Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 9, 2021

CLAIM NO. 201850424

DANIELLE DUNLAP PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH, ADMINISTRATIVE LAW JUDGE**

KYNETIC LLC
and HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING

* * * * * *

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

STIVERS, Member. Danielle Dunlap ("Dunlap") seeks review of the November 20, 2020, Opinion, Award, and Order of Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ") finding she sustained a July 19, 2018, low back injury while in the employ of Kynetic LLC ("Kynetic"). The ALJ awarded permanent partial disability benefits enhanced by the multipliers set forth in KRS 342.730(1)(c)1 and temporary total disability ("TTD") benefits spanning three different periods. Medical benefits

were also awarded. Dunlap also appeals from the December 14, 2020, Order overruling her Petition for Reconsideration.[1]

On appeal, Dunlap argues the ALJ erred in limiting her award of TTD benefits. She accepts the ALJ's finding that she attained maximum medical improvement ("MMI") in October 2019. However, Dunlap contends the ALJ failed to award TTD benefits from May 20, 2019, through October 31, 2019.

BACKGROUND

Dunlap testified at an April 28, 2020, deposition and at the September 21, 2020, hearing. Dunlap's deposition reveals she was born March 19, 1989, is 5'1" and weighs 98 pounds. She has a 10th grade education. While living in Connecticut, she obtained state certification in customer service. She worked at Wendy's, McDonald's, and in the coffee shop of Mohegan Sun Casino. She also worked as a housekeeper for approximately five years. She moved to Louisville on March 16, 2018. On April 9, 2018, she began working for Rue La La which is owned by Kynetic.[2] She described her job as a warehouse associate as follows:

> Q: What did you do? Is [sic] says warehouse associate. What does that person do?
>
> A: I was actually inbound. I did profiling.
>
> Q: What does that mean?
>
> A: Everything that comes into the warehouse we would get it and pull it to our desk. And then we would open

[1] Kynetic also filed a Petition for Reconsideration which the ALJ sustained and corrected the award to reflect the employer was not Rue La La but Kynetic LLC/Rue Gilt Group as previously set forth in a May 6, 2020, Order. The ALJ amended stipulation #5 to reflect Kynetic voluntarily paid TTD benefits from November 26 2018, through January 11, 2019, and February 14, 2019, through February 25, 2019. The ALJ also amended the award to reflect it was rendered on November 20, 2020, instead of August 9, 2020, as incorrectly reflected in the Opinion, Award, and Order.

[2] Henceforth, we will refer to Kynetic as the employer pursuant to the agreement of the parties.

the boxes and sort through everything that we got, whether it's color, size, by the RPN number, and we would scan it in, tell them how many quantity we had into the computer, and then then put it on a cart. When the cart was full we'd pull the cart over so the put-away people could put it away.

Q: What sorts of things are coming in? Is this clothing or what is that?

A: Anything. It could be clothing, it could be boxes of shoes, it could be kitchen utensils, it could be curtains, it could be jewelry, it could be anything pretty much. We didn't really do the big furniture. It was more clothing, shoes, high heels, that kind of stuff.

Q: Okay. What sort of lifting requirements did that job require? How much would you have to lift a day?

A: I lift all day long for my whole 8 – to 10-hour shift. Heaviest box I think I would have had to pick up there was about 65 pounds, a box of shoes. And it's not like one box, it's like a big box with like 10 to 13 pairs in the box. You know what I mean?

Q: Okay. You're putting them from your desk area into a cart, you say?

A: Yeah. You would have to move those boxes off the crate onto the floor or move them around because sometimes you don't put the shoes on the cart, you put them right back in the box and then move the boxes around because it's easier for them to put them away that way.

Dunlap explained why she was terminated on May 19, 2019.

Q: When did you stop working there?

A: They terminated me May 19, 2019.

Q: Due to attendance issues?

A: Well, yeah. I guess you could say that. It's – yeah. You can just say that. It wasn't really attendance issues, it was due to my back, but.

Dunlap has not worked since and is still under the care of Dr. Paul McKee. She is being supported by family members. Dunlap provided the following account of the July 19, 2018, event:

> A: … Well, on the day of my injury I was sent to the dock where all the totes were coming off the trucks and they were supposed to be three high. Well, they were sitting four high. When I reached the top to grab the top one, I didn't realize that it was all glass the way that Gilt had packed it. It was all glass in that tote and it yanked me to the floor when I grabbed it four high and I literally could not stand up.
>
> Q: So you knew immediately that you had injured yourself?
>
> A: Oh, I couldn't stand up. I couldn't put pressure on my left foot. Every time I put pressure on my left foot, it was sending pains from my leg all the way up into my back. Every time I put weight on it.

Dunlap testified she was immediately sent to Dr. Abby Devine, with Kentucky One Health, who informed her she may have a pinched sciatic nerve and pulled muscle in her low back. Dr. Devine prescribed a muscle relaxer and instructed her to apply heat at 20-minute intervals. She was returned to work that same day. When she returned to work she was unable to stand, and as a result, the Human Resources representative sent her home. Dr. Devine imposed no work restrictions apart from not working overtime.

Even though Dr. Devine referred Dunlap to physical therapy, she continued to work regular duty. Because her pain persisted during the physical therapy sessions, an MRI was performed on November 9, 2018. She denied her condition had improved after undergoing physical therapy explaining as follows:

> A: When she put me through her physical therapy, Abby Devine, it was putting me in pain. That's what

> prompted her – after 21 visits, that's what prompted her to send me for the MRI in November. And then when she sent me for the MRI in November that's when she found out I had herniated disks and distorted disks and sent me to Paul McKee at Orthopedic Specialists. I was still in a lot of pain because my injury was still untreated that whole time.

When Dunlap first saw Dr. McKee on November 26, 2018, he administered a steroid injection and took her off work. She was paid TTD benefits from November 26, 2018, through January 11, 2019. She worked light duty between January 11, 2019, and February 14, 2019. Her restrictions were:

> Q: Was your restriction like no lifting over five pounds; is that right?
>
> A: Yeah. The no lifting over five pounds, no squatting, no stooping, no bending, no pushing, no pulling, and have to have a seat provided 50 percent of my shift so I could sit or stand.

Because she received another injection, Dr. McKee took her off work from February 17, 2019, through February 25, 2019. Dunlap received TTD benefits from February 14, 2019, through February 25, 2019, and returned to work on February 26, 2019. A third injection was administered on March 28, 2019, resulting in Dunlap being off work from that date until April 9, 2019. She did not receive TTD benefits during this period. She did not receive the injection which Dr. Stacie L. Grossfeld recommended in her report of April 11. 2019.[3]

[3] Dr. Grossfeld recommended Dunlap undergo "an SI joint injection done under fluoroscopy, not in the office done blindly, but actually under fluoro with documentation that the injection is actually going into the SI joint."

Although Dunlap looked for work, she found no jobs fitting her restrictions. Dr. McKee declined to lessen her restrictions because he was afraid she would "slip further than I already am." Dr. McKee also restricted her from lifting or working overhead. Dunlap testified the SI injections administered by Dr. McKee provided relief for two and a half to three months. She takes Ibuprofen and Flexeril prescribed by Dr. McKee.

Much of Dunlap's hearing testimony is a reiteration of her deposition testimony. However, she elaborated further concerning her problems immediately following the injury.

> A: As soon as I would step on my left foot, I was getting sharp pain all the way down my leg from about the middle of my back. And every time I stepped on it, I was just getting that spiking pain. And then my lower back – my foot was going numb at first. When I first got the injury, my foot was going numb. That's why they put me in physical therapy.

At the time of the hearing, her restrictions had not been modified. She was scheduled to see Dr. McKee the day after the hearing. In addition to the previous restrictions, Dr. McKee also limited her to working no more than 8 hours a day. The last injection she received was in July 2020. She still takes Flexeril and over-the-counter Ibuprofen. Her current symptoms include the following:

> A: So on a typical day, my back has a – it's just from my spine, and it goes from my spine to my left hip. It's just a constant dull pain, about a four to a five. Now, that's just me on a regular day not doing nothing. Now, if I have to clean. I have to clean my house. I have an 11-year-old son, and I'm sole provider. I have full custody. So I have to clean. I have to do laundry. I have to sweep. I have to mop. Now, my back – if I do those, my back feels – like, if I've been sitting like this for hours, where your shoulders start burning, my lower back is on

> fire, just burning. That's the sensation I get when I do too much. And then if I bend over too far forward, it feels like my back is catching, like it's going to get caught. I can't reach my toes. And going backwards, I can't lean. That's as far back as I can lean back before I start losing my breath in the front. I can't go back no more. I've lost a lot of the range of motion.

Dunlap explained why her last day of work was May 19, 2019, and described her current symptoms.

> A: I worked until May 19th. That's when I lost my job due to – they said that they got a letter from – or email from Workers' Comp saying I got returned to full duty even though I had a work restriction note from Paul McKee from two weeks prior in my pocket that I showed my supervisor. He said that – John DeFazio at that time got an e-mail from Workers' Comp saying that I got returned to full duty because they went with the IME. And at that time, I was trying to perform full duty. I went to John DeFazio numerous times and the HR office telling him, please, let me work eight hours. This is hurting me. Sometimes I was actually crying. He said that he couldn't do anything because he couldn't show favoritism. Workers' Comp released me back to full duty, and that's what I had to do.
>
> Q: Okay. So you tried to work fully duty; is that correct?
>
> A: Well, yes, but I was on work restrictions, so I was barely – you know, work restrictions are very, very, very light duty. So when they returned to [sic] me, not only did they return me to lifting my 55-pound boxes at my regular job, they also made me mandatory work ten-hour days and overtime Saturdays. So my schedule was 109 dollars – I mean, 109 hours on one paycheck even though I was injured. And I asked him, please, let me go on eight.
>
> Q: And what kinds of symptoms were you having when you were doing that?
>
> A: I couldn't even move at nighttime. Like, I would come in to my mom's house crying because my back was in so much pain. I couldn't bend over. Every time I bent, I felt like it was getting stuck. It was real bad. I was

> getting really bad pain. It was sharp and went all the way down to my knee.
>
> Q: What part of your legs?
>
> A: From my hip – it came from my spine over to hip down, and it goes down my leg to my knee.
>
> Q: What part of your leg?
>
> A: My thigh.
>
> Q: What was it?
>
> A: My thigh.
>
> Q: Okay. And given your condition now, do you think your're physically capable to go back doing that job?
>
> A: Not that job, no. I could probably have a desk job somewhere, somewhere I could maybe – I can't sit for a full eight hours.
>
> Q: And what kinds of problems would you have with that kind of work?
>
> A: Well, my back. I mean, it just – it messes my whole life up. Because if I did do that and I did work eight hours sitting at a desk, I could do it, but then I would come home and I would be miserable. And I have an 11-year-old son, and I have to cook. I have a life other than just having to try to get through [sic] job. You know what I mean? I can't be miserable at home because I have to do an eight-hour job that I cannot do. I would be in severe pain. My back aches all the time, and when I do more, it just adds more pain to what I have to do.

Dunlap acknowledged she worked approximately four to five weeks as a receptionist after ceasing work at Kynetic:

> A: … So it takes me two months to find a job within some of my restrictions. And the only way that I found it is I took my son to get a haircut, and they had a receptionist sign on the window, and I said, How many days a week, and what do you want to do? And they said all you have to do is answer phones and check people in, and it's two days a week. So I said, Let me try

> it. After three weeks or four weeks of me working, they said, Danielle, can you sweep up this hair? No, I can't. It's beyond my restrictions. Danielle, can you help us stock the shelves? No, I can't. It's beyond my restrictions. I quit my job. I worked four to five weeks That's it. …
>
> …
>
> So yes, I tried to get a job within my restrictions. I thought it was going to work until they started asking me to do more, and I can't do more, you know.

In the opinion, the ALJ noted all the physicians agreed Dunlap sustained a July 19, 2018, injury; however, they disagreed as to its permanency. Based upon the treatment records, the ALJ found Dunlap sustained a permanent injury and, per the opinion of Dr. Richard Holt, the injury generated a 6% impairment rating. Because the ALJ found Dunlap does not possess the ability to return to the type of work she was performing at the time of the injury and does not possess a high school diploma, her benefits were enhanced by 3.2. Relative to the issue before us, the ALJ awarded TTD benefits based on the following findings of fact and conclusions of law which are set forth *verbatim*:

> Temporary Total Disability is 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. Pursuant to *Double L Construction, Inc. v. Mitchell*, 182 S.W.3d 509 (KY 2005), in order for a claimant to qualify for TTD benefits, she must satisfy at two-prong test: (1) she must not have reached MMI; and (2) she must not have reached a level of improvement that would permit her return to employment. In *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (KY 2000), interpreted "return to employment" 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. Wise does not stand

> for the principle that workers 13 who are unable to perform their customary work after an injury are always entitled to TTD. *Livingood v. Transfreight, LLC, et.al*, 467 S.W.3d 249 (KY 2015).
>
> The ALJ finds Dunlap is entitled to TTD as paid from November 26, 2018 through January 11, 2019 and from February 14, 2019 through February 25, 2019 and additionally from March 28, 2019 to April 9, 2019. The ALJ relies on the MMI of Dr. Holt. He placed Dunlap at MMI as of October 2019.
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> Although the Dunlap was not at MMI until October 2019, she was released to return to work with restrictions in May 2019 and entitled to no further TTD. Dr. McKee released Dunlap to return to work on restrictions on February 25, 2019. Dunlap returned to work at Rue La La. On March 28, 2019, Dr. McKee administered an SI injection and took Dunlap off work through April 9, 2019. Dr. McKee explained it was in Dunlap's best interest to rest after the SI injection to allow the injection to kick in. Dr. McKee returned Dunlap to work April 9, 2019 on light duty restrictions. Dunlap returned to work and worked until May 19, 2019, when she was terminated.
>
> The parties stipulated that TTD was paid at a rate of $339.44, which is an incorrect rate. The parties stipulated Dunlap's average wage was $529.34. Sixty-six and two thirds of $529.34 equals $352.90, which is the correct TTD rate.
>
> Based on the forgoing, the ALJ finds Dunlap is entitled to TTD at the rate of $352.90 from November 26, 2018 through January 11, 2019; February 14, 2019 through February 25, 2019; and March 28, 2019 through April 9, 2019.

Dunlap filed a Petition for Reconsideration requesting additional findings regarding the restrictions assigned by Dr. McKee and whether those restrictions were in place at the time the ALJ concluded she attained MMI in October 2019. Dunlap requested a finding of whether these restrictions prevented her from returning to work at Kynetic and/or prevent her from returning to the

customary work she performed in the past. She also requested additional findings concerning her capability of returning to any work she performed in the past. She asserted the ALJ erred in not awarding benefits during the period she was not working, on restrictions, and not at MMI. Therefore, an additional award of TTD benefits was proper. Dunlap also requested the ALJ to determine whether she was entitled to receive TTD benefits following Dr. McKee's injection in July 2020. In overruling the Petition for Reconsideration, the ALJ provided the following:

> **IT IS HEREBY ORDERED** Kynetic's Petition for Reconsideration is **SUSTAINED**. There are several typographical errors on the face of the Opinion, Award, and Order. First, the Opinion, Award and Order shall be amended to correct the name of the Defendant/Employer from Rue La La to Kynetic LLC/Rue Gilt Groupe as amended by order dated May 6, 2020. Second, on page one Stipulation number five shall be amended to reflect that the Defendant/Employer voluntarily paid TTD benefits at the rate of $339.44 from November 26, 2018 through January 11, 2019 and February 14, 2019 through February 25, 2019 for a total of $2,764.01. Finally, the Opinion, Award, and Order shall be amended to reflect it was rendered on November 20, 2020.
>
> **FURTHER, IT IS ORDERED** Dunlap's petition for reconsideration is **OVERRULED**. As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v.Tipton, 862 S.W.2d 308 (KY 1993). The ALJ had the right to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (KY 1977). Dunlap's Petition is a rearguing of the facts and request to reweigh the evidence. The ALJ specifically stated that although Dunlap did not attain MMI until October 2019, she returned to work and continued to work until terminated. The ALJ found Dunlap returned to work on February 25, 2019. Except for several times Dr. McKee took Dunlap off work for

> recovery following injections and for which the ALJ awarded TTD benefits, Dunlap continued to work until terminated by Kynetic on May 19, 2019. The ALJ finds no error on the face of the Opinion, Order and Award.

Dunlap first observes the date of MMI as found by the ALJ is not an issue. However, she asserts she is entitled to additional TTD benefits from May 20, 2019, through October 31, 2019. Dunlap notes when she was terminated on May 19, 2019, it was not because of anything she did but because Kynetic choose to accept Dr. Michael Best's statement that she was capable of returning to full duty work. Contrary to Dr. Best's opinion, Dunlap asserts she could not fulfill the strenuous job duties associated with that job. Dunlap relies upon Dr. McKee's deposition testimony that he had not released her to full duty without restrictions which resulted in worsening pain and symptoms. She notes Dr. McKee explained the restrictions were in place for her to be employed doing a light duty job. However, Kynetic stopped accommodating Dunlap's restrictions causing her to lose her job. Dunlap notes that based upon her April 11, 2019, examination of Dunlap, Dr. Grossfeld opined she would attain MMI two weeks after the SI injection she recommended.[4]

Next, Dunlap complains the ALJ's decision failed to provide a finding of fact addressing the restrictions of either Drs. McKee or Grossfeld. Because of her severe restrictions, Dunlap contends an understanding of the restrictions is essential to deciding the issue of her entitlement to TTD benefits. According to Dunlap, the ALJ only considered the time she was completely taken off work by her physician after undergoing injections but did not consider the significant work restrictions

[4] Dr. Grossfeld's April 11, 2019, report reflects she was unable to determine an MMI date until she learned when the SI joint injection was administered.

imposed. In Dunlap's view, the evidence shows that because she has less than a high school education and significant restrictions, she had a very difficult time finding sustained work. She notes she attempted to return to work for a few weeks but was unable to perform work within her restrictions. Consequently, Dunlap urges the award of TTD benefits was short-sighted as the ALJ failed to consider her restrictions in awarding TTD benefits. Dunlap requests remand for further findings of fact concerning her work restrictions and whether she is entitled to TTD benefits between May 20, 2019, and October 31, 2019.

Because the ALJ's analysis is deficient and we are unable to determine the medical evidence she considered and relied upon in awarding TTD benefits, we vacate the award of TTD benefits and remand.

ANALYSIS

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 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 Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (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.

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/she 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/she remains disabled from his/her customary work or the work he/she was performing at the time of the injury. The Court in Helms, 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), the Supreme Court further elaborated with regard to the standard for awarding TTD 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 employ-ment. *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.

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249, 254 (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 stating as follows:

> As the Court explained in *Advance Auto Parts v. Mathis,* No. 2004–SC0146–WC, 2005 WL 119750, at (Ky. Jan. 20, 2005), and 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."

Two months after rendering Livingood v. Transfreight, LLC, supra, the Supreme Court rendered Zappos.com v. Mull, 2014-SC-000462-WC, rendered October 29, 2015, Designated Not To Be Published, specifically rejecting the Court of Appeals' interpretation of "a return to employment" as set forth in KRS 342.0011(11)(a).[5] There, the ALJ awarded TTD benefits during a period Mull had not returned to her regular employment but worked light duty. TTD benefits were awarded during the period Mull had not attained MMI and had not reached a level of improvement which would permit her to return to her regular customary employment. Zappos.com appealed to this Board and we reversed the award of TTD benefits. The Court of Appeals reversed the Board and reinstated the award of TTD benefits. In reversing the Court of Appeals, the Supreme Court stated:

> The Board held:
>
> > Here, Zappos accommodated Mull's restrictions with a scanning position, which she testified was a normal part of her employment prior to the injury. Zappos correctly notes Mull acknowledges she was capable of continuing to perform the light duty work but ceased her employment with Zappos for personal reasons completely unrelated to the work injury. Nothing in the record establishes the light duty work constituted 'minimal' work and she worked regular shifts while under restrictions. She was also capable of performing, and continued to perform for more than one year post-injury, her primary fulltime employment

[5] A determination of the existence of "a return to employment" necessarily requires a finding of whether the employee was performing customary work.

> with Travelex. Given Mull was capable of performing work for which she had training and experience, and voluntarily ceased her employment for reasons unrelated to her injury or the job duties, substantial evidence does not support the award of TTD benefits and we therefore reverse.

Mull subsequently appealed to the Court of Appeals, which reversed the Board and reinstated the award of TTD benefits. The Court of Appeals held that the phrase "return to employment," as found in KRS 342.0011(11)(a), "was only achieved if the employee can perform the entirety of her pre-injury employment duties within the confines of the post-injury medical restrictions." Thus, since Mull no longer retained the physical ability to perform any activities requiring gripping and grabbing with her right hand, and her pre-injury employment required such tasks, the Court of Appeals held she was entitled to TTD benefits. We disagree, and reverse the Court of Appeals.

The Board's review in this matter was limited to determining whether the evidence is sufficient to support the ALJ's findings, or if the evidence compels a different result. *W. Baptist Hosp. v. Kelly,* 827 S.W.2d 685, 687 (Ky. 1992). Further, the function of the Court of Appeals is to "correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Id.* at 687–88. Finally, review by this Court "is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Id.* The ALJ, as fact-finder, has the sole discretion to judge the credibility of testimony and weight of evidence. *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418 (Ky. 1985).

As stated above, pursuant to KRS 342.0011(11)(a), in order for a claimant to be entitled to TTD benefits, she must satisfy a two-prong test: (1) she must not have reached MMI; and (2) she must not have reached a level of improvement that would permit her

return to employment. *Double L Constr., Inc. v. Mitchell,* 182 S.W.3d 509, 513 (Ky. 2005). *Wise* stands for the proposition that TTD benefits for a claimant should not be terminated just because she is released to perform minimal work if it is not the type of work that was customary or that she was performing at the time of his injury. 19 S.W.3d at 657. However, "*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.'" *Livingood v. Transfreight, LLC,* 467 S.W.3d 249 (Ky. 2015). Accordingly, the ALJ must analyze the evidence in the record and determine whether the light duty work assigned to the claimant is not minimal and is work that she would have performed before the work-related injury.

In *Livingood,* the claimant, a forklift driver, could not drive a forklift due to his light duty work restrictions. Instead, while on light duty restrictions he changed forklift batteries, monitored bathrooms for vandalism, and checked to make sure freight was correctly placed around the facility. The ALJ determined that since Livingood had performed those tasks before, and the work was not a make-work project, he had returned to employment and was not entitled to TTD benefits. The ALJ's findings were affirmed by this Court.

In this matter, Mull satisfied the first prong of the TTD benefit test because she had not reached MMI. But, the ALJ did not perform an in depth analysis of the second requirement, whether the light duty work Mull performed was a return to her regular and customary employment. However, despite the lack of an in depth analysis the facts of this matter are relatively clear, and we must agree with the Board that substantial evidence does not support the ALJ's award of TTD.

Prior to her injury, Mull's job tasks included retrieving a product, scanning it, and placing it in a shipping box. Mull was trained in all of these tasks. After the injury, Mull was restricted to scanning items. Mull testified that scanning was a normal part of her pre-injury employment. The light duty work is not a significant diversion from her original employment and there is no indication the work was minimal. Mull also received the same hourly wage. Mull returned to her

> regular and customary employment at Zappos and she does not satisfy the second requirement to receive TTD benefits.

Slip Op. at 4-7.

More recently, in Trane Commercial Systems v. Tipton, 481 S.W.3d 800, 806 (Ky. 2016), the Supreme Court reinforced its decision in Zappos.com v. Mull, supra, and again rejected the Court of Appeals' definition of "a return to employment" stating as follows:

> The Court of Appeals in this case held that Tipton was entitled to TTD while she was working full-time for Trane and earning the same hourly rate. This holding by the Court of Appeals was based on a misunderstanding of *Bowerman* and an understandable misinterpretation of what "return to employment" means.

The Supreme Court also delved into the Court of Appeals' holding in Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009), explaining as follows:

> However, as noted above, the Court of Appeals only held that Bowerman was entitled to additional TTD for part of the period his claim was in abeyance, a period when he was not working. It did not hold that he was entitled to TTD for the period before his claim was placed in abeyance and during which he had worked.

Id. at 806.

In Trane Commercial Systems v. Tipton, supra, the Supreme Court provided the following clarification regarding the standard to be applied in determining when an employee has not reached a level of improvement that would permit "a return to employment":

> We take this opportunity to further delineate our holding in *Livingood,* and to clarify what standards the

> ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.,* 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.
>
> 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 ALA 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.

Id. at 807.

The first of the two prongs contained in the definition of temporary total disability set forth in KRS 342.0011(11)(a) requires a determination of when

Dunlap attained MMI. Relying upon Dr. Holt's opinion, the ALJ found the date of MMI to be "as of October 2019." That finding is insufficient, as the ALJ was required to set the specific date upon which Dunlap attained MMI. The ALJ accurately noted Dr. Holt assessed MMI as of October 2019. However, Dr. Holt did not provide a specific date in October 2019. Accepting Dr. Holt's date of MMI leaves the parties and this Board to speculate concerning what date in October he concluded Dunlap reached MMI. For example, if the date of MMI is October 31, 2019, as opposed to October 1, 2019, Dunlap would be entitled to an additional four weeks of TTD benefits. Conversely, if the date of MMI is October 1, 2019, Dunlap would not receive TTD benefits during the month of October. Thus, on remand, the ALJ must determine a specific date of MMI based on the medical evidence. We point out MMI is a medical question to be resolved based on the medical evidence.

As to the second prong, when Dunlap reached a level of improvement which would allow her to return to employment, the ALJ stated Dr. McKee returned Dunlap to work on April 9, 2019, with light duty restrictions. However, the ALJ made no finding that as of April 9, 2019, Dunlap had reached a level of improvement which would permit a return to employment. To the contrary, Dr. McKee's medical records and his deposition testimony reflect Dunlap returned to work with significant restrictions, none of which were discussed by the ALJ. During his August 1, 2020, deposition, Dr. McKee testified he first saw Dunlap on November 26, 2018, at which time he administered an intramuscular injection. At that time, Dunlap had slight radiculopathy with pain down her leg and was placed in physical therapy. Dr. McKee concluded the dancing performed by Dunlap depicted on a number of videos

obtained by Kynetic was not overly taxing. He noted the November 9, 2018, MRI revealed a central disc protrusion. When he saw her on January 9, 2019, an injection was not administered. Dr. McKee saw Dunlap again on February 14, 2019, and on March 28, 2019. On March 28, 2019, he administered an SI joint injection. Regarding her return to work, Dr. McKee testified as follows:

> A: … I said certainly if they have light duty at work we could consider that after two weeks, but we wanted to put her – however, if going to light duty she got back to lifting 16-pound totes, which was a scenario that got her with this disk, low back pain and paraspinal strain with radiculopathy, that was not going to work for her.
>
> So we're not going to, in that first note, necessarily put her on a lot of day-to-day work restrictions or life restrictions until we know what she can get better with.

Concerning his examination on June 4, 2019, Dr. McKee explained as follows:

> A: So on that day with her FABER test, which is the flexion abduction external rotation test, she had pain and tenderness with that and that results in SI joint compression. That suggests that there was developmental SI joint or sacroilititis at that time. So an SI joint injection is an injection directly into the sacroiliac joint and we gave her three cc's of Lidocaine and 40 milligrams of Kenalog.
>
> Q: And in your next note, which I think is June 4, 2019, you note that that injection gave her "solid one-month relief of symptoms"?
>
> A: That's correct.
>
> Q: Is that typically what you would expect from an SI joint injection, about a month? Is that pretty good?
>
> A: We like to see more than that, and so with an SI joint injection that's treating the SI joint that day. And what's nice about an SI joint injection is when they get pain

> relief from that, that's indicative of how much pain and discomfort is in the sacroiliac joint at that point in time.
>
> With it not lasting as long as we would want, then you've got to make sure that the pain that goes into the SI joint isn't coming from the low back consistent with an L4-L5, L5-SI nerve compression.

Regarding the advisability of Dunlap returning to work per Dr. Best's opinion that she had reached MMI and could return to work with no restrictions, Dr. McKee testified as follows:

> Q: Well, at her job she'd been placed on work restriction criteria of no lifting more than five pounds. She had been seen and evaluated by IME with Dr. Best. Dr. Best stated she was at MMI. He sent her back to work with no restrictions lifting 75-pound totes, but this has exacerbated more back pain. She was scheduled to see me back – well, you can read it as well as I can.
>
> But it says in the next paragraph, subsequently she was released, terminated, and fired from her job because she could not meet the criteria as outlined by Dr. Best. As the treating physician I have not released her back to full duty. Clearly, she was not at MMI at the return to full duty without restrictions resulting in worsening pain and symptoms.
>
> A: I don't know that that says that there's any – I don't know what the exact word you'd use, but that's basically an HPI stating what happened at that point in time. If the facts of the case are that she was released back to work without restrictions and lifting 75 pounds that exacerbated her symptoms, that's basically just stating what happened.

Dr. McKee also explained the purpose for returning Dunlap to work with restrictions:

> Q: So keeping her off from work or with a five-pound weight restriction doesn't suggest to you that she's complaining of very severe symptoms in her low back on a fairly constant basis?

> A: Those are two different statements. A five-pound work restriction is because it's repetitive over the course of an eight-hour day. With repetitive lifting versus standing there and swaying her hips side-to-side for 30 seconds are two different things.
>
> The work restrictions were there to attempt to get her into a light-duty role so that she could get back to work and be employed, but the last time that we tried that they put her on a job that required her to lift significantly more than that.

At the time Dr. McKee saw Dunlap on October 8, 2019, his work restrictions were still in place. He explained why he imposed those work restrictions:

> Q: You still had her on restrictions at this time? I guess you have had her the whole time.
>
> A: That's correct.
>
> Q: She's either off or on restrictions.
>
> A: It said that her restrictions at this point from a work standpoint would be to keep all the same work restrictions of no bending, stooping, squatting, pushing, pulling, bending, twisting at the waist, that she can stand about 50 percent of the time, sit for 50 percent of the time. She has to be able to change positions and she has no lifting greater than five pounds, no overhead work.
>
> Q: Why wouldn't you assess these restrictions?
>
> A: Again, if she's got to do repetitive heavy lifting, those are going to exacerbate her symptoms. We're trying to avoid that. And, again, if she can go back to work with those restrictions, she can work.

Dr. McKee testified he attempted to comply with Dr. Grossfeld's recommendations set forth in her April 11, 2019, report. A review of Dr. Grossfeld's report reflects she diagnosed an SI joint sprain on the left side. Dr. Grossfeld believed Dunlap could return to light duty full-time work with lifting restrictions of no more

than 10 pounds. Regarding Dunlap's ability to perform full duty, Dr. Grossfeld provided the following:

> She has continued to improve. Her symptoms are definitely coming from the SI joint. I would recommend a referral to one of the anesthesia doctor/interventional radiologist or pain management physicians to do a cortisone injection under fluoroscopy into the left SI joint because her symptoms are definitely in that area.

However, Dr. Grossfeld did not believe Dunlap had attained MMI explaining as follows:[6]

> I anticipate MMI two weeks after the SI joint injection. I am unable to determine an exact date until I know when the SI joint injection took place. However, once the MMI date is determined, the claimant may then return to full duty work, no restrictions.
>
> She recommended the following:
>
> I would recommend an SI joint injection done under fluoroscopy, not in the office done blindly, but actually under fluoro with documentation that the injection is actually going into the SI joint.

Concerning Dr. Grossfeld's recommendations, Dr. McKee testified as follows:

> Q: Next, I believe, is December 10, 2019 and at this time it says "she is still not to the point that she can maintain gainful employment." With that do you mean gainful employment at the job she was working or gainful employment period?
>
> A: Which line is that one?

[6] Dr. Grossfeld also authored a June 24, 2020, report based on another examination on the date of her report. Dr. Grossfeld noted Dunlap recently received the recommended SI joint injection and opined she was at MMI. As her opinions do not relate to the period during which Dunlap seeks additional TTD benefits, Dr. Grossfeld's report will not be discussed further.

Q: Let me find it for you. Yeah. First page History of Present Illness, second paragraph. I think. Hold on. No, I think I'm wrong.

A: I didn't see that there. That's why I didn't know where you were getting that from.

Q: Let me find it. (Examines document) I can't find it now, but you did recommend another SI joint injection at that time. This is under Plan, paragraph 6.

A: On her physical exam that day the FABER test was positive whereas it had actually resolved prior to that. Then with that pain coming back in the SI joint at that point in time the plan was to schedule her for a fluoroscopic-guided SI joint injection to the left SI joint of Kenalog 40 milligrams and Lidocaine three cc's.

Dr. Grossfeld wanted that to be done under musculoskeletal ultrasound guidance through a hospital system through interventional radiology so we were attempting to get that scheduled for her.

…

A: Well, I think the question is workers' comp was having her go to get the SI joint injection, right? So our goal to get her back to her preinjury state – well, we're still waiting on the SI injection to be approved. Again, we have given the SI joint in the office before. She walked out a hundred percent pain-free that day.

The recommendation is the IME [sic] (in original transcript) be under – in the hospital under either CT or fluoro guidance. Therefore, we're going to refer to that at this time. So workers' comp, the IMEs that she'd been sent for, had said that she needed to get that injection repeated. And because they wanted it done in a hospital setting, we were waiting for that to be set up.

Upon being advised Dunlap did not undergo the injection recommended by Dr. Grossfeld, Dr. McKee offered the following:

Q: I want you to assume that she did not, that she never had that injection that Dr. Grossfeld recommended.

A: So she never got the final treatment that was recommended by the independent medical exam?

Q: That's my understanding.

A: Then that's confusing to me too because my understanding is that when a patient is sent for an independent medical exam during a workers' comp claim that that person gets that recommendation done, whether it be work restrictions or further physical therapy or epidural injection.

Or if the recommendation was to receive an SI joint injection, then it's my understanding that's what was supposed to happen next. So she didn't get that done before seeing Dr. Grossfeld for the final appointment; is that right?

Q: She only had the one that I'm aware of and that was in your office. And I don't know how important it is –

A: Well, it's important because if she had an SI joint injection under CT guidance as Dr. Grossfeld had recommended, if she had that prior to the exam, then there's a good likelihood that that's why she didn't have pain in that SI joint that day when she was examined.

…

A: Right. So we tried to carry out that recommendation, but workers' comp could never find the facility to get set up in that met all the criteria for her to get that. So I guess my question would be if the diagnosis is sacroilitis and SI joint pain from Dr. Grossfeld who did the IME, which is in conjunction with the same diagnostic criteria that we came up with in our office, the SI joint injection should have been rendered as treatment.

I think that oftentimes these cases get bogged down in details that aren't always relevant and we have to remember that in healthcare it's really simple. If you make a diagnosis and you treat the diagnosis and patients get better, then the treatment rendered is cost effective, it's efficient, it provides high quality care which leads to value. Inefficient, not cost effective, low quality care leads to decreased value.

> And the idea of helping people get back to work to do what they need to do, with the diagnosis that Dr. Grossfeld and I both came up with the same, and the treatment that was offered was to be the same, to me that's a lot of the same diagnostic criteria and that's what should be rendered to require treatment.
>
> I think, again, in a workers' comp claim like this there ends up being other details that become involved. But if we focus on the diagnosis in actually treating the patient, it tends to be a little bit less complicated.

Drs. McKee, Best, and Grossfeld offered medical opinions germane to the issue before us. During the period to which Dunlap claims she is entitled to additional TTD benefits, Drs. McKee and Grossfeld concluded she needed additional medical treatment which the record reflects she never obtained. Further, the record reveals when Kynetic allowed Dunlap to return to work, it did so based on the opinions of Dr. Best who diagnosed "musculoligamentous lumbosacral sprain/strain– Resolving." Dr. Best indicated Dunlap "should be returned to work for another one week of light-duty restrictions (no lifting greater than 25 pounds) and then she should be returned to her normal work activities thereafter." However, he indicated Dunlap could perform her full-duty job where she lifts no greater than 50 pounds. Dr. Best concluded Dunlap would attain MMI when she returned to her regular job in one week. The medical records and Dr. McKee's testimony would support a finding that Dunlap may be entitled to TTD benefits during all or a portion of the period from April 10, 2019, through October 2019. Dr. McKee's testimony, if accepted, establishes Dunlap's condition, after being returned to work with no restrictions per the instructions of Dr. Best, may have regressed to an extent that she no longer had reached a level of improvement allowing her to return to employment

as defined by the statute and relevant case law. The ALJ must address this issue in determining the extent to which Dunlap is entitled to TTD benefits and particularly beyond April 9, 2019.

Without question, the ALJ is required to summarize the medical evidence to be analyzed in resolving the contested issue. In Ann Taylor, Inc. v. McDowell, 2018-SC-000091-WC, rendered December 13, 2018, Designated Not To Be Published, the Kentucky Supreme Court directed:

> "[W]hen the question is one properly within the province of medical experts, the [ALJ] is not justified in disregarding the medical evidence." *Kingery v. Sumitomo Electric Wiring,* 481 S.W.3d 492, 496 (Ky. 2015) (internal citations omitted). *"[O]ur legal system requires reliable expert proof on issues such as medical causation and the necessity of medical treatment when they would not be apparent to a layperson. It does so because this is the only way to reasonably ensure that the fact-finder answers those questions reasonably, rather than arbitrarily." Id.* at 499-500 (emphasis added).
>
> It is true that conflicting evidence was presented in this case. It is also true that the ALJ incorporated the "Analysis" section of his opinion into the findings of fact and conclusions of law. However, we agree with the Board and the Court of Appeals that the ALJ acted in error; such error requires a remand for additional and specific findings.
>
> The case of *Passmore v. Lowes Home Center,* 2008-SC-000224-WC, 2008 WL 5274855, [footnote omitted] (Ky. Dec. 18, 2008), is instructive. In *Passmore,* the ALJ determined that Passmore lacked the physical capacity to return to the work performed at the time of injury but was only partially disabled. Passmore filed a petition for reconsideration requesting specific findings regarding alleged errors of fact and misinterpretation of the evidence. *Id.* The ALJ denied the petition for reconsideration. This Court cited *Big Sandy Community Action Program v. Chaffins,* 502 S.W.2d 526 (Ky. 1973), for the proposition that parties are entitled to findings of fact sufficient to apprise them of the basis for the

> decision and to permit a meaningful appellate review. *Passmore,* 2008 WL 5274855, at 2. Because the record contained substantial evidence supporting both a finding of partial disability and total disability, the Court held that *Passmore was entitled to be certain that the ALJ considered and understood all of the relevant evidence when finding him to be only partially disabled. Id.* at 3.
>
> In the ALJ's findings of fact and conclusions of law, he stated that McDowell's right elbow injury was compensable based on the testimony of McDowell, Dr. Bonnarens, and Dr. Roberts. In addressing the right shoulder injury, the ALJ stated that McDowell had not carried his burden of proof regarding causation and notice, only stating that he was basing his decision on the total weight of the lay and medical evidence regarding the work accident of October 2, 2014. The ALJ did incorporate the "Analysis" section of his opinion into his findings of fact and conclusions of law. However, the "Analysis" section of the ALJ's opinion did not summarize the total of the medical testimony and contains some internal inconsistencies.

Slip Op. at 4.

The above language is insightful if not controlling. In light of the documented problems Dunlap developed following her return to work on April 10, 2019, the ALJ was required to summarize the germane medical evidence and after sifting through that medical evidence determine the period or periods of TTD benefits to which Dunlap was entitled.

Notably, in her Petition for Reconsideration, Dunlap requested additional findings as to what restrictions were assigned to her and if they were in place at the time the ALJ found her to be at MMI in October 2019. She also set forth Dr. McKee's restrictions and sought additional findings as to whether those restrictions would prevent her from returning to work at Kynetic. Dunlap asserted since she had not reached MMI, the ALJ should have provided additional findings

as to her capability to return to work under the restrictions imposed by Dr. McKee. The ALJ summarily denied the Petition for Reconsideration reiterating Dr. Holt's date of MMI, the date Dunlap returned to work, and the date Kynetic terminated her employment. We believe the ALJ's response was insufficient, and Dunlap was entitled to additional findings based on her testimony and the opinions of Drs. McKee, Best, and Grossfeld.

Accordingly, the ALJ's award of TTD benefits set forth in the November 20, 2020, Opinion, Award, and Order and in her December 14, 2020, Order are **VACATED**. This claim is **REMANDED** to the ALJ for a summarization of the medical testimony, additional findings of fact, and an appropriate award of TTD benefits in accordance with the views expressed herein.

ALL CONCUR.

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