

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 14, 2018

CLAIM NO. 201685226

HAYATTE KLEIER

PETITIONER

VS. APPEAL FROM HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

MACY'S #562
and HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Hayatte Kleier ("Kleier") seeks review of the May 18, 2018, Opinion of Hon. John H. McCracken, Administrative Law Judge ("ALJ"), finding she sustained a work-related right thumb injury on January 31, 2016, while in the employ of Macy's #562 ("Macy's"). Relying upon the opinion of Dr. Jeffrey Fadel, the ALJ found the right thumb injury generated a 3% permanent impairment rating. The ALJ also concluded Kleier had not returned to work at the same or greater

wages than at the time of the injury. However, the ALJ concluded Kleier did not retain the capacity to return to the type of work she was performing at the time of her injury and enhanced her income benefits by the three multiplier. The ALJ dismissed claims for a work-related left hand and upper extremity injury, CRPS, and Raynaud's phenomenon of the right upper extremity. The ALJ awarded temporary total disability ("TTD") benefits from September 27, 2016, the date Kleier underwent right thumb surgery through December 6, 2016, when Dr. Thomas Gabriel determined she attained maximum medical improvement ("MMI"). The ALJ awarded permanent partial disability benefits and medical benefits for the right thumb injury. Kleier also appeals from the June 12, 2018, Order overruling her petition for reconsideration.

On appeal, Kleier contends the ALJ erred by not awarding TTD benefits from May 29, 2016, through September 26, 2016, the day before she underwent right thumb surgery. Kleier argues that, during this period, she had not reached MMI and was awaiting surgery. Kleier asserts the ALJ never addressed her entitlement to TTD benefits prior to the surgery. Kleier notes she came under the care of Dr. Ethan Blackburn in March 2016 and he immediately placed her on one-handed duty. She contends Dr. Blackburn continued to restrict her work throughout her monthly visits in March, April, May, and June, and on two occasions in July 2016. Kleier notes surgery requests were made after the August 29, 2016, visit, and during this time she was unable to perform her work with Macy's and had not reached MMI. Even though she continued to perform her baby-sitting and tutorial

job, Kleier argues she is entitled to an award of TTD benefits during the period in question.

BACKGROUND

Kleier's Form 101 alleged she injured her right thumb as follows: "I was working and pushed drawer and injured my right thumb/hand when it was trapped. I also developed left arm/hand problems from overuse."¹

During her January 19, 2018, deposition, Kleier testified that, after moving to the United States in November 2007, she worked at Baptist East Hospital in the cafeteria. Thereafter, she was hired as a tutor and baby-sitter for two young brothers. When the two brothers started school, she obtained a part-time job at Macy's as a beauty advisor. Kleier continued tutoring the two brothers after she began working part-time at Macy's. Her job as a tutor involved picking up the two brothers from school and going to the library to work on their homework. She was paid \$408.00 weekly as a tutor. She testified Macy's offered her a job because she could work primarily on the weekends. Her job as a beauty advisor involved applying makeup and advising customers on skin care and makeup. She also cleaned and organized her work area. She was paid by the hour plus commission.

After her work injury, she was treated by Norton Immediate Care Center on February 2, 2016. Following the injury, she continued to work at Macy's under restricted duty. She described her post-injury work as follows:

¹ As the only issue on appeal relates to the right thumb injury, we will not discuss the other alleged work injuries.

Q: Okay. And how often would you say that you—that you did work after the injury?

A: So because I was senting [sic] – I was being sent back to work with restrictions, I was trying to go back and work with restrictions.

Q: Yes.

A: -- doing all the tasks that my manage – manager was telling me to do, like, you know, phone calls, all with my left hand, compensating with my left hand since my right hand was either in that cast for the first wee [sic] – week or after that in splints.

Q: Okay.

A: So I was going back as much as I could.

Q: Okay. So would you say that it was every day of the week or . . .

A: To Macy's?

Q: Yes.

A: Oh, no. No. No. Macy's, my hours were limited to mostly Friday, the late shift Friday night –

Q: Okay.

A: -- Saturday, and Sunday.

Q: So about three days a week –

A: Yes.

Q: -- part-time?

A: I – I've always been part-time –

Q: Okay.

A: -- at Macy's, always.

After the injury, Kleier continued to pick up the two brothers from school, take them to the library, and help with their homework.

Ultimately, she came under the treatment of Dr. Blackburn, a hand specialist. Upon realizing she had been incorrectly referred to a physical therapist, Dr. Blackburn referred her to an occupational therapist. Kleier testified that, until she stopped working at Macy's on May 28, 2016, she greeted the customers and secured a beauty advisor for them. She provided the following reasons for quitting her job at Macy's:

Q: And you did this – you worked – you continued working there, I'm guessing, until May 28th; is that correct?

A: So here – if I may, here what – what happened. So I was seeing – sending – I – I was being sent back with restrictions, and at some point I was uncomfortable in pain all over my shoulder and my arm because I was on the floor constantly guarding my arm and my hand.

I was scared that somebody would bump into it. I was scared by instinct I would reach for something or – I was concerned about my – my arm. So I started to use my paid time off that I had accumulated that whole time working for Macy's.

Q: Okay.

A: So I started to use my paid timed [sic] off because I wanted to protect myself, to not be on the floor or not be in the office making phone calls for three, four hours in a row, and at the same time my left arm was getting tired, tired for compensating. So here I was in constant pain with my right hand, right arm, and then developing something on the left hand, which started probably in June.

So I used all my time paid off and then I decided that I could not go back –

After she ceased working for Macy's on May 28, 2016, Kleier took a job working for Randstad for a short period of time. She provided the following testimony concerning her duties with Randstad:

Q: Have you worked anywhere, other than for Ms. Fernandez, since you left Macy's?

A: Yes, twice. Remember, we talked on the phone about that. So in the building of Macy's, the day I quit, apparently – because I worked for the counter called bareMin – can I – it needs some explanation.

I worked for bareMinerals – for the counter bareMinerals in Macy's, so apparently when I quit, the Macy's executive of the region noticed that I quit. So she did reach out to me and said – and said, well, would you like to work smaller shifts, not for Macy's, for Randstad.

Q: Okay.

A: Would you like to try to work smaller shifts, like for example, 11:00 – 12:00 to 5:00 and see now [sic] it works? I tried it two –

Q: And how long did that last?

A: Maybe two or three times.

Q: Okay. Is that two or three days or two –

A: Shift. When I say times, it means shifts like –

Q: And you said you worked somewhere else?

A: That's what I'm talking about.

Q: That was it?

A: Because its –

Q: Just the one place?

A: -- not Macy's. It's Randstad, yes.

Q: Is that the only place that you've worked?

A: Yes.

...

Q: Okay. I think that's – and can you clarify one more time about the – you said you worked somewhere else after Macy's. Was it Randstad?

A: Randstad.

Q: Randstad?

A: Would you like me to spell it for you?

Q: Yes, please.

A: It's R-A-N-S-T-A-D (sic).

Q: Okay. And you may have answered this already. I apologize if so. I just wanted to clarify. What were – what were your duties at this job and –

A: Exactly the same thing.

Q: Okay.

A: Beauty adviser.

Q: Okay.

A: So when I quit Macy's, the – I think that I told you is the manager executive for the region of bareMinerals, because working in the building of Macy's, I was working for the counter bareMinerals.

Q: Uh-huh.

A: So she reached out to me when she heard that I was not at Macy's anymore, and I explained to her why, because I could not do these long shifts anymore So she did ask me, would you like to try to work for us smaller shifts, and I tried probably twice in the building of Macy's at the very same counter and once at Ulta, but I couldn't.

This is when I realized even just the smaller shifts, I just couldn't.

Q: Okay. And this was after you'd already resigned - -

A: Right after.

Q: from Macy's?

A: Oh, yeah. Like a month or a month and a half.

Since her deposition, Kleier's only employment has been as a tutor for the two brothers.

Norton Healthcare medical records reflect as early as March, Dr. Blackburn allowed Kleier to return to left hand work. A Physical Capabilities document indicates Kleier could return to left hand only work on March 18, 2016.

The April 15, 2016, record of Norton Healthcare reveals Dr. Blackburn imposed light duty work restrictions, and Kleier was to wear a brace if needed at work. As of April 15, 2016, Kleier was returned to light duty work which comprised of a maximum lifting weight of 20 pounds, frequent lifting or carrying with both hands of 10 pounds or less, and the use of a brace if needed.

Dr. Blackburn's May 13, 2016, note reflects Kleier could continue light duty work, but if her symptoms continued, he would consider moving forward with work restrictions at the next visit. The Physical Capabilities document dated May 13, 2016, restricted Kleier to performing light duty work with a 20-pound maximum lifting weight and frequent lifting or carrying of 10 pounds or less with both hands.

Dr. Blackburn's June 10, 2016, note reveals Kleier reported increased strength and range of motion since completing therapy. As a result, he referred her to occupational therapy. The note states Dr. Blackburn reassured Kleier that using her hand normally will not cause harm, and she should learn to trust the hand again. Dr. Blackburn recommended a work-conditioning program and switched her restrictions

to medium duty work. There would be a follow-up in four weeks at which time he would release her to full duty. Consistent with that medical record, the Physical Capabilities document reflects Kleier was returned to medium duty work on June 10, 2016, with restrictions of lifting 20 to 50 pounds but frequent lifting or carrying of only 10 to 25 pounds using both hands.

The July 1, 2016, note reflects Kleier experienced complete relief following a previous right thumb trigger digit injection. She complained of recurrent pain and stiffness localized in the palm and affected digit. She also experienced catching and locking. There was associated numbness and tingling. The pain was worse with gripping and grasping. Dr. Blackburn was to follow-up in four weeks. He continued her medium duty restrictions. A Physical Capabilities document dated July 1, 2016, reflects Kleier was returned to medium duty.

A July 29, 2016, office note reveals Kleier reported mild pain and decreased range of motion in her right thumb. She had received right thumb trigger injections in April and July and had good relief of her symptoms. She reported the clicking and locking had improved but her pain was persistent. Dr. Blackburn restricted Kleier to medium duty work and would recheck her in four weeks. She was to call if she wished to schedule surgery. A July 29, 2016, Physical Capabilities note reflects Kleier was again returned to restricted activities at medium duty.

The August 29, 2016, note of Dr. Blackburn reveals Kleier rated her discomfort as moderate to severe. Her pain was worse with pinching and grasping. Under "Assessment," Dr. Blackburn continued her medium work duty restriction and indicated he specifically discussed with Kleier her atypical symptoms including

achy, radiating forearm and arm pain. He believed the trigger thumb did not explain these symptoms. He noted surgery was designed to relieve discomfort at the base of the thumb and any associated mechanical symptoms. The Physical Capabilities note of August 29, 2016, again reflects Kleier was returned to medium duty.

The September 27, 2016, operative report reveals the pre-operative and post-operative diagnosis was trigger finger. Dr. Blackburn performed a right trigger thumb release.

In a September 27, 2016, note, Dr. Blackburn stated as follows: "It is my medical opinion that Hayatte Yousfi Kleier is out of work until 10/30. She may return to strict one handed duty at that time. If there is no work available, then consider off of work until re-evaluated."

The March 14, 2018, Benefit Review Conference Order & Memorandum reflects the parties stipulated TTD benefits were paid at varying rates from May 8, 2016, to May 14, 2016, from May 15, 2016, to May 21, 2016, and May 22, 2016, to May 28, 2016. The contested issues were "Work-related injury/causation; Permanent income benefits per KRS 342.730; TTD benefits; Wages upon return to work; Current wages; Ability to return to work; and Unpaid or contested medical expenses." Under "Other contested issues" was "Work Related injury/causation except for right thumb, Plaintiff's unreasonable failure to follow medical advice."

ALJ'S DECISION

In the May 18, 2018, decision, the ALJ provided the following relevant summary of Kleier's testimony:

Ms. Kleier sought treatment for her right thumb injury. Initially, she received treatment from Norton Immediate Care Center and was later treated by Dr. Ethan Blackburn. She did not report any left hand or left arm symptoms to Dr. Blackburn until October 10, 2016. She stated that in August 2016, she told Dr. Lang of her left hand problems and that he diagnosed probable tendonitis caused by overcompensation with the left hand.

At the hearing, Ms. Kleier testified that her right hand and arm had been isolated for months and she was not able to properly use it. She stated that from the last day of January 2016 to the time of her right thumb surgery she used only her left hand causing overuse. She gave examples of washing her hair, washing herself, writing, opening doors, and cooking. She states that she still has to adjust her grip. She quit working for Defendant due to the pain she was experiencing.

The day she quit working for Macy's, she was approached by a Macy's executive and asked to work for Randstad and take care of the Bare Minerals in smaller shifts. At the hearing, Ms. Kleier stated that her job duties with Randstad as a beauty adviser were the same as with the Defendant. It is unclear from her testimony, but it appears as though she quit the job with Randstad shortly after she began work. She wrote a letter to Defendant and stated that she had another full-time job and was having difficulty combining it with the part-time work for Defendant.

Ms. Kleier received two right thumb injections by Dr. Blackburn which were followed by a trigger release on September 27, 2016. She was seen by Dr. Bradley Duncan for her left hand. She stated that she needed to see a hand surgeon and that he could not offer any help. She next saw Dr. Shatford, who performed surgery on her left hand for tendinitis on May 9, 2017. She has not received any further treatment since that time. She testified that the right thumb surgery was helpful. She asserted that she still has problems all the time with both her right and left hands. She stated that since the right thumb surgery, she has been unable to fold her thumb as well as she did before the surgery.

The ALJ's decision contained, in relevant part, the following summary of the records from Dr. Blackburn and Norton Immediate Care Center:

C. DR. ETHAN BLACKBURN

Ms. Kleier filed the medical records of Dr. Blackburn dated August 2, 2016 to November 14, 2016. He performed right thumb trigger finger surgery on September 27, 2016. He removed her from work from the date of surgery until October 30, 2016. He released her to one hand, medium duty work at that time.

On October 10, 2016, Ms. Kleier reported new symptoms of left wrist pain over the prior month. This was specifically described as a new problem, post-operative time frame. She rated the pain as severe and radiating into the forearm. Dr. Blackburn stated that left wrist pain was most likely consistent with de Quervain's tendinitis and that it was possible that over use of the left hand and wrist during restriction of the right thumb could have caused this condition. He injected the left 1st dorsal compartment. On her next office visit, she complained of continued shoulder weakness and fatigue which Dr. Blackburn did not attribute to the work injury.

F. NORTON IMMEDIATE CARE CENTER

...

On April 15, 2016, Dr. Blackburn release her to return to light duty work with a maximum lifting of 20 pounds and restrictions to 10 pounds with frequent lifting or carrying using both hands. She was to wear a brace as needed. On June 10, 2016, she was released to return to medium duty work. This allowed her to lift a maximum of 20 to 50 pounds but restricted her to 10 to 25 pounds with frequent lifting or carrying using both hands. On July 1, 2016, Ms. Kleier advised Dr. Blackburn that she experienced 100% from the right thumb injection. She had catching and locking in the thumb on this visit. As of July 29, 2016, she remained on medium duty restrictions.

Concerning Kleier's entitlement to TTD benefits, the ALJ found the following:

In Ms. Kleier's case, the ALJ may only look to her wages at Macy's for determining the appropriate rate of TTD since she continued to work her job as a tutor/babysitter. Ms. Kleier's TTD, based upon her AWW from her work at Macy's, should have been paid at the rate of \$448.73 per week. She was paid at the varying rates of \$282.17, 350.20 and 303.22 for the periods she received TTD as stipulated to in the BRC order. The ALJ finds that Ms. Kleier was underpaid TTD for each of the weeks she received TTD. The ALJ finds that the correct weekly TTD rate was \$448.73. Ms. Kleier is entitled to the difference of \$448.73 and what was actually paid during the periods of time she received TTD.

Dr. Blackburn removed Ms. Kleier from work from September 27, 2016 to October 30, 2016 due to her right thumb surgery. She was restricted to one hand work following this time period until she could be re-evaluated. Dr. Gabriel placed her at MMI for the right thumb injury on December 6, 2016. He assessed a permanent injury as of that date.

The ALJ relies upon Dr. Blackburn and Dr. Gabriel to find that Ms. Kleier is entitled to additional TTD from September 27, 2016 to December 6, 2016 at the rate of \$448.73 per week. This provides TTD from the date of her right thumb surgery through the date of MMI.

Kleier filed a petition for reconsideration asserting the ALJ erred in the award of TTD benefits as the ALJ did not award TTD benefits from May 29, 2016, through September 26, 2016, because she had not reached MMI and was awaiting surgery on September 27, 2016. Kleier observed she first came under the care of Dr. Blackburn in March 2016 and he immediately placed her on one-handed duty. He kept her on restricted work throughout her visits in March, April, May, June, and on two occasions in July. Kleier asserted the surgery request was made after an August

29, 2016, visit. Kleier did not request additional findings or take issue with the accuracy of the ALJ's findings. Finding the petition for reconsideration to be a re-argument and a request for the ALJ to reconsider the decision with no patent error identified, the ALJ overruled the petition for reconsideration.

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 [MMI] 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 Construction Company v. Baker, 858 S.W.2d 202 (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.

Id. at 205.

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 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 or she remains disabled from his or her customary work or the work he or she was performing at the time of the injury. The Court in Magellan, 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), with regard to the standard for awarding TTD benefits, the Supreme Court elaborated 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 employment. 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.

More recently, 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.

Finally, in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Kentucky Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Supreme Court stated as follows:

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 TDD 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 TDD 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 TDD 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 TDD benefits in addition to the employee's wages would forward that purpose.

Id. at 807.

The ALJ awarded TTD benefits, in addition to those already paid, from September 27, 2016, the date of surgery through December 6, 2016. In initiating TTD benefits on September 27, 2016, the ALJ relied upon Dr. Blackburn’s September 27, 2016, note in which he stated Kleier “is out of work until October 30, 2016,” and could return to strict one-handed duty at that time. The ALJ terminated her TTD benefits on December 6, 2016, when Dr. Gabriel determined she was at MMI.

The ALJ correctly determined the date of MMI based on the medical evidence. However, his analysis regarding the second prong of the statute as to whether Kleier had reached a level of improvement which would permit a return to employment is limited. In his summary of the evidence, the ALJ noted the records of

Norton Immediate Care Center reflect that, in April 2016, Dr. Blackburn released Kleier to light duty work with lifting limitations. He also noted Kleier was allowed to resume medium duty work in June, and Dr. Blackburn continued the medium duty restrictions at least through June 29, 2016. We note the ALJ did not summarize in depth the medical records of Norton Immediate Care Center set forth herein. However, those records reveal Kleier was no longer limited to one-handed duty. Further complicating this issue is that, in her brief to the ALJ, Kleier's argument concerning her entitlement to TTD benefits consists exclusively of the following:

Again, based upon the testimony of Dr. Jeffrey Fadel and that of the Claimant, the Administrative Law Judge should award a 6% impairment and in addition that should be modified by a 3 factor as the Claimant cannot return to the work she performed at the time of the injury. Benefits should be suspended for the period that temporary total disability benefits were voluntarily paid, 5/8/16 to 5/28/16 and from 5/29/16 through 7/1/17 or at least from 5/29/16 to 11/1/16 and again from 5/9/17 through 7/1/17.

The last sentence of her argument is confusing. However, one interpretation is that Kleier is arguing for a suspension of her benefits during the period her TTD benefits were voluntarily paid from May 8, 2016, through May 28, 2016, and she is entitled to additional TTD benefits from May 29, 2016, through November 1, 2016, and from May 9, 2017, through July 1, 2017. Kleier did not provide an argument explaining to the ALJ the basis for her contention she was entitled to such an award. Also, Kleier did not request additional findings of fact or a more explicit ruling in her petition for reconsideration as required by KRS 342.281 and KRS 342.285. While this Board is aware of the fact that, in determining Kleier's entitlement to TTD benefits, the ALJ was required to provide an adequate basis to

support his determination, Kleier's failure to request additional findings means the issue is not properly preserved for review by this Board. See Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007) (failure to make statutorily-required findings of fact is a patent error which must be requested in a petition for reconsideration in order to preserve further judicial review).

On appeal, Kleier cannot, for the first time, set forth an argument supporting an award of TTD benefits from May 29, 2016, through September 26, 2016.

Our task on appeal, therefore, is to determine whether substantial evidence supports the ALJ's decision. As the ALJ noted in his summary of the evidence, Dr. Blackburn imposed certain work restrictions and did not direct Kleier should remain off work prior to September 27, 2016. Not until September 27, 2016, the date of surgery, did Dr. Blackburn state Kleier should remain off work. Thus, the ALJ could reasonably conclude Kleier had not satisfied the second prong of KRS 342.0011(11)(a), as it appeared she had improved enough following the injury that she could return to work despite not having fully recovered. As noted by the ALJ, the medical records reveal the first time Dr. Blackburn indicated Kleier should remain off work was September 27, 2016. The records also reveal prior to September 27, 2016, Dr. Blackburn had specifically indicated Kleier could work but with certain restrictions. Importantly, the record indicates Kleier's restriction of one-handed work does not fall within the time period Kleier now asserts she is entitled to additional TTD benefits. As substantial evidence supports the ALJ's decision not to award

additional TTD benefits until after the September 27, 2016, surgery, this Board has no authority to disturb the ALJ's decision.

Accordingly, as substantial evidence in the form of Dr. Blackburn's records and the records of Norton Immediate Care Center constitute substantial evidence in support of the ALJ's determination that Kleier is only entitled to TTD benefits from September 27, 2016, to December 6, 2016, the ALJ's decision must be **AFFIRMED**.

ALL CONCUR.

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