Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 25, 2021

CLAIM NO. 201458676

KENNETH BERGERON PETITIONER

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

AMEC FOSTER WHEELER
and HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Kenneth Bergeron ("Bergeron") seeks review of the March 19, 2018, Interlocutory Opinion, Award, and Order, the June 1, 2018, Order ruling on his Petition for Reconsideration, the June 18, 2021, Opinion, Award, and Order, and the July 22, 2021, Order ruling on his Petition for Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge ("ALJ").

In the interlocutory decision, the ALJ found Bergeron sustained a November 20, 2014, injury while in the employ of AMEC Foster Wheeler ("AMEC") and he provided due and timely notice. The ALJ also determined Bergeron had not attained maximum medical improvement ("MMI") and was entitled to future treatment. Bergeron was also entitled to temporary total disability ("TTD") benefits from the date Dr. Harry Lockstadt performed surgery until he attained MMI. AMEC was not allowed a credit for unemployment benefits Bergeron received against its obligation to pay TTD benefits. The ALJ placed the claim in abeyance. In the June 1, 2018, Order, the ALJ overruled Bergeron's Petition for Reconsideration asserting entitlement to TTD benefits from November 16, 2015, when he stopped working for AMEC until he underwent surgery.[1]

In the June 18, 2021, final decision the ALJ did not alter his finding Bergeron sustained a work-related injury and had given due and timely notice. The ALJ awarded TTD benefits for two periods following the initial lumbar surgery Dr. Lockstadt performed on May 17, 2018. The ALJ did not award TTD benefits from the time Bergeron stopped working in November 2015 until he underwent the initial lumbar surgery. The ALJ awarded permanent partial disability ("PPD") benefits enhanced by the three-multiplier pursuant to KRS 342.730(1)(c)1 and future medical benefits. The ALJ also resolved a medical fee dispute and directed Bergeron undergo a vocational evaluation pursuant to KRS 342.710(3). The ALJ overruled Bergeron's Petition for Reconsideration again requesting an award of TTD benefits from mid-November 2015 until the day before the first surgery, adopting in full the contents of

[1] The record actually indicates Bergeron stopped working for AMEC on November 13, 2015.

the June 1, 2018, Order. On appeal, Bergeron argues the ALJ erred in failing to award TTD benefits from the date he stopped working for AMEC until he underwent lumbar surgery.

BACKGROUND

Bergeron's Form 101 alleges a November 20, 2014, low back injury occurring as follows: "Plaintiff suffered work-related injury to his back handling concrete forms in the course of employment causing a harmful change evidenced by objective evidence resulting in permanent impairment by the 5th AMA Guides." The cause of injury was "strain or injury by lifting."

Bergeron testified at a December 7, 2016, deposition and at the January 22, 2018, Hearing.

The December 6, 2017, Benefit Review or Status Conference Order and Memorandum reflects the claim was bifurcated to resolve whether a traumatic event occurred on November 20, 2014. The parties stipulated Bergeron's average weekly wage and listed the following contested issues: work-related injury, due and timely notice, TTD benefits paid, medical expenses unpaid or contested, physical capacity to return to the type of work performed at time of injury, exclusion for pre-existing impairment, permanent income benefits per KRS 342.730 including multipliers, and credit for unemployment benefits. Under "Other contested matters," is listed "whether it was a temporary or permanent alleged injury."

During Bergeron's December 7, 2016, deposition, he testified that he is a high school graduate and had previously sustained a work-related injury in 1998 or 1999 at the L3-4 level of his spine. As a result, he underwent fusion surgery in the

lumbar region and was off work four or five years. He was released by a doctor to return to work in 2002. Bergeron did not remember whether the doctor imposed any physical restrictions. He did not undergo any further treatment after being released by the doctor.

Between 2002 and 2014, he took no medication except a "handful of Tylenol." He experienced no back issues prior to the November 20, 2014, injury. Before working for AMEC, he worked as a deck hand on a drilling rig for approximately ten years and as a heavy equipment operator for two or three years. He worked for AMEC from 2005 until 2015.

Bergeron was working as a forklift operator when he was injured on Thursday, November 20, 2014. He provided a description of the events of that day. Because he was experiencing back problems on Friday, he informed his supervisor he would not be at work. That same day, Bergeron drove to Louisiana to visit relatives.

While in Louisiana, Bergeron was hospitalized twice due to back problems. He provided the particulars of his discussions with AMEC's personnel upon his return to Kentucky pertaining to the nature of his injury and symptoms. Eventually, Bergeron saw Dr. Lockstadt and at the time of the deposition was waiting to hear about pending surgery. Bergeron described the treatment he initially received from Dr. Lockstadt:

> A: He – I don't know. First time, first visit, he gave me several shots like in my back. And then he ordered physical therapy again, and I went back, and I seen him a month later, and then he took this long fricking needle about yeah long, shoved it all the way in my back, gave me a shot. And then went back and seen him the third

> time. He said, "That's okay. I'm going to release you." Still having the same thing. Then I turned around the following week, went back the Monday after he turned me loose, and then requested surgery. And he asked me which one I want done first, the L2 or the L5.

Bergeron had not seen Dr. Lockstadt since his initial visit. He recounted the conversation with Lockstadt at the initial visit.

> A: The Monday right after he released me. The Monday. So whatever date we got when he released me, I went back where no safety guy that worked for AMEC. And I went by myself, and I talked to him, and he sat me down. And he says, "You got to pick one or two. You need surgery." He says, "This is what I can do." He says "I'm going to send this to Workmans comp. They probably ain't going to do it, but they might." He said, "I'll send it and see what happens."

Bergeron testified he did not see a doctor from the middle of 2015 through August 2016. He moved to Texas in January or February 2016. He testified he has not worked since November 2014. As to when he last sought employment, he testified as follows:

> A: When was the last time I really did look for work? I know I can't hold a job right now or I can tell you. The last time I looked for work was when [sic] the last time I went to Kentucky to pay me my unemployment.
>
> Q: So as soon as you stopped receiving your unemployment, you stopped looking for work?
>
> A: Yes. Because I can't hold a job right now. My back is fried.

He also described his symptoms at that time.

At the January 22, 2018, Hearing, Bergeron confirmed he had undergone prior fusion surgery in the lumbar region in the late 90s. Thereafter, he returned to work without any problems and received no further medical treatment.

He worked for AMEC from 2004 or 2005 as a heavy equipment operator until November 16, 2015.[2] He again recounted the events of November 20, 2014, while working as a forklift operator. Bergeron identified the lower back just above the belt line as the symptomatic area. He provided a description of the post-injury light duty work he performed at AMEC.

> A: I was – I was – I would help out what I could do, and I wasn't on my machine. I couldn't run the machine and –
>
> Q: Are you talking about the forklift –
>
> A: Yes.
>
> Q: -- when you say machine?
>
> A: Yes. And like I said, I was – I'm not a lazy person; but I wasn't doing my job; and then later on, part of the job, they wanted me to climb three – three stories up. I did it because I didn't want, you know, insubordination, "If you don't do something, I'll put you on insubordination," so I – so I went up there and I did what I can do to help them out. I didn't lift nothing. Just had a machine for the – what do you call that? -- to check the oxygen, make sure if somebody is working down in a hole that they've got enough oxygen coming through, and that wasn't good, and like I said, I did it anyway, but my back would hurt. Then a couple of days or a few days later, they had – the safety guy was standing there, and he says, "You don't have to do something – or if you think you're hurt, you do not have to do that job," so from that point on, I told them, "I'm not climbing them steps no more, I'm done, but I can go – I'll walk around." They wanted me to check if I see anything that was unsafe or something that needed to be fixed. I walked around and I did that, you know, so I – once or twice, I grabbed a broom and maybe sweep, but that didn't help, so I went to get the leaf blower, and I used the leaf blower to blow the dust out and stuff like that, but as to doing that [sic] to [sic] what I was doing

[2] As noted by the ALJ, during his deposition, Bergeron failed to acknowledge he worked for AMEC approximately one year following the injury.

> before, it's totally – I was – I put it as I wasn't doing nothing compared to my normal job.

Bergeron testified that during a June 29, 2015, appointment, Dr. Lockstadt recommended he undergo surgery. He was laid off in November 2015 when AMEC's Harrodsburg job was completed. AMEC personnel did not advise him of the location of the next project when the Harrodsburg job was completed. Rather, he told them he was going to try to get his back fixed and they wished him good luck. Bergeron believes he is unable to work as a heavy equipment operator. He experiences low back and left leg pain extending to his toes daily. He also experiences right leg symptoms daily which are not as severe.

On cross-examination, Bergeron elaborated further concerning his job duties after November 20, 2014.

> A: … So, it was – I more [sic] kind of walked around. I was on the forklift. I was everywheres [sic] on this job, and I can see it. I know what was going on. If it was wrong, I told them it was wrong. I didn't care if you were the big boss coming out in the field. If you didn't have something right, it wasn't right, turn around and go get your stuff and put it on. You know, it was safety, so that works for everybody.
>
> Q: So, when you started doing that after, I guess, was there any kind of specific training or anything you had to go to, or did they just move you to this team?
>
> A: No, no, it's just – it's not actually a training, because I'm on the job – like I just told you, I'm a forklift operator. I take care –
>
> Q: So, kind of from your experience?
>
> A: Yes, I take care of the whole job.
>
> Q: And how many people were on kind of that team?

A: I think it was seven. I can give you an example for one. She – she wrote a – we've got to fill out a card, and they had another contractor that was up standing on the pipes. He had this harness on, but he wasn't tied off, so she made a card and said, "Why do we have to watch people fall to their death because they can do different from us?" and that kind of – you know, why do I want to watch this guy standing up here, he's not tied off, and he'll fall off and he'll kill himself just because he didn't tie off?

Q: So, that's something that – an example of what –

A: Yes.

Q: -- the safety team did?

A: Yes.

Q: They came up with stuff like that to make the site safer?

A: Right.

Q: And I guess in terms of the, you know, sweeping, leaf blowing, that kind of thing, was there someone specifically hired to do that kind of stuff, or is that kind of the supporting position?

A: It was the laborers or stuff, but –

Q: Is it something everyone would kind of pitch in to help with things like that?

A: No, not – you know, it – it's – clean jobs – having a clean job site is a safety – it's – it's a safe job site, and where I used the leaf blower or something is where everybody ate, you know, and you've got to watch for snakes and stuff like that, and then the mice or rats will come in and eat the food and crumbs fall on the floor, so I didn't like it. We cleaned it. I take a leaf blower and I would blow it out, and that was it. It was just to keep a good, safe job – you know, clean job site.

Q: I guess in terms of when you did return to work after the alleged incident, did there – was there ever a time that you were off restrictions or back to your forklift operating job?

A: No, no.

Q: It was always, you know –

A: I – I was –

Q: -- doing the safety or helping with things around, but –

A: They kept me on light duty and – but until they started wanting me to walk three stories up, and I just did it, like I said, because I didn't want to lose my job for insubordination and I didn't – you know, the – I was just – but when the safety guy told me I don't have to, then that's when I said, "I'm not going back up there. I'm done. I'll stay down here."

Bergeron began receiving unemployment benefits after he was laid off. He described his efforts to obtain employment while receiving unemployment benefits.

A: I called my friends, and they didn't need me.

Q: Did you look for employment elsewhere at all?

A: No, I didn't have no training for other stuff.

Q: So, you didn't really look for work?

A: I just said I called my friends. That's looking for work.

Q: Did you actually apply for any jobs?

A: I'm [sic] already applied for jobs. Just they didn't need me.

Q: Outside of your former employers having new job locations or anything like that, did you ever apply for any new employers or anything like that?

A: No, never.

After the injury, Bergeron did not operate a forklift.

AMEC introduced the medical report and deposition of Dr. Henry Tutt, the medical records of Acadian Ambulance Service, an EMG-NCV report of Bluegrass Orthopedics and Handcare, Dr. Thomas O'Brien's report, Dr. Lockstadt's June 18, 2015, medical record, and the records pertaining to unemployment benefits Bergeron received from Kentucky following his layoff. Bergeron introduced his December 1, 2014, handwritten statement, Dr. Warren Bilkey's report, the records of Gulf Coast Health Center, the records of Dr. Richard Dartt covering the period from December 1, through December 31, 2014, the records of Byrd Regional Hospital in Louisiana dated November 25, 2014, the records of Harrodsburg Physical Therapy spanning the period between December 8, 2014, through April 20, 2015, the records of Dr. Khursheed A. Siddiqui, with Central Kentucky Interventional Pain Center, spanning the period from January 16, 2015, through March 19, 2015, and Dr. Lockstadt's records spanning the period from March 25, 2015, through July 9, 2015.

After summarizing the lay and medical evidence, the ALJ determined Bergeron sustained a November 20, 2014, work-related injury based upon the opinions of Drs. Lockstadt and Bilkey.

As previously noted, the ALJ found due and timely notice was given. In finding Bergeron had not attained MMI, the ALJ reasoned as follows:

> Maximum Medical Improvement (MMI) is the point at which a condition causing disability has stabilized and will not be improved by additional medical treatment, although some medical treatment may still be necessary. W.L. Harper Construction Co., Inc. v. Baker, 858 S.W.2d 202, 204 (Ky. App. 1993).
>
> Dr. Lockstadt has recommended back surgery for Plaintiff. Plaintiff testified that he wants the back surgery. Dr. Bilkey stated that Plaintiff was at MMI

> unless he received further treatment. The ALJ relies upon the testimony of Plaintiff, Dr. Lockstadt and Dr. Bilkey to find that the surgery may improve Plaintiff's condition and therefore he is not at MMI.

Relying upon Dr. Lockstadt's opinion and his interpretation of the MRI, the ALJ found surgery would help Bergeron's lumbar condition. Consequently, future medical benefits including surgery were awarded. Concerning Bergeron's entitlement to TTD benefits, the ALJ found and directed as follows:

> The ALJ relies upon Dr. Lockstadt to find that Plaintiff shall be entitled to TTD benefits once surgery has been completed and he reaches MMI from that operation. As of at least November 15, 2015, Plaintiff's last day of work for Defendant, Dr. Lockstadt had restricted Plaintiff to a maximum occasional lift of 50 pounds, minimal repetitive bending and twisting, frequent position changes, and avoidance of impact loading and vibration to the spine. The ALJ notes that the standard for receiving TTD is different than that for finding a basis for a three factor. Plaintiff asserts that because, as of November 15, 2015, Plaintiff was unable to return to his customary work he should receive TTD benefits. However, KRS 342.0011(11)(a) defines temporary total disability to be a condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a return to employment. Plaintiff was working for Defendant until November 15, 2015. He was capable of being employed. He filed for unemployment and in doing so, stated that he was capable of working. The ALJ finds that Plaintiff was not entitled to TTD following his severance from employment with Defendant on November 15, 2015. However, the ALJ finds that he will be entitled to TTD following the completion of the surgery recommended by Dr. Lockstadt.

The ALJ placed the claim in abeyance until Bergeron attained MMI.

Bergeron filed a Petition for Reconsideration taking issue with the refusal to award TTD benefits from November 16, 2015, when he was laid off and

requesting additional findings. The ALJ's June 1, 2018, Order overruling the Petition for Reconsideration is set forth, in relevant part, *verbatim* as follows:

> Mr. Bergeron testified that he began working for Defendant in 2005. He worked as a fork lift operator. His date of injury was November 20, 2014. At that time he was a fork lift operator. He testified in his deposition that he did not return to work following the weekend of November 20, 2014. However, he stated that sometime in the middle of 2015 he was either laid off or fired. He moved to Texas at either the end of January, or early February, 2016. He stated in his deposition that he had not worked anywhere since November 2014. The ALJ notes that his deposition was taken on December 7, 2016. Mr. Bergeron stated that his back was fried and he passes time by taking care of his dog and walking, a lot. He did not describe his job duties as a fork lift operator in his deposition.
>
> At the hearing, he stated that in addition to operating a forklift, he would help other employees if they needed help. He testified that operating a forklift was not physically a hard job. He stated that he operated on asphalt and it bounced a lot. He stated the job was more mental because of the radios that would go off and someone was calling your name frequently. He testified that eighty-five percent of the time he might have to get off of his machine and move some bottles around, or make sure there are empties on the rack. He made clear that he was on the forklift more than he was off of it. At the hearing he clarified this to mean that at least one time during the day, he would have to get off of the forklift. On average, he would lift from 20, 25 to 75 or 80 pounds. Sometimes he would lift 100 pounds. Some of the heavier items he would lift would be cross ties. Again, at the hearing he clarified this to say that he was unable to state that he would lift something in excess of fifty pounds each day. It depended on the job. The forklifts are different. Some have tires with air, and some have hard tires.
>
> During the hearing, Mr. Bergeron stated that he worked while on restrictions assessed by the doctors. He stated that he helped out other workers and was not operating his forklift. At times he was told to climb ladddders and

he did that because he did not want to be considered insubordinate. He testified that a safety person told him he did not have to performs tasks that hurt him. He stopped climbing at that point. He walked around to see if anything was unsafe or needed to be fixed. He would sweep the floor if it needed it. He also used a leaf blower to blow dust out. However, this was not his normal job. He worked the tool room where he would hand out tools others may need. He next testified that he had not worked since November 2015 when the Harrodsburg project was completed. He testified that he was laid off November 16, 2015.

Mr. Bergeron testified that after the accident he was part of a safety team while he worked. This was not something he specifically trained for at work. He relied upon his experience. There were seven people on his team. He stated that using the leaf blower and sweeping was part of safety. You had to have a clean work site.

The Supreme Court of Kentucky stated in Trane Commercial Systems v. Tipton, 481 S.W. 3d 800 (Ky. 2016) that an employee is entitled to TTD benefits until he reaches maximum medical improvement (MMI), or has improved to the point where he can return to employment. In Tipton, the Plaintiff was injured and return to work at a job that was not her customary job, but which required no additional training. The Court, citing Wise, supra, stated that "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." Tipton, at 804. The Court held that Tipton was not entitled to TTD during the time period she worked as a circuit board assembler. She had been released to return to light duty and sedentary work, which Trane provided. The Court stated that while Tipton had not previously assembled circuit boards, she had assembled air conditioning units and tested them. She did not produce evidence that this required significant additional training or that it was beyond her intellectual capabilities.

Mr. Bergeron testified that although he was not operating a forklift upon return to work following his injury, he was performing work on a seven person safety team which required no additional training. He stated

> that safety was a part of every person's job. He walked the job site and looked for unsafe items or things that needed fixing. He also worked the tool room. The ALJ finds that while this was not Mr. Bergeron's customary job as a forklift operator, it was not a minimal job that was made up for him to avoid paying TTD. The ALJ further finds that he worked for months at this job until he was laid off on November 16, 2015. Mr. Bergeron's job from November 2014 through his lay-off on November 16, 2015 is similar to that of Ms. Tipton. It was not his pre-injury job, but it was a real job that was not minimal or made just for him. For purposes of the interlocutory order, not a final order, the ALJ finds that he is not entitled to TTD during the time period from November 16, 2015 through the date of surgery.

Thereafter, both parties introduced Dr. Lockstadt's records. His May 17, 2018, surgical note reveals Bergeron underwent left sacroiliac joint arthrodesis with instrumentation. The pre-operative and post-operative diagnosis is listed as left sacroiliac joint osteoarthritis, disorder, disruption, dysfunction, sacroillitis, arthropathy. The October 30, 2018, surgical note reveals Bergeron underwent right sacroiliac joint arthrodesis with instrumentation. The pre-operative and post-operative diagnosis is "right sacroiliac joint osteoarthritis, disorder, disruption, dysfunction, sacroillitis, arthropathy.

AMEC introduced the report of Dr. James Hood, a Texas orthopedic surgeon.

Bergeron submitted the medical records of Beaumont MRI, Fondren Orthopedic Group, and Dr. Lockstadt. He also submitted Dr. Jules Barefoot's report.

At his August 13, 2020, deposition, Bergeron did not offer any further testimony relating to his entitlement to TTD benefits from the time he was laid off until he underwent surgery in 2018.

At the April 19, 2020, Hearing, Bergeron testified his unemployment benefits terminated in May 2016 and he received no income between May 2016 and May 2018 when he began receiving TTD benefits. His first job after being laid off in November 2015 was in January 2020 working for McDonalds in Jasper, Texas, in the maintenance department. He worked for McDonalds approximately ten months during 2020 and 2021. He explained he quit work approximately three or four months in the latter part of 2020 but returned to McDonalds in January or February 2021 for about a month. He stopped working for McDonalds on both occasions because the work was too hard on his back. Between employments with McDonalds, he briefly worked elsewhere. He quit that employment due to back problems.

Bergeron acknowledged he worked light duty for AMEC for approximately a year following the injury. He provided the following regarding the nature of that work and the duration of the unemployment benefits he received:

> Q: Now, after this work injury, you kept working for Amec for a full year afterwards; is that correct?
>
> A: Light duty.
>
> Q: Full-time work?
>
> A: Yeah. Light duty.
>
> Q: Substantial overtime of up to 30 hours a week?
>
> A: We did the shutdown. So I know one week was like 80 something and everything but all I was doing was sitting in the tool room.
>
> Q: You were in charge of the tool room passing out tools?
>
> A: Yeah, just – or writing it down. They'd come get your [sic] own tools.

Q: Keeping inventory?

A: Yes.

Q: And you stopped that job because the Amec assignment ended?

A: That is correct.

Q: Then you applied for and received unemployment benefits for 26 weeks because you were laid off?

A: Yes.

Q: Now, since then, you had two surgeries both done by Dr. Lockstadt; one to your left SI joint in May 2018, and then one to the right SI joint in October 2018.

A: Yes, sir. That's correct.

In the June 18, 2021, decision, the ALJ again found Bergeron sustained a November 20, 2014, work injury and notice was timely given. The findings concerning Bergeron's entitlement to TTD benefits reads as follows:

…

In the Order on Petition for Reconsideration dated June 1, 2018, the ALJ found Bergeron was not entitled to temporary total disability income benefits from November 16, 2015 through the date of surgery. He was injured on November 20, 2014 and went on vacation. He returned to work with restrictions. The ALJ found he was not entitled to TTD benefits at any point until the date of his first surgery. The ALJ adopts and incorporates that order, findings and reasoning herein as if fully set forth. The ALJ does not believe that the facts have changed regarding his pre-surgery work and physical limitations that warrant any additional TTD income benefits prior to the first surgery.

Defendant paid TTD at the rate of $796.06 from May 17, 2018 through August 17, 2018 and then from October 30, 2018 through July 28, 2019. Bergeron underwent the first sacroiliac surgery on May 17, 2018. Dr. Lockstadt placed Bergeron at MMI for the first

surgery as of August 17, 2018. He stated that Bergeron was free to perform activities as tolerated for the left sacroiliac joint surgery. The ALJ relies on Dr. Lockstadt to find that due to the effects of the May 17, 2018 surgery, Bergeron was temporarily totally disabled and entitled to receive TTD from May 17, 2018 through the date he reached MMI on August 17, 2018.

Bergeron underwent a second sacroiliac surgery on October 30, 2018. However, Dr. Lockstadt removed Bergeron from work on September 26, 2018. The last record filed for Dr. Lockstadt regarding Bergeron's off-work status in 2019 is dated January 17, 2019. Dr. Lockstadt removed Bergeron from work through April 17, 2019. The record notes that Bergeron is retired and does not place any restrictions on his abilities after April 17, 2019. However, an April 17, 2019 office record placed work restrictions of minimizing repetitive bending and twisting and alternating between sitting, standing and walking for frequent posture changes of the lumbar spine. He was to avoid vibration and impact loading with a lifting restriction of up to 10 pounds on an intermittent basis.

Dr. Barefoot placed Bergeron at maximum medical improvement (MMI) on June 18, 2019, six months after the last procedure performed on Bergeron. The ALJ notes that Dr. Barefoot is one off in his calculation. Dr. Hood placed Bergeron at MMI six months after the last procedure in January 2019. He stated Bergeron reached MMI on July 18, 2019.

The ALJ relies on Dr. Lockstadt to find that Bergeron was not capable of returning to employment and was temporarily totally disabled, following the October 30, 2018 surgery, until July 18, 2019, when he was placed at MMI. The ALJ finds that Bergeron is entitled to receive TTD income benefits from October 30, 2018 through July 18, 2019.

The parties stipulated that Bergeron's pre-injury average weekly wage was $1,291.63. The ALJ finds that his TTD rate was the state maximum for 2014 injuries in the weekly amount of $796.06.

Relying upon the impairment rating of Dr. Barefoot, the ALJ concluded Bergeron has a 29% impairment rating, with 20% attributable to the 1999 injury and 9% attributable to subject work injury. Since Drs. Barefoot and Hood agreed Bergeron did not retain the capacity to return to the type of work he performed on November 20, 2014, the ALJ found the three-multiplier in KRS 342.730(1)(c)1 is applicable. Bergeron was awarded PPD benefits beginning November 20, 2014, for a period of 425 weeks to be interrupted during any period TTD benefits were paid. Bergeron was to undergo a vocational rehabilitation evaluation.

Bergeron filed a Petition for Reconsideration asserting he did not return to regular duty following his work injury but worked light duty through November 13, 2015. During that time, his work activities had been restricted by Dr. Lockstadt. Bergeron requested additional findings of fact regarding his ability to perform his customary work and whether he is entitled to TTD benefits from November 14, 2015, through May 16, 2018. By Order dated July 22, 201, the ALJ overruled the Petition for Reconsideration adopting the contents of the June 1, 2018, Order.

On appeal, Bergeron states he never returned to regular duty following his work injury and worked light duty through November 13, 2015. Referencing the work restrictions imposed by Dr. Lockstadt, Bergeron emphasizes he is not requesting TTD benefits during the period he worked light duty. Rather, he asserts entitlement to TTD benefits during the period he was not performing any work while restricted from his customary work. He maintains the ALJ utilized an incorrect

standard in refusing to award TTD benefits from the time he was laid off by AMEC until undergoing the initial lumbar surgery. Bergeron seeks remand for findings regarding his ability to perform his customary work and whether he is entitled to TTD benefits from November 14, 2015, through May 16, 2018. He also maintains he is entitled to TTD benefits from November 14, 2015, continuing through July 18, 2019.

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 from an injury and has not reached a level of improvement that would permit a return to employment.

The above-cited definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (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.

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/she 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/she remains disabled from her customary work or the work she was performing at the time of the injury. The court in Helms, 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), the Supreme Court further elaborated regarding the standard for awarding TTD benefits 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 employ-ment. *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.

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249, 254 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he/she is unable to perform the work performed at the time of the injury stating as follows:

> As the Court explained in *Advance Auto Parts v. Mathis,* No. 2004–SC0146–WC, 2005 WL 119750, at (Ky. Jan. 20, 2005), and 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."

Two months after rendering Livingood v. Transfreight, LLC, supra, the Supreme Court rendered Zappos.com v. Mull, 2014-SC-000462-WC, rendered October 29, 2015, Designated Not To Be Published, specifically rejecting the Court of Appeals' interpretation of "a return to employment" as set forth in KRS

342.0011(11)(a).[3] There, the ALJ awarded TTD benefits during a period Mull had not returned to her regular employment but worked light duty. TTD benefits were awarded during the period Mull had not attained MMI and had not reached a level of improvement which would permit her to return to her regular customary employment. Zappos.com appealed to this Board and we reversed the award of TTD benefits. The Court of Appeals reversed the Board and reinstated the award of TTD benefits. In reversing the Court of Appeals, the Supreme Court stated:

> The Board held:
>
> > 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 was also capable of performing, and continued to perform for more than one year post-injury, her primary fulltime 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 and we therefore reverse.
>
> Mull subsequently appealed to the Court of Appeals, which reversed the Board and reinstated the award of TTD benefits. The Court of Appeals held that

[3] A determination of the existence of "a return to employment" necessarily requires a finding of whether the employee was performing customary work.

the phrase "return to employment," as found in KRS 342.0011(11)(a), "was only achieved if the employee can perform the entirety of her pre-injury employment duties within the confines of the post-injury medical restrictions." Thus, since Mull no longer retained the physical ability to perform any activities requiring gripping and grabbing with her right hand, and her pre-injury employment required such tasks, the Court of Appeals held she was entitled to TTD benefits. We disagree, and reverse the Court of Appeals.

The Board's review in this matter was limited to determining whether the evidence is sufficient to support the ALJ's findings, or if the evidence compels a different result. *W. Baptist Hosp. v. Kelly,* 827 S.W.2d 685, 687 (Ky. 1992). Further, the function of the Court of Appeals is to "correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Id.* at 687–88. Finally, review by this Court "is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Id.* The ALJ, as fact-finder, has the sole discretion to judge the credibility of testimony and weight of evidence. *Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418 (Ky. 1985).

As stated above, pursuant to KRS 342.0011(11)(a), in order for a claimant to be entitled to TTD benefits, she must satisfy a two-prong test: (1) she must not have reached MMI; and (2) she must not have reached a level of improvement that would permit her return to employment. *Double L Constr., Inc. v. Mitchell,* 182 S.W.3d 509, 513 (Ky. 2005). *Wise* stands for the proposition that TTD benefits for a claimant should not be terminated just because she is released to perform minimal work if it is not the type of work that was customary or that she was performing at the time of his injury. 19 S.W.3d at 657. However, "*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.'" *Livingood v. Transfreight, LLC,* ––– S.W.3d ––– (Ky. 2015). Accordingly, the ALJ must analyze the evidence in the record and determine

> whether the light duty work assigned to the claimant is not minimal and is work that she would have performed before the work-related injury.
>
> In *Livingood,* the claimant, a forklift driver, could not drive a forklift due to his light duty work restrictions. Instead, while on light duty restrictions he changed forklift batteries, monitored bathrooms for vandalism, and checked to make sure freight was correctly placed around the facility. The ALJ determined that since Livingood had performed those tasks before, and the work was not a make-work project, he had returned to employment and was not entitled to TTD benefits. Id. at ____. The ALJ's findings were affirmed by this Court.
>
> In this matter, Mull satisfied the first prong of the TTD benefit test because she had not reached MMI. But, the ALJ did not perform an in depth analysis of the second requirement, whether the light duty work Mull performed was a return to her regular and customary employment. However, despite the lack of an in depth analysis the facts of this matter are relatively clear, and we must agree with the Board that substantial evidence does not support the ALJ's award of TTD.
>
> Prior to her injury, Mull's job tasks included retrieving a product, scanning it, and placing it in a shipping box. Mull was trained in all of these tasks. After the injury, Mull was restricted to scanning items. Mull testified that scanning was a normal part of her pre-injury employment. The light duty work is not a significant diversion from her original employment and there is no indication the work was minimal. Mull also received the same hourly wage. Mull returned to her regular and customary employment at Zappos and she does not satisfy the second requirement to receive TTD benefits.

Slip Op. at 4-7.

More recently, in Trane Commercial Systems v. Tipton, 481 S.W.3d 800, 806 (Ky. 2016), the Supreme Court reinforced its decision in Zappos.com v. Mull, supra, again rejecting the Court of Appeals' definition of "a return to employment" stating as follows:

> The Court of Appeals in this case held that Tipton was entitled to TTD while she was working full-time for Trane and earning the same hourly rate. This holding by the Court of Appeals was based on a misunderstanding of *Bowerman* and an understandable misinterpretation of what "return to employment" means.

Id. at 806.

In Trane Commercial Systems v. Tipton, supra, the Supreme Court provided the following clarification regarding the standard to be applied in determining when an employee has not reached a level of improvement that would permit "a return to employment":

> 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.

We affirm the ALJ's refusal to award TTD benefits from the date Bergeron was laid off until he underwent surgery on May 17, 2018. In the March 9, 2018, interlocutory decision, the ALJ provided the analysis required in determining the point at which Bergeron was entitled to TTD benefits. The ALJ first determined Bergeron had met his burden of establishing he was not at MMI relying upon his testimony and the opinions of Drs. Lockstadt and Bilkey in finding surgery may improve his condition. He noted Dr. Bilkey stated Bergeron was at MMI unless he received further treatment. However, since he was to undergo surgery, the ALJ concluded Bergeron was not at MMI.

Regarding the second prong of the analysis i.e., whether Bergeron had reached a level of improvement that would permit a return to reemployment the ALJ correctly noted Bergeron continued to work after the November 20, 2014, injury albeit in a light duty capacity. Relying upon Dr. Lockstadt, the ALJ found Bergeron would be entitled to TTD benefits upon undergoing surgery which was ultimately performed on May 17, 2018. However, the ALJ concluded that prior to that date he

was not entitled to TTD benefits as Dr. Lockstadt had provided restrictions which would allow him to continue working. Consistent with those restrictions, the ALJ noted Bergeron was working until he was laid off on November 15, 2015. Thus, he was capable of employment. The ALJ concluded Bergeron's receipt of unemployment benefits is an indication of his work capabilities during the period in question. Indeed, the records of the Kentucky Office of Employment and Training support the ALJ's finding, as Bergeron's application indicates he was seeking unemployment benefits because he had been laid off due to "lack of work."

Bergeron argues on appeal that he never returned to regular duty, stopped working light duty, and during the period in question he was not performing any work while he remained restricted from his customary work. Bergeron insists the ALJ used an incorrect standard. However, he does not indicate the standard the ALJ incorrectly utilized or misapplied.

Bergeron bore the burden of satisfying the second prong of the analysis. Notably, Dr. Lockstadt's medical records, considered by the ALJ in rendering his interlocutory decision do not support a finding Bergeron was incapable of performing light duty work after the November 2015 layoff. Specifically, Dr. Lockstadt's records do not demonstrate Bergeron was incapable of performing light duty between November 2015 and the date of his first surgery. As of the March 19, 2018, interlocutory decision, Bergeron had introduced Dr. Lockstadt's records spanning the period from March 25, 2015, through July 19, 2015. Within those records is Dr. Lockstadt's March 25, 2015, record relating to Bergeron's capacity to work. On that date, Dr. Lockstadt indicated Bergeron could return to work with

restrictions and was to perform light duty. On April 13, 2015, Bergeron could return to light work categorized as occasional lifting and carrying a maximum of 20 pounds. On May 21, 2015, Dr. Lockstadt permitted Bergeron to work and imposed light duty and lumbar spine restrictions. On June 18, 2015, Dr. Lockstadt permitted Bergeron to increase his work load so he could perform medium work with lumbar spine restrictions which were different than the previous lumbar spine restrictions. Those lumbar spine restrictions instructed Bergeron to avoid impact loading and vibration to the spine. Finally, on June 29, 2015, Dr. Lockstadt again indicated Bergeron could perform medium work with lumbar spine restrictions maximizing repetitive bending and twisting through the spine, alternating between sitting, standing, and walking, with frequent change of posture, avoiding impact loading and vibration to the spine. Relying upon those records, the ALJ could reasonably infer Dr. Lockstadt had not changed his opinions regarding Bergeron's work capabilities, and Bergeron was capable of performing regular work subject to the light duty work restrictions imposed on June 29, 2015.

We emphasize Bergeron retained the burden of satisfying both prongs of the test in establishing entitlement to TTD benefits. Since no other documents were introduced from Dr. Lockstadt, or any other physician, establishing Bergeron was incapable of performing the light duty work to which Dr. Lockstadt restricted him, the ALJ correctly declined to award TTD benefits up until he underwent surgery on May 17, 2018. We note Bergeron does not contest the ALJ's award of TTD benefits between May 17, 2018, and August 17, 2018, since Dr. Lockstadt

concluded Bergeron had attained MMI following the May 17, 2018, surgery on August 17, 2018.[4]

Equally important is the fact that the record is devoid of medical evidence introduced after the ALJ's interlocutory decision supporting an alteration or amendment of the ALJ's determination not to award TTD benefits between the time Bergeron stopped working in November 2015 up until he underwent surgery on May 17, 2018. As set forth in Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009), the ALJ was not authorized to change his decision since no evidence was introduced following the interlocutory decision which would permit a change in his ruling concerning entitlement to TTD benefits between November 13, 2015, and May 17, 2018.

> In Bowerman, the Court of Appeals explained:
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> > Unlike *Vendome,* the ALJ in Bowerman's claim rendered a final opinion with factual findings inconsistent with those previously adjudicated in her interlocutory opinion regarding the same factual questions and based on the same evidence. To do so was arbitrary, unreasonable, unfair, and unsupported by sound legal principles, and was an abuse of the ALJ's discretion.
> >
> > …
> >
> > While an ALJ's discretion as fact-finder is expansive, it is not limitless. [footnote omitted] Reason, logic, and sound principles of justice dictate that findings regarding questions of fact, once fully litigated by the parties and properly adjudicated by the fact-finder, should not be subject to change absent new evidence, fraud, or mistake, regardless of whether rendered in an

[4] This is supported by Dr. Lockstadt's brief note of August 16, 2018, which reads as follows: "The patient is at MMI, for his left sacroiliac joint, with activities as tolerated for his left sacroiliac joint status is left sacroiliac joint fusion. An MMI would be achieved 3 months status post surgery of the left sacroiliac joint, which was May 17, 2018. Therefore MMI would be August 17, 2018."

> interlocutory order or a final decision. *See Garrett Mining,* 122 S.W.3d at 522.

Id. at 870-871.

In the June 1, 2018, Order ruling on Bergeron's Petition for Reconsideration, citing Trane, supra, the ALJ noted that when Bergeron returned to work following his injury, he was working on the seven-person safety team requiring no additional training. The ALJ described the nature of Bergeron's work, and based on Bergeron's testimony concluded that even though this job was not his customary job of operating a forklift, his work was not a minimal job made up for Bergeron in order for AMEC to avoid paying TTD benefits. Significant to the ALJ was the fact Bergeron worked for almost a year after his injury until he was laid off in November 2015. The ALJ concluded that at the time he was laid off, Bergeron remained capable of performing the work he had been performing. Further, Bergeron's January 22, 2018, hearing testimony establishes that after he was laid off, he sought unemployment benefits and called friends to see if there was work available. Although Bergeron testified he did not submit applications, he acknowledged he "called [his] friends. That's looking for work," and he "already applied for jobs. Just they didn't need [him]." Based on Bergeron's testimony and the lack of evidence demonstrating Dr. Lockstadt had altered the work restrictions imposed on June 29, 2015, the ALJ reasonably concluded Bergeron was capable of continuing the work he was performing at the time he was laid off and that he had failed to establish his entitlement to TTD benefits from the date of layoff until he underwent surgery on May 17, 2018. Since substantial evidence supports the ALJ's findings and Bergeron has not established the record compels a finding he was entitled to TTD benefits

between November 14, 2018, and May 17, 2018, the ALJ's refusal to award benefits during that period must be affirmed.

Because Bergeron also asserts entitlement to TTD benefits from the date he was laid off through July 18, 2019, we will address his entitlement to TTD benefits between August 18, 2018, the day after Dr. Lockstadt assessed MMI and October 29, 2018, the day before the second surgery. We first note the second period of TTD benefits spanning from October 30, 2018, the date of the second surgery, through the date he attained MMI on July 18, 2018, is supported by the medical evidence. The ALJ relied upon Drs. Hood and Barefoot in determining MMI was attained on July 18, 2019. The ALJ noted Dr. Hood assessed MMI on July 18, 2019, and Dr. Barefoot opined MMI would be reached six months after the surgery in January 2019. However, Dr. Bilkey miscalculated the six-month period and assessed MMI on June 18, 2019, instead of correctly assessing MMI on July 18, 2019.

The ALJ relied upon Dr. Lockstadt in finding Bergeron was entitled to TTD benefits beginning on October 30, 2018, the date of surgery. Even though Dr. Lockstadt removed Bergeron from work on September 26, 2018, there is nothing indicating Bergeron's MMI status on August 17, 2018, was in any manner altered until he underwent surgery on October 30, 2018.

Stated another way, although Bergeron's removal from work by Dr. Lockstadt on September 26, 2018, satisfied one prong of the temporary total disability analysis, Bergeron did not satisfy the second prong of the analysis as the record contains no medical evidence establishing Bergeron's MMI status had changed after August 17 2018, through October 29, 2018, the day before the second

surgery. Consequently, the ALJ's refusal to award TTD benefits from August 17, 2018, through October 29, 2018, is supported by substantial evidence and will also be affirmed. Since Dr. Lockstadt assessed MMI on August 17, 2018, and the medical evidence does not indicate that status changed up until Bergeron underwent surgery on October 30, 2018, Bergeron is not entitled to TTD benefits during that period.

Accordingly, the March 19, 2018, Interlocutory Opinion, Award, and Order, the June 1, 2018, Order, the June 18, 2021, Opinion, Award, and Order, and the July 22, 2021, Order are **AFFIRMED**.

ALL CONCUR.

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