contrary, it is evident Dr. Gilbert was aware Fox experienced neck problems before the work injury. In Dr. Gilbert's January 2, 2019, report, he noted Fox had "a little bit of neck problem in August of 2017." Dr. Gilbert's reference to "August of 2017" is consistent with Dr.

Gay's records, as his records of August 2017 and before indicate Fox was experiencing neck pain. While Cliffview takes issue with Dr. Gilbert's use of the phrase "little bit" to describe Fox's pre-existing neck problems, it is important to note Fox was working for Cliffview at the time of her fall without any restrictions and performing tasks such as lifting bags of linens weighing up to fifty pounds.

Cliffview's allegations that Dr. Gilbert was unaware Fox saw Dr. Gay on December 7, 2017, for alleged neck problems - "a mere three (3) days prior to her slip-and-fall at work," is unsupported by the record. The ALJ addressed this issue on page four of his decision by determining that the date on the medical record is a misprint stating as follows:

Although that encounter date is dated for December 7, 2017, it appears to be a misprint, as the insurance provider is noted to be workers' compensation insurance for a date of injury of December 10, 2017. The record even notes the insurance adjuster is Alicia Thompson. The record refers to medications being refilled on December 20, 2017. The note indicates it was reviewed and signed by Dr. Gay on December 20, 2017 at 3:48 PM. This leads the undersigned to believe the date of the note of December 7, 2017 is incorrect, as it refers to the work incident and medications being refilled at a later date. It also refers to rib pain with onset date of December 10, 2017.

Our review of this specific medical record reveals an assortment of contradictory dates matching the ALJ's description. Thus, within his discretion the ALJ interpreted this medical record as actually being generated on the date of the injury instead of three days before the injury. This Board's role is not to second-guess the ALJ or substitute our interpretation of the evidence for that of the ALJ's. As fact-finder, the ALJ has the sole authority to determine the quality, character, and

substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). Since the ALJ's conclusion regarding this medical record is supported by the record, we may not disturb it.

Finally, we note that Dr. Gilbert's precise knowledge, or alleged lack thereof, concerning Fox's pre-existing neck problems does not affect the admissibility of his opinions. Rather, whether Dr. Gilbert had knowledge of the precise degree of Fox's pre-existing neck problems goes to the weight the ALJ chooses to afford his opinions.

Here, the ALJ determined Dr. Gilbert's opinions regarding the cause of Fox's cervical spine condition were credible and, accordingly, relied upon them in reaching his ultimate conclusions and rendering his final award. Although Cliffview may be able to point to evidence supporting a different outcome than reached by the ALJ, such proof is not an adequate basis to reverse on appeal as long as substantial evidence supports the ALJ's ultimate determination. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). 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). As Dr. Gilbert's opinions remain unaffected by the grip of Cepero and comprise substantial evidence upon which the ALJ was free to rely, we will not disturb the ALJ's decision.

We note the ALJ determined a portion of Fox's cervical spine condition was pre-existing and active and relied upon the opinions and impairment rating of Dr.

Arthur Hughes to apportion a 5% whole person impairment rating to the pre-existing condition. The ALJ, in the July 24, 2019, Opinion and Order, held as follows: “The plaintiff clearly had symptoms for which treatment was being rendered prior to the work event. Therefore, the condition was symptomatic and impairment ratable as required in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007).” In light of this, Cliffview’s objections in this first argument on appeal ring somewhat hollow.

Cliffview next asserts the ALJ erred by awarding TTD benefits through January 2, 2019, the date upon which Dr. Gilbert opined Fox reached MMI, as “all physicians who examined Respondent prior to Dr. Gilbert’s evaluation were in agreement that the Respondent was at MMI for her neck on March 27, 2018.” We affirm on this issue.

KRS 342.0011(11)(a) defines temporary total disability as follows:

‘Temporary total disability’ means the condition of an employee who has not reached maximum medical improvement [MMI] from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993), wherein the Kentucky Court of Appeals stated generally:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that 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.

Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Id. at 205.

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. In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant’s level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

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 or she remains disabled from his or her customary work or the work he or she was performing at the time of the injury. The Court in Magellan, supra, stated:

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.

. . .

The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase ‘return to employment’ was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), with regard to the standard for awarding TTD benefits, the Supreme Court elaborated as follows:

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an ‘all or nothing’ argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, *supra*, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform ‘any type of work.’ *See* KRS 342.0011(11)(c).

...

Central Kentucky Steel v. Wise, *supra*, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than ‘the type that is customary or that he was performing at the time of his injury’ does not constitute ‘a level of improvement that would permit a return to employment’ for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

More recently, in Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury. The Court stated, “... we reiterate today, Wise does not ‘stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.’” Id. at 254.

Finally, in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Supreme Court instructed as follows:

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 TDD 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 TDD 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 TDD 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 TDD benefits in addition to the employee's wages would forward that purpose.

Id. at 807.

In determining Fox's entitlement to TTD benefits, the ALJ was required to provide an adequate 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). While the 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, he is required to 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).

Here, the ALJ relied upon the date of MMI assessed by Dr. Gilbert, January 2, 2019. Noteworthy is Fox's testimony she did not return to any form of work following the December 10, 2017, fall. The ALJ set forth an analysis apprising all parties and this Board of the basis for his award of TTD benefits. While we acknowledge there are differing opinions in the record regarding the date Fox achieved MMI, if "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

Accordingly, on all issues raised on appeal, the July 24, 2019, Opinion and Order and the August 22, 2019, Order are hereby **AFFIRMED**.

ALL CONCUR.

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