

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: July 8, 2022

CLAIM NO. 201980741

GE APPLIANCES, A HAIER COMPANY

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

KIMBERLY JACOBS  
and HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING IN PART AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** General Electric Appliances, a Haier Company (“GE”), appeals from the March 9, 2022, Opinion, Award, and Order and the March 19, 2022, Order on Petition for Reconsideration of Hon. Chris Davis, Administrative Law Judge (“ALJ”). In the March 9, 2022, Opinion, Award, and Order, the ALJ awarded Kimberly Jacobs (“Jacobs”) permanent partial disability benefits, temporary

total disability (“TTD”) benefits from February 21, 2019, through November 5, 2020, and medical benefits for her work-related right knee injury.

On appeal, GE asserts the ALJ erred by failing to perform a complete analysis of Jacobs’ entitlement to TTD benefits during the periods she returned to work full-time in an accommodated job following her injury. Alternatively, GE asserts the ALJ erred in holding the net wages Jacobs received during the period TTD benefits were awarded must be shown in order for GE to receive a credit/offset against its obligation to pay TTD benefits.

### **BACKGROUND**

The Form 101 alleges Jacobs sustained work-related cumulative trauma injuries to her right knee on February 21, 2019, in the following manner: “As a result of repetitive twisting activities, her right knee became symptomatic.”

Jacobs was deposed on March 23, 2021, during which she detailed her employment history. Jacobs was employed with Humana from 1999 to 2003 working as a customer service representative. This was primarily a desk job. Jacobs worked as a self-employed cosmetologist in 2003. She also worked at Walgreens as a pharmacy technician from 2003 to 2005. From 2005 through 2006, Jacobs worked as an admission specialist at University Hospital registering emergency room patients and taking them, if necessary, to different floors of the hospital. Jacobs worked as a self-employed cosmetologist once again from 2006 through 2010. From 2010 through 2013, Jacobs worked as a cosmetology instructor at Empire Beauty School. Jacobs was unemployed from 2013 through 2015. From 2015 through 2017, Jacobs worked in customer service and patient registration at Conifer Health Solutions.

Jacobs began working for GE in 2017. She worked forty hours a week with some overtime. At the time of her injury, she was working the “wire rack” position making baskets for dishwashers. She described her job duties as follows:

A: You have to pick the wire racks up, place them in the correct slots to be able to build the dishwasher.

Q: How many times a day or how many wire racks would you put together per day?

A: I think 1,600.

Q: What was the most physically demanding part of that job position?

A: The moving from left to right.

Q: How often would you have to move from left to right?

A: Until you received a break. It may be two hours, it may be three hours.

Q: So you were just constantly moving left to right your entire shift?

A: Yes; left, right and forward.

At the time of her deposition, Jacobs was still employed at GE.

Jacobs worked light duty at GE immediately following her injury. She described her job duties during this time period as follows:

A: They had placed me on light duty, so they just actually had me just sitting and putting parts together.

Q: What kind of parts were you working with?

A: Just any kind of parts, small parts. Just parts that have to be put together for the employees to use.

Q: Were you paid your same hourly rate during that time period?

A: Yes.

Jacobs also testified at the January 26, 2022, hearing. She described her light-duty tasks as follows:

Q: What did they have you do?

A: Just sit down in a chair with my leg propped up in another chair and putting parts together for the lines.

Q: Okay. Was this work that had to be done or performed by somebody?

A: Yes.

Q: Okay. And when you did this job, did you get to work any overtime, or were you limited just to the 40-hour workweek?

A: Just a regular workweek. No overtime was allowed.

On January 12, 2022, GE introduced a Form AWW-1 indicating Jacobs' post-injury gross wages.

The January 12, 2022, Benefit Review Conference Order and Memorandum lists the following contested issues: "benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid or contested medical expenses, injury as defined by the Act, exclusion for pre-existing disability/impairment, and TTD." Regarding TTD benefits voluntarily paid, the stipulation indicates as follows: "TTD benefits were paid at the rate of \$392.84 a week from 07/10/19 – 08/04/19 and from 06/02/20 – 11/09/20 in the total amount of \$10,494.44."

The March 9, 2022, decision contains, in relevant part, the following findings of fact and conclusions of law which are set forth *verbatim*:

...

### **III. Temporary total disability benefits**

This issue consists of three sub-units, the correct TTD rate, the correct TTD dates, and the appropriate credit Haier should receive for real wages paid to Jacobs.

As for the rate the parties have stipulated to an AWW of \$547.97 and therefore the correct rate of TTD is \$365.31.

As for the dates Jacobs' date of injury is February 21, 2019. She entered into a course of treatment almost immediately and ultimately had surgery by Dr. Griffin. Dr. Griffin placed her at maximum medical improvement on November 5, 2020. While I have other dates of MMI I find the date assigned by the treating physician, Dr. Griffin, the correct one. Dr. Griffin is the only doctor who had an opportunity to follow and examine Jacobs on several occasions. He has no known bias. Jacobs reached MMI on November 5, 2020 and is therefore entitled to TTD from February 21, 2019 through November 5, 2020.

Jacobs worked from February 21, 2019 through July 9, 2019 and again August 5, 2019 through December 11, 2019. Contrary to her testimony it appears from the wage records filed by Haier, which I consider the best evidence on the matter over her testimony, she did, at times, work overtime. However, while Jacobs concedes that Haier is entitled to a credit under KRS 342.730(7) I am unable to calculate that credit. The statute clearly sets forth that the credit shall be equal to "... the employee's gross income minus applicable taxes ... "I have no information regarding the amounts of Jacobs' net pay, only the gross amount. The amounts listed in the wages records are clearly gross pay, not net pay. I cannot award any credit against TTD for wages paid.

Relying upon the impairment rating assessed by Dr. Griffin, the ALJ found the work injury generated a 1% impairment rating. He also found Jacobs lacked the ability to perform the type of work performed at the time of injury and her income benefits should be enhanced by the three-multiplier pursuant to KRS 342.730(1)(c)(3). The ALJ found Jacobs is not totally occupationally disabled.

In its Petition for Reconsideration, GE asserted the same arguments it now makes on appeal.

The March 19, 2022, Order reads, in relevant part, as follows:

This matter comes before me on the Defendant's Petition for Reconsideration and the Plaintiff's Objection thereto. Having carefully considered the pleadings, law and file as a whole the following findings and Orders are made. I am unaware of appellate authority reviewing KRS 342.730(7) as effective on July 14, 2018, much less on this particular issue. All of the case law cited by the Defendant was created prior to the effective date of that statute. Further, I am not aware of any prior version of the Act which approximated the current version of KRS 342.730(7). All of the case law cited by the Defendant addresses the issue of comingled periods of TTD and light duty. A not unreasonable interpretation of the law would be that the General Assembly, in codifying KRS 342.730(7), for the first time, sought to address these prior cases. As such I conclude there is no appellate authority on the issue and my interpretation of the statute, as applied to these facts, is not unreasonable. In other words the General Assembly has specifically concluded that when periods of TTD and light duty overlap the Defendant is entitled to a credit against TTD owed for gross wages paid minus taxes. No other considerations are necessary, beyond the proof of what the gross wages minus taxes is. Finally, while I generally accept that the Plaintiff's gross wages, even after taxes, exceeds the rate of TTD, I cannot make that determination. The Petition is OVERRULED.

GE first asserts the ALJ erred by failing to perform the requisite analysis regarding Jacobs' entitlement to TTD benefits at the time she was working full-time for GE. It complains the ALJ failed to address whether Jacobs had reached a level of improvement that would permit a return to employment even though it had requested such findings. It further asserts there is no justification for an award of TTD benefits during the periods Jacobs returned to employment following her injury

and was earning full-time wages working light duty. It requests the claim be remanded for findings concerning Jacobs' entitlement to TTD benefits. We vacate the award of TTD benefits and remand for additional findings.

### **ANALYSIS**

A determination of a claimant's entitlement to TTD benefits, particularly during periods when the claimant has returned to work following the injury, is a multifaceted process. Here, the ALJ did not set forth adequate findings of fact supporting the award of TTD benefits during the periods Jacobs returned to work light-duty; specifically, from February 21, 2019, through July 9, 2019, and again from August 5, 2019, through December 11, 2019. This Board is fully cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his or her reasoning in reaching a particular result. However, an ALJ is required to provide a sufficient basis to support each one of his or her conclusions, as 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).

TTD is statutorily defined in KRS 342.0011(11)(a) as "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[.]" 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/she remains disabled from his/her customary

work or the work he/she 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 Kentucky 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.

Importantly, in Trane Commercial Systems v. Tipton, 481 S.W3d 800 (Ky. 2016), the Kentucky Supreme Court clarified when an award of TTD benefits is 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.

Id. at 807. (emphasis added).

In the March 9, 2022, Opinion, Award, and Order, and as affirmed in the March 19, 2022, Order on Petition for Reconsideration, TTD benefits were awarded from February 21, 2019, through November 5, 2020, which includes the periods Jacobs worked light duty. The record reveals Jacobs worked light duty from February 21, 2019, through July 9, 2019, and again from August 5, 2019, through December 11, 2019. In the March 9, 2022, Opinion, Award, and Order, the ALJ determined Jacobs reached MMI on November 5, 2020; however, he failed to offer

any analysis, pursuant to Trane, regarding Jacobs' entitlement to TTD benefits during the periods she worked light duty at GE following the work-related injury. In other words, the ALJ never made a determination as to whether Jacobs' return to light-duty work at GE following her injury constitutes "extraordinary circumstances," thus entitling her to TTD benefits. Id. Despite GE's request for additional findings on this issue in its Petition for Reconsideration, the ALJ failed to set forth additional findings in the March 19, 2022, Order.

On remand, the ALJ must make a determination as to Jacobs' entitlement to TTD benefits during the periods she returned to light-duty work at GE following her work-related injury pursuant to the tenets articulated in Trane. On remand, should the ALJ determine Jacobs' return to light-duty work from February 21, 2019, through July 9, 2019, and again from August 5, 2019, through December 11, 2019, does *not* comprise "extraordinary circumstances" pursuant to Trane, an award of TTD benefits shall not extend to the time periods in question.

GE next asserts, "in the alternative," that the ALJ erred in his conclusion that Jacobs' net wages must be introduced before he can grant GE a credit against its obligation to pay TTD benefits during the period Jacobs earned wages. While the second issue on appeal has been rendered moot by our resolution of the first issue, it requires resolution in the event the ALJ, upon analysis pursuant to Trane, again awards TTD benefits during the periods Jacobs returned to light-duty work following her injury.

KRS 342.730(7) enacted in 2018 which became effective July 14, 2018, states as follows:

Income benefits otherwise payable pursuant to this chapter for temporary total disability during the period the employee has returned to a light-duty or other alternative job position shall be offset by an amount equal to the **employee's gross income minus applicable taxes** during the period of light-duty work or work in an alternative job position. (emphasis added).

As a general rule, statutes and duly promulgated regulations are open to construction only if the language contained therein is ambiguous and requires interpretation. If, on the other hand, the language of the statute or regulation is clear and unambiguous on its face, statutory construction mandates that we follow the provision's plain meaning. Layne v. Newberg, 841 S.W.2d 181 (Ky 1992); Overnite Transportation v. Gaddis, 793 S.W.2d 129 (Ky. App. 1990); Claude Fannin Wholesale Co. v. Thacker, 661 S.W.2d 477 (Ky. App. 1983). In this instance, we find nothing ambiguous within the plain language of KRS 342.730(7). KRS 342.730(7) is clear. The credit against income benefits for post-injury wages encompasses the "employee's gross income **minus applicable taxes.**" (emphasis added). As the party requesting the credit, GE had the burden to produce evidence showing entitlement to the credit. American Standard v. Boyd, 873 S.W.2d 822 (Ky 1994); Millersburg Military Institute v. Puckett, 260 S.W.3d 339 (Ky. 2008).

Here, GE filed only Jacobs' post-injury gross wages and not, as required by KRS 342.730(7), gross income minus applicable taxes. Consequently, on remand, should the ALJ once again award TTD benefits during the periods Jacobs returned to light-duty work following her injury, no credit shall be awarded.

Accordingly, the ALJ's award of TTD benefits, as awarded in the March 9, 2022, Opinion, Award, and Order and affirmed in the March 19, 2022,

Order on Petition for Reconsideration, is **VACATED**. This claim is **REMANDED** to the ALJ for additional findings in accordance with the views set forth herein and entry of an amended order and award. On remand, should the ALJ once again award TTD benefits during a period or periods Jacobs returned to light-duty work following her injury, no credit for wages earned shall be awarded.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON DOUGLAS U'SELLIS **LMS**  
600 E MAIN ST STE 100  
LOUISVILLE KY 40202

**COUNSEL FOR RESPONDENT:**

HON CHED JENNINGS **LMS**  
401 W MAIN ST STE 1910  
LOUISVILLE KY 40202

**RESPONDENT:**

DR JAMES BRENT **USPS**  
GWENDOLYN THOMAS NP **USPS**  
CAPITAL PAIN INSTITUTE  
6801 DIXIE HWY STE 135  
LOUISVILLE KY 40258

**ADMINISTRATIVE LAW JUDGE:**

HON CHRIS DAVIS **LMS**  
MAYO-UNDERWOOD BUILDING  
500 MERO ST 3<sup>RD</sup> FLOOR  
FRANKFORT KY 40601