

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 8, 2019

CLAIM NO. 201663660

GLENN DAVIS

PETITIONER

VS.           **APPEAL FROM HON. JONATHAN WEATHERBY,  
ADMINISTRATIVE LAW JUDGE**

BLENDX COMPANY;  
AND HON. JONATHAN WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**RECHTER, Member.** Glenn Davis appeals from the May 22, 2019 Opinion and Order, and the June 24, 2019 Order on Petition for Reconsideration rendered by Hon. Jonathan Weatherby, Administrative Law Judge (“ALJ”). The ALJ dismissed Davis’ claim as untimely. On appeal, Davis argues he was entitled to temporary total disability (“TTD”) benefits during a period he worked light duty, and that such

entitlement operates to toll the statute of limitations that otherwise bars his claim as untimely. For the reasons set forth herein, we affirm.

Davis worked as a quality control specialist for Blendex Company. He was injured on April 11, 2016 when his right foot was burned by a high-pressure hose. Davis was first treated at BaptistWorx and was placed on sit-down duty. Later he treated with Dr. Kevin Majzoub, who eventually released him to light duty on April 26, 2016. Dr. Majzoub restricted Davis from working more than five hours a day, and directed him to keep the foot elevated at all times. Davis also was restricted from heavy lifting and strenuous activity. He was released to full duty on June 20, 2016. After his return to full duty work, Davis continued to experience pain in his right foot and was eventually referred to Dr. Ellen Ballard.

Following the injury, Davis did not miss more than seven days of work and was not paid TTD benefits. During the period he worked light duty, Davis performed office work. He was able to use a laptop and elevate his leg, and worked no more than five hours each day. Davis testified he spoke with Kate Claudio, the insurance adjustor for the workers' compensation carrier, about TTD benefits. According to Davis, Claudio informed him he would need to be off work for 21 days minimum and then he would be paid a percentage of his regular wages thereafter. During the period of light duty work, Davis was paid his regular wages for the hours worked, and he used his accrued paid time off to compensate for the reduction in overall pay.

On November 20, 2016, Claudio informed Davis that Dr. Majzoub had placed him at maximum medical improvement and assigned an impairment

rating. The carrier offered to settle permanent partial disability benefits on the basis of Dr. Majzoub's rating, but Davis rejected the offer. He advised the adjuster he would be seeking legal counsel, though he ultimately failed to do so until 2018. On January 26, 2017, Davis requested a change in his designated treating physician because he was unhappy with Dr. Ballard's care. Davis acknowledged he sought treatment with other providers after November 20, 2016, and was informed by Blendex's human resources manager that the statute of limitations on his claim would run on April 11, 2018. Davis filed his Form 101 on August 10, 2018.

In the May 22, 2019 Opinion and Order, the ALJ first noted Davis' Form 101 was not filed within the two year statute of limitations set forth in KRS 342.185. The ALJ also noted KRS 342.020(1) requires an employer to notify the Department of Workers' Claims when it terminates TTD benefits or when it fails to pay TTD benefits to an employee who has missed more than seven days of work due to the work injury. The ALJ then analyzed whether the statute of limitations was tolled:

7. KRS 342.185 operates together with KRS 342.040(1) and tolls the period of limitations until after the payment of voluntary income benefits ceases in order to protect injured workers from being lulled into a false sense of security by receiving such payments and, therefore, failing to actively pursue a claim. *City of Frankfort v. Rogers*, 765 S.W.2d 579, (Ky. App.1988).

8. The facts in this matter dictate that not only was there no false sense of security created but that the Plaintiff was actually offered a settlement by the carrier which he did not accept. The evidence indicates that thereafter he was advised by the carrier that the statute of limitations period was soon to expire and expressed his plan to seek counsel and file a claim. The Plaintiff however did not file his claim until the statute had run.

9. Additionally, *Roark v. United Parcel Service*, 2007 WL 4139636 stands for the proposition that an employer does not become liable to pay temporary total disability benefits until the employee misses seven consecutive days of work. The Plaintiff in this matter never missed seven consecutive days of work which would have triggered the obligation for the employer to pay TTD benefits and to notify the Department of Workers' Claims. The ALJ is therefore unable to apply the principles of equitable estoppel in this instance because there was no injustice to the Plaintiff and because there was no obligation to notify the Department of Workers' Claims. The Plaintiff was also specifically aware of the applicable statute of limitations period and merely failed to act. The ALJ therefore finds that this matter must be dismissed as it was not filed in a timely manner.

Davis petitioned for reconsideration, arguing he was entitled to TTD benefits during the period he worked light duty for five hours a day. As requested, the ALJ provided further findings of fact on the issue of Davis' entitlement to TTD benefits:

The Plaintiff testified that he was injured on April 11, 2016, was placed on sit-down duty with no prolonged walking, and returned to work on April 26, 2016, with restrictions of working half days, elevating the leg, and no prolonged walking. He said that the Defendant was partially able to accommodate his restrictions and that he continued under the restrictions until June 26, 2016, when he was released to regular duty.

2. The Kentucky Supreme Court has determined in *Trane Commercial Systems v. Tipton*, 481 S.W.3d 800 (Ky. 2016), that it would not be 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.

3. The Plaintiff in this matter returned to work without a loss of pay and was able to work within his stated restrictions until ultimately being returned to regular duty. The extraordinary circumstances referred to in *Tipton, supra*, were not specifically identified but the ALJ finds that the Plaintiff was able to continue in his job within the stated restrictions without a loss of income and as such his situation falls short of the extraordinary circumstances contemplated by the Kentucky Supreme Court.

4. The Kentucky Supreme Court also specifically identified in *Double L Construction v. Mitchell* 182 S.W.3d 509, (Ky.2005), that the general 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. The ALJ finds that this purpose has been achieved in this matter and as such the Petition is denied.

Davis now appeals. He continues to assert he was entitled to TTD benefits during the two-month period he worked light duty. According to Davis, if he was entitled to TTD benefits during that two-month period, this circumstance would operate to toll the statute of limitations. In asserting his entitlement to TTD benefits, Davis highlights the ALJ's statement that he worked light duty "without a loss of income." He argues the only reason he experienced no loss of income was because he chose to deplete his accrued vacation and personal days to compensate for the loss of overall income. In this sense, Davis argues he was not yet released to return to employment because he was not released to full-time work.

The ALJ accurately identified the applicable law. TTD is the condition of an employee who has not reached maximum medical improvement

from an injury and who has not reached a level of improvement which would permit a return to employment. KRS 342.0011(11)(a). Absent “extraordinary circumstances”, an award of TTD benefits is inappropriate if an injured employee has been released to his “customary employment, *i.e.* work within [his] physical restrictions and for which [he] has the experience, training, and education; *and* the employee has actually returned to employment.” Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). The ALJ enjoys the discretion to determine whether extraordinary circumstances exist, and his findings will not be disturbed absent indication that discretion was abused. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993).

At the outset, we reject Davis’ contention the ALJ did not understand he was working part-time during the contested two-month period. The ALJ references Davis’ release to part-time hours in the Opinion and Order, noting Dr. Majzoub’s restriction that he work no more than five hours per day. The ALJ again referenced these restrictions in the Order on Reconsideration.

Moreover, we find no abuse of discretion in the ALJ’s conclusion that Davis’ light duty work constituted a return to employment within the meaning of KRS 342.0011(11)(a) and applicable case law. Davis performed data entry concerning Blendex’ sales and pending orders. He acknowledged the office work was not “made-up” work, and would be completed by someone else had he not done so. There was no evidence that this office work was outside Davis’ experience and training at Blendex.

Further, the ALJ enjoys the discretion to determine whether extraordinary circumstances exist such that an award of TTD benefits would be warranted despite the injured worker's return to employment. The ALJ articulated his reasoning on this issue, taking into account that the purpose of TTD benefits is to protect the injured worker's income and Davis was able to maintain his income by using vacation time. Under these circumstances, we cannot conclude the ALJ abused his discretion.

In conclusion, substantial evidence supports the ALJ's conclusion that Davis is not entitled to TTD benefits during the period he was released to light duty work, and therefore a different result was not compelled. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Because Davis was not entitled to TTD benefits for this period, the statute of limitations was not tolled by Blendex' failure to notify the Department of Workers' Claims that TTD benefits were terminated or a failure to pay TTD benefits otherwise due. As such, the ALJ properly determined Davis' Form 101 was untimely filed.

For the foregoing reasons, the May 22, 2019 Opinion and Order, and the June 24, 2019 Order on Petition for Reconsideration rendered by Hon. Jonathan Weatherby are hereby **AFFIRMED**.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

HON. PHILLIPE W. RICH  
1001 TREVILIAN WAY  
LOUISVILLE, KY 40213

**LMS**

**COUNSEL FOR RESPONDENT:**

HON. STEPHANIE ROSS  
250 GRANDVIEW DRIVE  
SUITE 550  
FORT MITCHELL, KY 41017

**LMS**

**ADMINISTRATIVE LAW JUDGE:**

HON. JONATHAN WEATHERBY  
ADMINISTRATIVE LAW JUDGE  
MAYO-UNDERWOOD BUILDING  
500 MERO STREET, 3<sup>RD</sup> FLOOR  
FRANKFORT, KY 40601

**LMS**