Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 22, 2022

CLAIM NO. 202100258

ESTES EXPRESS LINE PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

SHANE THOMPSON and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART &
REVERSING IN PART

* * * * * *

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

MILLER, Member. Estes Express Line ("Estes") appeals from the October 23, 2021 Opinion, Award and Order, and the November 30, 2021 Order on Petition for Reconsideration, rendered by Hon. Christopher Davis, Administrative Law Judge ("ALJ").

Based on a back injury that occurred on April 8, 2019, the ALJ awarded Shane Thompson ("Thompson") temporary total disability ("TTD") benefits from June 2, 2019 through October 27, 2020 at the rate of $819.66 per week with Estes taking credit for any benefits paid and credit for any unemployment benefits paid. He also awarded permanent partial disability ("PPD") benefits based upon a 6% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") enhanced by the 2 multiplier pursuant to KRS 342.730(1)(c)2 for all weeks in which his average weekly wage ("AWW") was less than $1,229.49. The ALJ also awarded medical benefits for the April 8, 2019 back injury.

Estes filed a Petition for Reconsideration stating: 1) The 2 multiplier per KRS 342.730(1)(c)2 is not applicable as Thompson never had a cessation of employment with a subsequent return to employment, and 2) Thompson is not entitled to TTD benefits for periods he voluntarily ceased employment while Estes provided light duty work.

On appeal, Estes argues the 2 multiplier is not appropriate for any periods of time Thompson earns less than his pre-injury wage as there was no cessation and then a return to employment. Estes also argues TTD benefits are not appropriate after Thompson voluntarily ceased working for personal reasons while it provided light duty work.

For the reasons set forth below, we affirm the award of TTD benefits and reverse the award of PPD benefits enhanced by the 2 multiplier.

BACKGROUND

Thompson alleged April 8, 2019 injuries to his low back and left leg on April 8, 2019. Thompson is 43 years old. He worked for Estes as a package and delivery driver. His duties included driving a large truck and using a pallet jack to unload his trucks for delivery of items, mainly to residential customers. This was a physical job involving lifting and pulling, working 10 to 14 hours a day, and driving a radius of more than 100 miles. On April 8, 2019, he reached to grab a metal strap on a pallet to pull it backwards to the edge of the truck and he felt pain down the left side of his back to halfway down his leg. The pallet had packages of rock on it but was too small for the pallet jack to fit.

Thompson did not miss work and continued to perform his regular job. He did not see a doctor. On May 10, 2019, Thompson bent over at home and could not straighten up. Thompson sought medical treatment with Concentra and was given physical restrictions which Estes accommodated. Thompson sorted paperwork regarding orders, work he had never done before. Estes reduced Thompson's wages, his hourly rate, and the number of hours worked. On June 2, 2019, Thompson took FMLA leave to care for his dad. He never returned to work. He continued to receive treatment for his back, including injections. He had unrelated right rotator cuff shoulder surgery from a fall. Thompson received short-term and long-term benefits, for which both he and Estes paid the premium. Thompson was terminated on March 23, 2020.

Thompson treated with Concentra on May 10, 2019, following his April 8, 2019 back injury. On that day he reached down in the shower and re-injured his back, experiencing acute bilateral low back pain with left-sided sciatica. He was prescribed medicine, physical therapy, and placed on restrictions of no lifting, pushing, or pulling over seven pounds, and no twisting, squatting, or kneeling, with occasional bending or standing. Lumbosacral X-rays taken on June 14, 2019 were normal. On July 2, 2019, Thompson continued to have moderate aching in the low back with radiation to the left leg. On July 9, 2019, Concentra referred Thompson to physical therapy and assigned restrictions of no lifting, pushing, or pulling over 20 pounds and only occasionally bending and standing.

Dr. Joseph L. Laratta examined Thompson on September 27, 2019 for a low back injury and left leg pain after moving a pallet at work. He diagnosed lumbar radiculopathy and lumbosacral back pain. Thompson was referred to pain management at Ohio Valley Pain where he received epidural steroid injections, which were unsuccessful.

In an August 26, 2019 report, Dr. Daniel Wolens stated he did not believe Thompson required work restrictions following the April 8, 2019 back injury. He opined Thompson, likewise, did not need restrictions following the May 10, 2019 injury that occurred at home. Dr. Wolens opined Thompson is fit for work in a manual labor environment. He believed the May 10, 2019 event was responsible for a definitive and significant change in Thompson's condition.

Dr. Jules Barefoot examined Thompson on October 27, 2020. He diagnosed a history of a workplace injury to the lumbar spine on April 8, 2019 and

L4-L5 left paramidline disc bulge and an L5-S1 disc degeneration with a circumferential degeneration with a circumferential disc osteophytes complex left of midline with moderate left lateral recess and foraminal stenosis. Dr. Barefoot assigned a 21% impairment rating in accordance with the AMA Guides. He opined Thompson had a 5% impairment rating prior to the April 8, 2019 injury, resulting in a 16% work-related impairment rating. He placed Thompson at maximum medical improvement ("MMI") as of October 27, 2020. Dr. Barefoot assigned restrictions of no lifting or carrying over 10 pounds occasionally. He also indicated that Thompson should sit and rest intermittently and should not walk over extended distances or uneven surfaces. Finally, he opined it is not safe for Thompson to work on ladders, scaffolding, or unprotected heights, and believed he cannot return to his work with Estes.

Dr. Thomas Menke examined Thompson on May 11, 2021 for left sided lower back pain. Dr. Menke assessed a 6% impairment rating, utilizing the DRE method, though he believed this impairment pre-existed the injury on April 8, 2019 and the May 10, 2019 event brought into disabling reality the degenerative changes in the lumbar spine. The impairment rating did not change after April 8, 2019. Dr. Menke opined Thompson does not require physical restrictions and can perform his job at Estes.

Dr. Wolens issued a report of August 26, 2019. He believed Thompson could work in an unrestricted capacity.

ANALYSIS

Temporary total disability is statutorily 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 that would permit a return to employment." 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 TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, "It 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." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

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. Most recently in Trane Commercial Systems v. Tipton, supra, the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Court stated:

> 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 ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose. (Emphasis added)
Id. at 807

Estes points to Zappos.com v. Sonia S. Mull, 2015 2014-SC-0000462-WC (Ky. October 29, 2015) DESIGNATED NOT TO BE PUBLISHED, in which the Supreme Court held:

> **The purpose of TTD benefits is to cover a period of time in which an employee cannot work or can only perform minimal work**. We acknowledge that a claimant can receive TTD for an injury sustained at one job while able to continue working a second job. Double L Construction, 182 S.W.3d at 514. But, TTD benefits should not be awarded to a claimant who chooses not to work for reasons unrelated to her work-related disability. (Emphasis added).
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> ….
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> 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 also was capable of performing, and continued to perform for more than one year post-injury, her primary full time employment 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

The main issue is whether Thompson is eligible to receive TTD benefits after leaving his job at Estes for reasons unrelated to his injury, to care for his ailing father. Pertinent to this issue is Thompson's inability to perform his *customary work*. Contrary to Mull, upon Thompson's return to work, his light duty restrictions

limited him to desk work. When asked if this was a job somebody normally did, he replied, "No." He testified at the August 26, 2021 final hearing that there were times when he did nothing, "it would be 30, 40 minutes at a time." In this case, the light duty work available to Thompson could be defined as "minimal." While Estes was able to accommodate Thompson's restrictions and placed him on light duty, it also reduced his pay from $25.25 to $12.00 per hour, and additionally lessened his work hours from fifty plus hours a week to less than forty. This could hardly be considered a return to customary work. Regardless of the reason for leaving his employment with Estes, it is evident Thompson had not reached a level of improvement permitting him to return to his previous employment or earning capacity and he had continuing treatment and restrictions. The medical documentation with continued treatment and restrictions in conjunction with Thompson's testimony of his pain and symptoms was relied upon by the ALJ in determining there was not light duty available within his restrictions.

The ALJ determines whether Thompson should be awarded TTD benefits after he voluntarily left the employment with Estes, balancing the views expressed by the Supreme Court in the above opinions. The ALJ believed the testimony of Thompson that the light duty work he was doing, sitting at a desk and sorting paperwork, and at times doing nothing for 30 to 45 minutes was not a sufficient return to employment which required the disallowance of TTD benefits when he ceased working for personal reasons. While performing work different than what was performed at the time of injury is not always a sufficient reason to award TTD benefits, neither is the performance of minimal type work a reason to deny

TTD benefits. The ALJ relied on the testimony of the claimant that the work he performed was not normal and the medical restrictions in awarding TTD benefits until Thompson reached MMI. It is significant that Thompson continued to receive treatment for his back including lumbar epidural steroid injections during the time frame TTD benefits were awarded. Restrictions included lifting, pushing or pulling up to 20 pounds and only occasional bending or standing. Thompson testified he understood further restrictions included sitting or standing as needed and lifting to 10 pounds.

Finally, in the Order on Petition for Reconsideration, the ALJ stated, "As for whether or not there was light duty within his restrictions available to the Plaintiff during any additional periods of TTD I have, based on evidence of record including the Plaintiff's testimony, that there was not." Entitlement to temporary total disability benefits is an issue of fact. WL Harper Construction Co. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993).

As the claimant in a workers' compensation proceeding, Thompson had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Thompson was successful in his burden regarding this claim, we must determine whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971).

KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The ALJ reviewed the evidence and explained his reasoning for awarding TTD benefits until Thompson reached MMI, notwithstanding Thompson left the employment for personal reasons. His decision will not be disturbed.

Estes second argument concerns the enhancement via the 2 multiplier per KRS 342.730 (1)(c)2.

The ALJ stated in his Opinion:

> Thompson continued to work for several weeks, at his same rate of pay, after April 8, 2019. Beginning on May 10, 2019 his wages became less than $1229.49and have continued to be less since then. For all periods which his wages are less than $1229.49 a week he is entitled to have his benefits enhanced under KRS 342.730(1)(c)2.

In the ALJ Order upon Reconsideration, he stated:

> As to the cessation of employment to qualify for KRS 342.730(1)(c)2 the undersigned believes that the case law cited by the Defendant is somewhat unclear, with due respect. Further, it is my understanding that there is at least one case on appeal to the Kentucky Supreme Court seeking clarification of this definition and that one of the parties in this claim would be required to file an appeal to preserve their rights. Therefore, I choose to make a decision based on my reading of the statute.
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> KRS 342.730(1)(c)2 states:
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> If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

In Bryant v. Jessamine Car Care, No. 2018-SC-000265-WC, 2019 WL 1173003 (Ky. Feb. 12, 2019), an unpublished opinion of the Supreme Court, the

claimant was injured and continued working until he was terminated. Regarding the 2 multiplier, the Court noted:

> "[T]he ALJ erred in determining the 2 multiplier applied under KRS 342.730(1)(c)(2). That multiplier only applies if the claimant returns to work after the injury. After Bryant was terminated, he did not *return* to work. ALJ Coleman cited to Bryant's June 2013 injury but that he continued to work until September. However, this *continuation* of work is not a return to work under KRS 342.730(1)(c)(2). To qualify as such a "return," there must be a cessation followed by a resumption. Bryant simply continued on in his regular employment until he was discharged. Since that time, ALJ Coleman made no finding of a "return" to employment at a wage equal to or greater than his average weekly wage at the time of injury. The 2 multiplier had no bearing on Bryant's case."
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> While the Bryant case is unpublished and therefore may not be cited as authority, the reasoning is instructive and guides us in the current decision.
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> The ALJ discussed a pending Supreme Court case, presumably Helton v. Rockhampton Energy wherein this same ALJ awarded the 2 time multiplier in circumstances where the employee continued to work and then was laid off. The Board reversed on this ruling and the Court of Appeals in its decision not to be published affirmed the Board. The Court of Appeals found the only fact relevant to this issue is that Helton continued working from the date of manifestation until his layoff.

Thompson continued working after his injury and, at first, he performed his regular job. On May 10, 2019, he bent over in the shower at home and could not straighten up. He sought medical attention and worked light duty until he voluntarily ceased employment to aid his sick father. In this case, there was no return to work as Thompson continued to work without cessation. Rather than

focusing on the cessation of work, the issue is that Thompson never returned to work as he continued working after his injury.

What constitutes a cessation of work, *i.e.*, whether performing other than customary work at less hours and less pay can be viewed as a cessation of work, is left for another day. Further, Thompson never returned to work once he ceased working at Estes so that is a moot issue.

The law regarding the 2 multiplier is clear: There must be a return to work at a weekly wage equal to or greater than the AWW at the time of injury and then a cessation of work. Thompson continued working after the injury until he left the employment with Estes and never returned to work. The enhancement of the award by the 2 multiplier must be reversed.

Accordingly, the October 23, 2021 Opinion, Award and Order and the November 30, 2021 Order on Petition for Reconsideration rendered by the Hon. Chris Davis are hereby **AFFIRMED** in part and **REVERSED** in part. This claim is **REMANDED** to the ALJ for entry of an amended opinion addressing the application of any multipliers.

ALL CONCUR.

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