

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: March 26, 2021

CLAIM NO. 201800101

HATTIE KING

PETITIONER/  
CROSS-RESPONDENT

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

JBS SWIFT & CO.  
AND  
HON. JONATHAN R. WEATHERBY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENT/  
CROSS-PETITIONER  
  
RESPONDENT

**OPINION  
AFFIRMING IN PART,  
VACATING IN PART & REMANDING**

\* \* \* \* \*

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

**ALVEY, Chairman.** Hattie King (“King”) appeals and JBS Swift & Co. (“Swift”) cross-appeals from the July 10, 2020 Opinion and Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ awarded King permanent partial disability (“PPD”) benefits based upon a 9% impairment rating

enhanced by the 3.8 multiplier contained in KRS 342.730(1)(c)1, limited by the version of KRS 342.730(4) effective July 14, 2018. The ALJ also awarded medical benefits for King's right hand injury, but found she is not entitled to an award of temporary total disability ("TTD") benefits because she has retired. The ALJ dismissed King's claim for an alleged left shoulder injury. King also appeals from the August 4, 2020 Order denying her Petition for Reconsideration.

On appeal, King argues the ALJ erred in dismissing her claim for a left shoulder injury. She also argues the ALJ erred by determining she is not entitled to TTD benefits after the date she retired. Swift argues the ALJ erred by enhancing the award of PPD benefits by the multiplier contained in KRS 342.730(1)(c)1. Regarding the enhancement of the award of PPD benefits pursuant to KRS 342.730(1)(c)1, we affirm. However, we vacate in part and remand for the ALJ to provide the appropriate analysis regarding King's entitlement to an award of TTD benefits. We also vacate the ALJ's dismissal of King's alleged left shoulder injury. We remand for a determination of whether she sustained a left shoulder injury, and whether she is entitled to an award of PPD benefits and/or medical benefits for such injury, either temporary or permanent.

King filed a Form 101 on January 18, 2018 alleging injuries to multiple body parts occurring on May 29, 2016, caused by cumulative trauma while working for Swift. On August 10, 2018, King filed a motion to amend the Form 101 to include a claim for a left shoulder injury. The Form 104 work history indicates she worked for Swift as a trimmer beginning in 2004. She previously worked as a sewing machine operator, machine operator, and as a hotel cook.

King testified at the hearing held May 23, 2019. King was born on July 7, 1948, and she resides in Louisville, Kentucky. She completed the eleventh grade, and does not have a GED nor any specialized or vocational training. King previously sustained a work-related hip injury while working at a Ponderosa restaurant in the early 1990's. She settled a claim for that injury, which is unrelated to the injuries she sustained while working for Swift.

King began working as a trimmer for Swift on March 15, 2004. She retired from Swift on August 12, 2016 due to wrist and shoulder problems. Her job required reaching, grabbing, and cutting meat on a production line. She testified the work environment at Swift was very cold. She used a knife with her right hand to remove fat from hams. She used her left hand to turn the meat. King testified she worked nine to sixteen hours per day. She estimated the meat weighed thirty-five to forty pounds. King is right-hand dominant. She testified she had never experienced any problems with her right hand or shoulder prior to working for Swift, nor had she undergone any such treatment.

King first sought medical treatment for her complaints on June 24, 2016, after experiencing problems for a few weeks. She reported problems with both her right hand and shoulder to the Swift medical department. She was given ice for her hand, but no treatment was provided for her shoulder. She was eventually placed on light duty consisting of pulling on the hams without using a knife. She was later referred to Dr. Huey Tien at Kleinert Kutz. Dr. Tien only treated her hand, and advised her that he does not treat shoulders. Dr. Tien administered multiple hand injections and ordered physical therapy. She testified the injections

only improved her condition for short time periods. When her condition persisted, he performed right hand surgery on March 23, 2017. On the surgery date, she also saw Dr. Scott Farner for her shoulder complaints. Her shoulders were injected, and the left shoulder was more responsive than the right.

Subsequent to the surgery, King had physical therapy for her shoulders and her right hand. She has continued to treat with her family physician, Dr. Marvin Chaqua for complaints in both shoulders and her right hand. She has ongoing difficulty with lifting, carrying, and working above her right shoulder. She complained of pain and numbness in her right hand, as well as little finger numbness. She stated her right hand pain shoots into her shoulder. She continues to take Diclofenac and Cyclobenzaprine prescribed by Dr. Chaqua.

King testified Swift only paid for her right hand treatment, not for treatment of her shoulders. Dr. Tien did not place any restrictions on King's activities until he performed the surgery. King testified she is prevented from returning to work because of her ongoing problems.

In support of her claim, King filed Dr. Tien's July 22, 2016 office note. He noted her right hand complaints, and the description she provided of her job duties. He noted she is right-hand dominant. He also noted that as a trimmer, she cut meat on a production line. She reported waking up at night with pain and paresthesias. He diagnosed King with right ring and small finger triggering. He administered Kenalog injections, and permitted her to return to work with no restrictions.

Dr. Jules Barefoot evaluated King on November 20, 2017. She presented with a history of ring and small finger releases performed in March 2017. She was working as a cutter for Swift at the time of her injury, and last worked there in August 2016. King advised she “jammed” her small finger at work in May 2016. She complained of pain at the base of her right thumb, with diffused right hand tingling and numbness. He diagnosed her with small and ring finger triggering, status-post release in March 2017. He also found she has mild carpal tunnel syndrome and clinical evidence of right ulnar neuropathy. He assessed a 9% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). He stated the treatment King received was reasonable and necessary. He recommended avoidance of vibratory equipment, working at unprotected heights, and using hand controlled machinery.

In a supplemental report dated September 21, 2018, Dr. Barefoot diagnosed King with right ring and small finger triggering, status-post right ring and small finger releases, clinical evidence of right ulnar neuropathy, electro-diagnostic evidence of mild carpal tunnel syndrome, impingement of both shoulders, and a history of right thumb and CMC joint arthritis. He stated the entire 9% impairment rating he had previously assessed is due to her work activities. He recommended the same restrictions he had previously outlined in 2017.

On August 8, 2017, Dr. Farner noted King complained of right shoulder pain, which he injected in March 2017. He diagnosed King with left and right shoulder impingement. He stated she has osteoarthritis, and right and left

shoulder pain. He stated King could have returned to regular work after the right shoulder injection.

King submitted treatment records from Dr. Chaqua from May 9, 2014 to May 16, 2019. The records from February 4, 2016 to June 8, 2016 reflect he treated her on four occasions for low back pain. The May 10, 2017 note indicates King complained of pain in the right shoulder and occasionally in the low back. He noted King underwent hand surgery in March 2017. The June 7, 2017 note was generally illegible, but indicated the office visit was a follow-up for shoulder treatment. On May 16, 2019, Dr. Chaqua stated King has impingement syndrome in both shoulders, neck tenderness and muscle spasm, menopause, and allergies. He prescribed Cyclobenzapine and Diclofenac.

In her May 23, 2018 report, Dr. Ellen Ballard noted King reportedly developed right hand and arm problems in May 2016, which continued after her injections. She diagnosed King with a history of right ring and small finger releases, which she determined were work-related. She assessed a 2% impairment rating pursuant to the AMA Guides. She found no sign of ulnar neuropathy, and did not recommend any restrictions or limitations on King's activities.

Swift filed numerous office notes from Kleinert Kutz for treatment King received from July 22, 2016 through July 27, 2017. King first treated with Dr. Tien on July 22, 2016. She reported she was dropping things, and her fingers were locking up. She reported a history of arthritis, along with kidney and bladder problems. On August 11, 2016, Dr. Ballard performed EMG/NCV studies at Dr. Tien's request, which she stated revealed mild carpal tunnel syndrome. On March

23, 2017, Dr. Tien performed A-1 pulley releases of the right ring and small fingers. He stated she could return to one-hand work twenty-four hours after her hospital release. Dr. Tien stated King had reached maximum medical improvement (“MMI”) in his July 27, 2017 note. Dr. Tien assessed a 2% impairment rating pursuant to the AMA Guides caused by her repetitive use.

At the May 7, 2019 Benefit Review Conference, Swift stipulated to notice of the right wrist injury, but not the alleged shoulder injuries. The remaining issues included benefits per KRS 342.730, notice of the alleged shoulder injuries, average weekly wage, and unpaid/contested medical benefits. The Hearing Order reflects the parties had stipulated to King’s average weekly wage. Entitlement to TTD benefits was added as an issue.

Subsequent to the Hearing, King filed a motion to remove the claim from submission in order to submit evidence regarding her alleged left shoulder injury. On June 28, 2019, the ALJ entered an Order removing the claim from submission, and he issued a scheduling order permitting the filing of additional evidence. On October 9, 2019, Swift filed a motion to submit the claim on the record, and requested a dismissal of the left shoulder claim. The last paragraph of the three-page motion states as follows:

That date has come and gone. Plaintiff has submitted no additional proof. Therefore, the defendant-employer respectfully requests that the ALJ deem this matter submitted and order the parties to file simultaneous briefs within a reasonable time. **The defendant-employer further requests that the plaintiff’s shoulder injury claim be dismissed, with prejudice, for failure to submit a physician’s report containing a finding of a ratable impairment. [Emphasis added.]**

King filed a response indicating she had no objection to submission of the claim for decision. On October 16, 2019, the ALJ entered an Order submitting the claim for decision and dismissing the left shoulder claim. King filed a Petition for Reconsideration of that Order. The ALJ denied the Petition, but modified the language of his Order. King appealed the Order to this Board. The Board dismissed the appeal on January 3, 2020 since it was from a non-final decision.

On July 10, 2020, the ALJ rendered his decision, relying primarily on Dr. Barefoot's opinion. The ALJ awarded PPD benefits based upon the 9% impairment assessed by Dr. Barefoot, enhanced by the 3.8 multiplier contained in KRS 342.730(1)(c)1. The ALJ found King is entitled to treatment for the conditions he found compensable. He additionally found King is not entitled to TTD benefits because she continued to work until August 2016, then retired. He noted she was retired at the time of her surgery. The ALJ noted the dismissal of the alleged left shoulder injury.

King filed a Petition for Reconsideration requesting additional findings regarding the dismissal of the left shoulder claim. She also requested the ALJ to set aside his previous dismissal of the left shoulder claim. Finally, she requested the ALJ to find she is entitled to TTD benefits. On August 4, 2020, the ALJ entered an Order denying the Petition for Reconsideration, finding King failed to set forth any patent errors.

As the claimant in a workers' compensation proceeding, King had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since King was successful in her burden regarding her

entitlement to the application of the multipliers contained in KRS 342.730(1)(c)1, we must determine whether substantial evidence 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 (Ky. 1971).

In rendering a decision, 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).

We find Dr. Barefoot's opinion constitutes substantial evidence supporting the ALJ's determination King is entitled to PPD benefits based upon a 9% impairment rating, enhanced by the multipliers contained in KRS 342.730(1)(c)1. Therefore, we will not disturb the ALJ's determination regarding King's right wrist, hand, and finger injuries.

However, we must vacate the ALJ's dismissal of King's claim for a left shoulder injury. The record is bereft of any discussion regarding this dismissal, despite King's requests in her Petitions for Reconsideration. Swift filed a motion to return the claim to submission for a final decision, to which King did not object. At the end of the motion to return the claim to submission, Swift asked for a dismissal of the left shoulder injury. King did not respond to this request, most likely because it was only minimally addressed at the end of the motion, and easily overlooked. The ALJ dismissed the claim for the alleged left shoulder injury without any discussion. King petitioned for reconsideration, requesting additional findings to support the dismissal, which the ALJ did not provide.

An ALJ is required to provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining, Co., 634 S.W.2d

440 (Ky. App. 1982). This Board is cognizant of the fact that 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. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). The ALJ did not set forth adequate facts supporting the dismissal of the alleged left shoulder, and provided no discussion supporting his determination. We therefore vacate the dismissal of the alleged left shoulder injury, and remand for a determination on the merits. We do not direct any particular result, and the ALJ may reach any decision supported by an adequate basis for his determination.

Finally, we must remand the claim to the ALJ for additional determination regarding King's entitlement to TTD benefits based upon the evidence. Merely stating she is not entitled to such benefits because she is "retired" is insufficient. TTD 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, 481 S.W3d 800 (Ky. 2016), 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.

Id. at 807

Neither statutory nor case law supports the ALJ’s determination that King is not entitled to an award of TTD benefits because she has retired. The ALJ provided no analysis regarding whether King is entitled to TTD benefits. He merely found she was “retired” and provided no analysis or findings. The ALJ’s determination failed to reasonably apprise the parties, and this Board, of the rationale for such finding. The ALJ was required to review the evidence, and determine the period or periods in which King may be entitled to an award of TTD benefits supported by the evidence. On remand, the ALJ must set forth a complete analysis of King’s entitlement to TTD benefits based upon the evidence. Again, we direct no particular result, and the ALJ may make any decision supported by the evidence.

Accordingly, the Opinion and Award rendered February 6, 2020, the February 27, 2020 Order, and Amended Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** to the ALJ for a determination in accordance with the directions set forth above.

ALL CONCUR.

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