

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 8, 2019

CLAIM NO. 201701582 & 201673241

LION APPAREL, INC.

PETITIONER

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

ALICE JOLLY AND
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING & REMANDING

* * * * *

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

ALVEY, Chairman. Lion Apparel, Inc. ("Lion Apparel") appeals from the Opinion and Award rendered July 12, 2018, by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ dismissed Alice Jolly's ("Jolly") claim for a low back injury allegedly occurring on August 8, 2016. However, the ALJ determined Jolly sustained a cervical injury on January 15, 2015, caused by cumulative trauma for which he awarded temporary total disability ("TTD") benefits, permanent partial

disability (“PPD”), and medical benefits. Lion Apparel also appeals from the August 16, 2018 order denying its petition for reconsideration, and from the September 18, 2018 order denying its second petition for reconsideration.

On appeal, Lion Apparel argues the ALJ erred as a matter of law in finding Jolly’s cervical spine condition manifested on January 1, 2016, especially since she amended her claim to assert the date of injury was January 15, 2015. Lion Apparel also contends the ALJ erred by awarding TTD benefits from January 15, 2015 through July 1, 2016. Lion Apparel argues the ALJ, in the August 16, 2018 order on reconsideration, only addressed the issue of whether Jolly had sustained a neck injury, but provided no clarification regarding the manifestation date. Likewise, it argues the order did not address how the award of TTD benefits from January 2015 through July 2016 is supported by the record. Lion Apparel also argues the ALJ failed to perform the appropriate analysis in determining Jolly’s entitlement to TTD benefits. Lion Apparel additionally argues the ALJ failed to provide an analysis allowing for meaningful review, and therefore he abused his discretion.

In her brief, Jolly agrees the ALJ erred in awarding TTD benefits from January 15, 2015 through July 1, 2016. She argues she is entitled to PPD benefits for her cervical injury beginning January 15, 2015, and is also entitled to a period of TTD benefits after August 8, 2016 for her low back. However, we note Jolly did not appeal from the ALJ’s dismissal of her low back claim. We vacate and remand the ALJ’s determinations regarding Jolly’s neck injury for entry of additional findings of fact requested by Lion Apparel which were not addressed by the ALJ. We also

remand for a correct determination of Jolly's entitlement to TTD benefits. Additionally, on remand, the ALJ is directed to deconsolidate Claim No. 2016-73241 (the alleged low back injury which was dismissed and not appealed) from Claim No. 2017-01582 pertaining to Jolly's neck injury which is the subject of this appeal.

On September 18, 2017, Jolly filed two claims. In Claim No. 2016-73241, she alleged she injured her low back on August 8, 2016 while lifting a bundle of jackets from her sewing machine to a buggy. In Claim No. 2017-01582, she alleged she sustained a neck injury caused by repetitive trauma due to twisting with January 1, 2016 listed as the injury date. Jolly did not file a Form 104 employment history in either claim.

Jolly testified by deposition on November 19, 2017, and at the hearing held May 17, 2018. Jolly was born on February 4, 1964, and is a resident of Ewing, Kentucky. She obtained a GED in 2001, and attended six months of college to obtain a CNA certification. She began working as a CNA in 2001, and subsequently worked in the scope of that certification for various employers. On November 27, 2004, she sustained a low back injury necessitating surgery at L5-S1 by Dr. Phillip Tibbs on April 8, 2005. She experienced left leg symptoms due to that accident. She did not work for three years, and was unable to resume her duties as a CNA. She settled that claim for \$30,000.00. She next worked for Dollar General Stores, where she was eventually promoted to store manager.

Jolly was later employed as a seamstress for Lion Apparel where she operated a commercial sewing machine. She sewed heavy firefighter, Navy, and

Coast Guard coats. She stated the work was repetitive, and operating the sewing machine required her to look down extensively. She last worked for Lion Apparel on August 8, 2016 when she allegedly injured her back.

Jolly testified she developed a knot on her neck in 2014, and experienced headaches after carrying a sewing machine at work. She testified she did not report this incident to her supervisor. She initially treated for this condition with Melissa Frederick, APRN (“Nurse Frederick”). She was referred to Dr. Tibbs in June 2015, although she alleged the date of her cervical injury was January 1, 2016. She last saw Dr. Tibbs on March 24, 2017, and she no longer receives treatment for either her neck or low back.

At the hearing, the cervical injury date was amended to January 15, 2015. Jolly testified that no physician ever advised her the neck condition is work-related, but she believes her symptoms were caused by her repetitive work activities.

Jolly was involved in a motor vehicle accident in July 2016 when her head struck the steering wheel of her car, and she sustained a concussion. She received a settlement for that non-work related injury.

Jolly began treating with Dr. David Bosomworth in 2013 for low back and left leg pain, but testified her condition worsened in August 2016. Dr. Bosomworth began treating her with lumbar injections in 2013, and cervical injections in 2015.

Since the ALJ’s dismissal of Jolly’s alleged August 8, 2016 low back injury was not appealed, we will not review the medical evidence/records submitted regarding that claim.

In support of her cervical injury, Jolly filed Dr. Bosomworth's records from January 26, 2016 and February 17, 2016. Jolly also filed Dr. Bosomworth's office note of December 18, 2015, which only referenced low back and left lower extremity pain. On January 26, 2016, Dr. Bosomworth noted he saw Jolly for a follow up from a cervical injection. On February 17, 2016, Dr. Bosomworth noted he saw Jolly for a follow up of her complaints of neck and low back pain. He noted she was taking Norco, which provided good pain relief with minimal side effects. He also noted cervical flexion and extension were limited due to her neck pain.

Jolly also filed records from the University of Kentucky Neuroscience Institute for treatment dates of January 11, 2005, April 25, 2005, May 25, 2005, June 26, 2015, October 18, 2016 and March 24, 2017. The treatment records from 2005 only addressed complaints related to the 2004 low back injury. On June 26, 2015, Dr. John R. Lamm noted Jolly complained of neck pain of eight months duration. A cervical MRI revealed disc herniations at C3-C4 and C5-C6. The October 18, 2016 and March 24, 2017 office notes only referenced Jolly's low back complaints.

Dr. Craig Roberts evaluated Jolly at her request on August 2, 2017. In his report, Dr. Roberts noted Jolly had no previous neck problems until she had a gradual onset of neck pain manifesting on January 1, 2016. Dr. Roberts noted that at the time of the examination, she had paravertebral muscle spasm and guarding of the neck, along with tenderness about the superior aspect of the trapezius on both the left and the right. Dr. Roberts diagnosed Jolly with cervical disc herniations at C3-C4; C4-C5; and C5-C6 due to cumulative trauma manifesting on or around January 1, 2016. He determined she reached maximum medical improvement ("MMI") for her

neck problems on or around July 1, 2016. Dr. Roberts opined he would limit Jolly from activities involving repetitive flexion, extension, rotation or bending of her neck. He assessed an 18% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) for Jolly’s cervical condition. He also determined Jolly lacks the physical capacity to return to the type of work performed on the date of injury. Dr. Roberts also opined that Jolly will require cervical spine decompression and fusion in the future.

In a supplemental report dated April 19, 2018, Dr. Roberts stated he had reviewed the MRIs and read the reports of Dr. Henry Tutt and Dr. Robert Vaughan. He reiterated that Jolly sustained a manifestation of the cumulative trauma injuries to her neck on January 1, 2016, and his previous opinions were unchanged.

Jolly also filed records from Morgan County ARH where she had cervical and lumbar MRIs on February 6, 2018. The cervical MRI revealed a large left herniation at C3-C4, and a mild broad based herniation at C5-C6.

Lion Apparel filed office notes from Dr. James Frederick for treatment on ten occasions between October 27, 2011 and October 8, 2015. He first treated Jolly for neck pain on January 8, 2013, when he referred her to a pain clinic for treatment of both the neck and low back. On December 12, 2013, he noted Jolly’s complaints of shoulder pain. On May 8, 2014, Jolly complained of low back and neck pain. She was prescribed Naproxen and Neurontin. On January 15, 2015,

Jolly was seen for neck pain. She reported no history of injury. On May 4, 2015, she was treated for neck pain radiating to both arms, and low back pain.

Lion Apparel also filed records from Dr. Tibbs' office for treatment from January 11, 2015 through December 1, 2016. As noted above, Jolly's first complaints of neck pain were listed in the June 26, 2015 office note. She related the complaints were of eight months duration.

Lion Apparel also filed Dr. Bosomworth's treatment records consisting of twenty-six office visits between January 30, 2013 and June 13, 2016. The December 18, 2015 office note indicates a cervical MRI showed evidence of cervical disc herniation and he diagnosed cervical spondylosis. Office notes of January 26, 2016; February 17, 2016; April 15, 2016; and June 13, 2106 reference treatment for Jolly's cervical complaints.

Dr. Tutt evaluated Jolly at Lion Apparel's request. Although the evaluation was primarily for her low back complaints, Dr. Tutt noted, "She related that she started having neck pain about a year and a half ago, made worse with flexion and sometimes associated with a feeling of swelling in the midline cervicothoracic region. She related having had several cervical injections by Dr. Bosomworth as well." Dr. Tutt also noted he had reviewed a cervical MRI, which demonstrated mild multi-level degenerative changes.

Dr. Vaughan evaluated Jolly at Lion Apparel's request on January 30, 2018. Her primary complaint was low back pain, with a secondary complaint of neck pain. She reported her neck pain and headaches began in 2015. She initially treated with Nurse Frederick. She also reported she began treating with Dr.

Bosomworth in 2013, initially for low back pain, and later for her neck. She sees Dr. Bosomworth every two months, and he prescribes Norco, Gabapentin and Flexeril. Dr. Vaughan noted Jolly worked as a seamstress for five years, but has not worked since August 8, 2016. Dr. Vaughan noted Jolly has wear and tear changes in her cervical spine, normal for her age, and she sustained no cumulative trauma injury. He found she has a 0% impairment related to the cervical spine, and her complaints are out of proportion to her objective findings.

After Jolly moved to amend the date of her cervical injury, Lion Apparel filed a Special Answer. It alleged the claim was not timely filed, and barred by the applicable statute of limitations contained in KRS 342.185 and KRS 342.270.

A telephonic benefit review conference was held on February 14, 2018. The parties identified benefits per KRS 342.730, work-relatedness/causation, notice (January 1, 2016 cervical injury), injury as defined by the Act, exclusion for pre-existing disability/impairment, TTD, proper rating per the AMA Guides, and duration of benefits per KRS 342.730(4) as contested issues. Jolly subsequently moved to amend the cervical injury date as January 15, 2015 instead of January 1, 2016. Lion Apparel filed a special answer asserting the cervical claim was not timely filed based upon the amendment. On March 27, 2018, the ALJ entered an order passing the motion to amend, and granting leave for Jolly to support the requested amendment. In the hearing order entered May 17, 2018, the ALJ permitted Jolly to amend the date of the cervical injury.

In the July 12, 2018 opinion, the ALJ summarized the evidence, and determined Jolly had sustained a cervical injury in January 2015, which did not

manifest until January 1, 2016, based upon Dr. Roberts' report. The ALJ made the following specific determinations regarding Jolly's cervical injury:

19. The Plaintiff testified that she developed pain in her neck but that she was not initially told that it was causally work-related when her symptoms appeared in January of 2015.

20. The ALJ notes that Dr. Roberts diagnosed cervical disc herniation C3-4, C4-5, C5-6 due to the cumulative trauma which became manifest on or around January 1, 2016.

21. The ALJ finds that the manifestation date of the Plaintiff's cervical spine injury is January 1, 2016, and that notice was given in a timely manner thereafter. The ALJ further finds that the claim was filed within the applicable statutory limitations period per the manifestation date found herein.

...

(Cervical)-Proper Rating Per the AMA Guides

26. The ALJ finds that the Plaintiff credibly described her cervical spine symptoms and that said symptoms are also supported by the diagnostic imaging that revealed a large cervical disc herniation on the left side.

27. The ALJ finds that only Dr. Roberts adequately addressed these objective medical findings in his opinion. Dr. Roberts diagnosed a cervical disc herniation at C3-4, C4-5, and C5-6 due to cumulative trauma and assessed an 18% whole person impairment per the AMA Guides. The ALJ finds that this rating is consistent with Table 15-5, DRE Cervical Category III.

28. Dr. Roberts further determined that the Plaintiff would require further medical treatment and that the Plaintiff would not be able to return to the same type of work. The opinion of Dr. Roberts regarding the cervical spine has convinced the ALJ and the ALJ thus finds that the Plaintiff has sustained an 18% whole person impairment to the cervical spine and that she does not retain the physical capacity to return to the same type of work as a result thereof.

Temporary Total Disability

29. 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...KRS 342.0011(11)(a)

30. The ALJ is persuaded by the opinion of Dr. Roberts for the reasons stated herein and therefore finds in accordance with said opinion that the Plaintiff reached MMI for the cervical spine on July 1, 2016.

31. The ALJ therefore finds that the Plaintiff shall be entitled to temporary total disability benefits from the date of injury, January 15, 2015, through July 1, 2016.

Duration of Benefits Per KRS 342.730(4)

32. The ALJ notes that this issue is hereby preserved for appellate review.

Both Jolly and Lion Apparel filed petitions for reconsideration. Jolly argued the ALJ erred in dismissing her claim for a low back injury. Lion Apparel argued the ALJ's decision contained multiple patent errors. It argued the ALJ failed to make necessary findings, and erred in awarding Jolly benefits for a neck injury. It argued Jolly first presented with neck pain in 2013. Lion Apparel requested additional findings regarding whether Jolly suffered from non-work-related cervical disc disease prior to January 1, 2016. Lion Apparel also argued the ALJ improperly awarded TTD benefits from January 15, 2015 through January 1, 2016. It noted Jolly continued to perform her regular job duties during that period. It argued the ALJ failed to perform the appropriate analysis in determining her entitlement to TTD benefits. Jolly filed a response to the petition for reconsideration agreeing the ALJ erred in awarding TTD benefits from January 15, 2015 through July 1, 2016 for

Jolly's cervical injury, but that she was entitled to TTD benefits from August 9, 2016 to February 8, 2017 for her low back injury.

The ALJ issued an order on August 16, 2018 denying Jolly's petition for reconsideration. Jolly did not appeal from either the ALJ's opinion, or from the order on reconsideration. The ALJ also issued an order on August 16, 2018 denying Lion Apparel's petition for reconsideration. He stated that he relied upon Dr. Roberts' report in determining Jolly sustained a work-related cervical injury. However, the ALJ failed to address Lion Apparel's concerns regarding the award of TTD benefits.

Lion Apparel filed a second petition for reconsideration on August 22, 2018. It argued the ALJ failed to make the requested additional findings regarding Jolly's cervical injury. It also argued the ALJ failed to address its concerns regarding the award of TTD benefits. It argued the ALJ failed to make sufficient findings of fact to support the award of TTD benefits.

The ALJ issued an order on the second petition for reconsideration on September 18, 2018. The order states as follows:

This matter is before the ALJ upon the second Petition for Reconsideration filed by the Defendant. The Defendant alleges patent error and requests additional findings. The Petition however fails to identify patent error. Having reviewed the Petition and the Response thereto;

IT IS HEREBY ORDERED, that the Petition fails to cite patent error and is therefore **DENIED**.

As noted above, Lion Apparel argues the ALJ erred in finding Jolly sustained a work-related cervical injury manifesting on January 1, 2016, especially in

light of the fact that she amended her claim to assert the date of injury was January 15, 2015. Lion Apparel also contends the ALJ erred by awarding TTD benefits from January 15, 2015 through July 1, 2016. Lion Apparel argues the ALJ, in the August 16, 2018 order on reconsideration, only addressed the issue of whether Jolly had sustained a neck injury, but provided no clarification regarding the manifestation date. Likewise, it argues the order did not address how the record supports an award of TTD benefits from January 2015 through July 2016. Lion Apparel also argues the ALJ failed to perform the appropriate analysis in determining Jolly's entitlement to TTD benefits. Lion Apparel also argues the ALJ failed to provide an analysis allowing for a meaningful review, and therefore he abused his discretion. We note Jolly concurs that the ALJ erred in awarding TTD benefits from January 15, 2015 through July 1, 2016.

We initially note that an ALJ has wide-ranging discretion in reaching his or her decision. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact, and is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

However, such discretion is not unlimited. While authority generally establishes that an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. However, in reaching a determination, the ALJ must provide findings sufficient to inform the parties of the basis for the 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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). In Arnold v. Toyota Motor Manufacturing, 375 S.W.3d 56, 61-62 (Ky. 2012), the Kentucky Supreme Court directed as follows:

KRS 342.275(2) and KRS 342.285 contemplate an opinion that summarizes the conflicting evidence concerning disputed facts; weighs that evidence to make findings of fact; and determines the legal significance of those findings. Only when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ's finding [footnote omitted] does it enable the Board and reviewing courts to determine in the summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable.

The ALJ determined Jolly sustained a work-related neck injury based upon Dr. Roberts' report. However, the ALJ failed to provide the additional findings requested by Lion Apparel regarding Jolly's cervical injury. The ALJ determined that Jolly's condition manifested on January 1, 2016, however January 15, 2015 was alleged as the date of injury. An injury caused by cumulative trauma

manifests when, "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). Consequently, "for cumulative trauma injuries, the obligation to provide notice arises and the statute of limitations does not begin to run until a claimant is advised by a physician that he has a work-related condition." Consol of Kentucky, Inc. v. Goodgame, 479 S.W.3d 78, 82 (Ky. 2015). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma injury. See American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness. We additionally note that date of injury, and date of manifestation are not necessarily synonymous.

Jolly testified that no physician had ever advised her that the cervical condition was work-related, although she believed that it was. Dr. Roberts determined that her cervical condition was indeed work-related in his report dated August 2, 2017. This was the first medical opinion that clearly stated Jolly's condition was due to her work. We additionally note that the January 15, 2015 date coincides with the office note of Dr. Frederick, who treated her for that condition. Treatment notes from 2013 and 2014 also reflect her neck complaints. On remand, the ALJ is directed to provide the additional findings of fact regarding Jolly's cervical injury requested by Lion Apparel.

We also find the ALJ's award of TTD benefits is insufficient. The ALJ awarded TTD benefits apparently without performing any analysis. Jolly agrees the ALJ erred in awarding TTD benefits from January 15, 2015 through July

1, 2016. 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 so 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.W.3d 800 (Ky. 2016), the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Court stated:

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

Here the ALJ awarded TTD benefits during a period when Jolly continued to work. The ALJ made no analysis regarding whether she could perform her usual work, whether she had any restrictions, or the basis for such award. On remand, the ALJ is directed to perform an appropriate analysis regarding an award of TTD benefits for Jolly’s cervical condition. Likewise, he is directed, if he determines Jolly was not entitled to TTD benefits, to make a determination regarding the appropriate commencement date for the award of PPD benefits. This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Any determination by the ALJ must be supported by the evidence after performing the appropriate analysis.

On remand, we additionally direct the ALJ to deconsolidate Claim No. 2016-73241 (the alleged low back injury that was dismissed and not appealed), from Claim No. 2017-01582 pertaining to Jolly's neck injury that is the subject of this appeal.

Accordingly, the July 12, 2018 Opinion and Award, the August 16, 2018 Order on Lion Apparel's petition for reconsideration, and September 18, 2018 Order on Lion Apparel's second petition for reconsideration, rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **VACATED**. This claim is **REMANDED** to the Administrative Law Judge for additional findings of fact and entry of an amended opinion in conformity with the views expressed herein.

ALL CONCUR.

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