

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 5, 2021

CLAIM NO. 201801569

REGAL PETROLEUM CO., INC.

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

TERRY KIDD and  
HON. GRANT S. ROARK,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Regal Petroleum Co., Inc. (“Regal”) appeals from the July 26, 2021 Opinion, Order, and Award rendered by Hon. Grant S. Roark, Administrative Law Judge (“ALJ”). In an Interlocutory Opinion and Order rendered August 26, 2019, the ALJ found Terry Kidd (“Kidd”) sustained a work-related right knee injury on June 26, 2018 as he was pulling on a hose at work. The ALJ dismissed Kidd’s claim for a right shoulder injury stemming from the same

incident. The ALJ awarded medical benefits, but declined to award temporary total disability (“TTD”) benefits in the interlocutory decision. The ALJ indicated he would entertain a motion for such benefits related solely to the right knee condition. The ALJ also placed the claim in abeyance until Kidd reached maximum medical improvement (“MMI”).

In the July 26, 2021 Opinion, Order and Award, the ALJ identified the additional evidence he reviewed, and again determined only the right knee injury is compensable. He awarded permanent partial disability (“PPD”) benefits based upon the 3% impairment rating assessed by Dr. James Farrage pursuant to the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, enhanced by the 3.4 multiplier contained in KRS 342.730(1)(c)1. The ALJ also awarded TTD benefits from September 19, 2018 through September 2, 2020. Regal also appeals from the August 16, 2021 Order denying its Petition for Reconsideration.

On appeal, Regal argues the ALJ erred by awarding TTD benefits prior to May 26, 2020. Regal additionally argues the ALJ impermissibly reversed his interlocutory finding pursuant to the holding in Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). Because we determine the ALJ’s decision is supported by substantial evidence, and the holding in Bowerman v. Black Equipment Co., *supra*, is inapplicable, we affirm.

Kidd filed a Form 101 on October 30, 2018, alleging injuries to his right knee and right shoulder when he twisted and fell while pulling hoses out of sleeves on a tanker truck. Kidd served in the Army for over twenty years, retiring in

1997. Afterward he worked as a long-haul trucker from 1997 to 2010, and again from 2016 to 2018. He drove tanker trucks for Regal from 2010 to 2016, and again in 2018. Because the ALJ's dismissal of the alleged right shoulder injury was not appealed, we will only discuss evidence relevant to the right knee injury.

Kidd testified by deposition on March 4, 2019, and at the hearings held June 26, 2019 and May 27, 2021. Kidd was born on March 26, 1969, and he currently resides in Grayson County, Kentucky. Kidd obtained a GED while serving in the Army. He testified he injured his left shoulder in 1980 while serving in the Army, but that condition healed. He denied having right knee or right shoulder problems prior to June 26, 2018.

Kidd testified at the deposition that his job with Regal involved driving tanker trucks to oil well sites. He tested crude oil stored in tanks, which he then loaded onto trailers through using heavy hoses. He was required to climb ladders to the top of the storage tanks. He drove sixty to seventy hours per week prior to the June 26, 2018 accident, loading and transporting multiple loads of crude oil each day. On that date, he was dragging a hose when he experienced a pop in his right knee, causing him to twist, fall, and strike his right shoulder. He finished his shift, but he did not work again until October 31, 2018 when he returned to light duty. When he returned to work in October 2018, he drove approximately 23 hours per week, loading and transporting crude oil once per day, with restrictions including no pulling, no overhead work, and no lifting greater than five pounds. Regal terminated Kidd's employment on May 9, 2019, and he drew unemployment benefits afterward. He has not returned to work since May 9, 2019. He does not believe he has the

physical capacity to perform any of his previous work. His CDL has also now expired. Subsequent to the interlocutory award, Regal paid Kidd TTD benefits from May 26, 2020 to November 16, 2020 at the rate of \$557.16 per week.

Kidd did not seek medical treatment after the June 26, 2018 incident until August 17, 2018 because he thought he had merely experienced a strain he believed would resolve. He first sought treatment with Rita Logsdon, APRN (“Nurse Logsdon”), his family physician, on August 17, 2018. Nurse Logsdon referred him to Dr. Michael Krueger, an orthopedic surgeon, who ordered MRIs of both the right knee and the right shoulder. Kidd testified he advised his medical providers both conditions were work-related stemming from the same incident. Dr. Krueger later administered Cortisone injections to the right knee and right shoulder. His treatment was paid for through Tricare, Kidd’s military retirement health insurance. Kidd later underwent right knee surgery performed by Dr. Mark Smith, an orthopedic surgeon. Although he continued to have knee pain afterward, he reported it was manageable.

At his first hearing, Kidd testified his right knee continued to swell, and frequently gave-way making it difficult to climb stairs. At the second hearing, Kidd reported his right knee continues to bother him, and occasionally pops out of joint. He is unable to sit for long periods due to his knee problems, and he still has problems climbing steps. He uses a cane and a soft leg brace. He can only stand for 15 minutes, or walk for 10 minutes at a time. He occasionally takes Ibuprofen.

Kidd previously treated at Hardin Memorial Hospital on June 8, 2018 for an unrelated swollen left leg. He also previously experienced low back and pelvic

fractures in 2011 when he was thrown from a horse. He testified those conditions ultimately resolved. Kidd testified he is no longer able to ride a motorcycle or jet ski, scuba dive, or fish due to limitations stemming from his work injury.

In support of his claim, Kidd filed Dr. Krueger's September 19, 2018, October 9, 2018, and the October 26, 2018 records. The primary complaints on the initial visit were for his right shoulder, although Dr. Krueger noted Kidd's right knee condition was "tolerable" but it was also a workers' compensation claim. On September 19, 2018, Dr. Krueger's diagnoses pertained to the right shoulder and the right knee. He placed Kidd off work until undergoing surgery. On October 9, 2018, Dr. Krueger noted Kidd would be off work until after he underwent surgery, although he did not specifically indicate whether that was for the shoulder or the knee. On October 26, 2018, Dr. Krueger re-checked Kidd's right shoulder and right knee. He reiterated Kidd would be off work until undergoing surgery.

Dr. Farrage evaluated Kidd on January 7, 2021. He noted Kidd sustained right shoulder and right knee injuries at work on June 26, 2018. Dr. Farrage noted Kidd twisted his right knee while pulling a hose from a tanker truck. He noted Kidd underwent a partial medial meniscectomy with continued complaints of pain, restricted range of motion, decreased strength, a gait abnormality, and impaired functional capacity. Dr. Farrage determined the twisting injury resulted in a complex tear of the medial meniscus.

Dr. Farrage restricted Kidd to light duty consisting of lifting or carrying no more than 20 pounds occasionally, or over 10 pounds frequently, and no pushing or pulling of more than 50 pounds occasionally. He also advised Kidd to

stand, sit, or walk no more than an hour at a time, and to avoid ladder climbing, or working at unprotected heights. He stated Kidd is unable to run, kneel, squat, or crawl. He also stated Kidd does not have the physical capacity to return to his previous job. Dr. Farrage assessed a 3% impairment rating for the right knee based upon the AMA Guides.

In a supplemental report dated May 26, 2021, Dr. Farrage noted he had reviewed Dr. Ronald Fadel's supplemental report. Dr. Farrage stated, "I am of the opinion it is not functionally reasonable for him to return to those duties without risking significant symptom exacerbation and potential re-injury." Dr. Farrage expressed concern about Kidd's ability to climb tank-mounted stairs, or to lift or carry a 75-pound hose. Dr. Farrage additionally stated he believed Kidd was physically unable to pass a DOT physical examination.

Kidd also filed Dr. Smith's treatment records from October 2, 2019 to February 7, 2020. On February 7, 2020, Dr. Smith noted Kidd had a complex tear of the medial meniscus in the right knee. He also noted Kidd had unilateral osteoarthritis in the right knee.

Regal filed treatment records from Hardin Memorial Hospital dated August 19, 2018 for complaints of right shoulder and right knee pain. X-rays revealed no fractures. Kidd underwent MRIs of the right shoulder and right knee on August 22, 2018. A complex tear of the posterior horn and body of the medial meniscus extending to the anterior horn of the right knee was noted. Regal filed Dr. Krueger's record from August 28, 2018. Dr. Krueger noted the incident Kidd experienced when he twisted his right knee causing it to pop. He stated Kidd had

medial and lateral knee pain with some crepitus, but found no instability. Dr. Krueger additionally noted Kidd, based upon his review of the MRI, had tri-compartmental arthritis in the medial compartment, medial meniscus extrusion, and degenerative tearing. Dr. Krueger diagnosed a peripheral right medial meniscus tear. On January 7, 2019, Kidd requested injections for his right knee and right shoulder, which Dr. Krueger administered.

Regal also filed records of Kidd's treatment with P.T. Pros in Leitchfield, Kentucky for his right shoulder complaints.

Regal additionally filed Nurse Logsdon's August 17, 2018 treatment record. Kidd initially complained of right shoulder and right knee pain. He had previously treated for left knee pain in June 2018 for which Tramadol was prescribed. Nurse Logsdon recorded Kidd had previously sustained right shoulder and bilateral knee injuries while serving in the Army, which he denied at his deposition.

Regal also filed a record from Dr. John Theophilus dated July 14, 1995. Dr. Theophilus, an Army physician, indicated he treated Kidd for a left shoulder injury. He restricted Kidd from doing any pushups, or from wearing a backpack. Although he referenced the treatment for the left shoulder, his last notation indicated treatment for the right shoulder. Dr. Theophilus' note corroborates Kidd's testimony regarding a left shoulder injury while in the Army.

Dr. Robert Jacob evaluated Kidd on April 3, 2019 at Regal's request. Kidd related the June 2018 work injury while pulling a hose from a truck, and he denied any previous right shoulder or right knee problems. Dr. Jacob stated the

record contradicted Kidd's denial of previous right shoulder and knee problems. He opined Kidd had no harmful change to either the right shoulder or right knee due to the June 2018 work incident. He stated Kidd reached MMI by August 1, 2018, and has no ratable condition.

Dr. Fadel evaluated Kidd at Regal's request on November 11, 2020. He stated Kidd reached MMI as of September 1, 2020, and he has a 1% impairment rating for his right knee condition pursuant to the AMA Guides. He also stated Kidd needs no future treatment for his right knee. In a follow-up report dated January 31, 2021, Dr. Fadel noted he had reviewed Kidd's job description. He stated Kidd could return to work to his previous job as set forth in the job description.

A Benefit Review Conference was held on June 26, 2019. The issues listed included work-relatedness/causation, benefits per KRS 342.730, average weekly wage, and return to work wages.

The ALJ rendered the Interlocutory Opinion & Order on August 26, 2019. The ALJ determined Kidd sustained a work-related right knee injury on June 26, 2018, but found he did not sustain a work-related right shoulder injury. The ALJ determined Regal was responsible for all reasonable and necessary medical treatment for the right knee injury pursuant to KRS 342.020. The claim was placed in abeyance pending Kidd reaching MMI for the right knee condition. The ALJ also found as follows:

As plaintiff's request for TTD benefits to this point has been primarily associated with his request for treatment of his right shoulder, the record is not yet clear whether plaintiff is or will be taken off work for his right knee condition. As such, no award of TTD benefits is made herein, but the ALJ will entertain any motion for TTD



benefits associated with the compensable right knee injury.

In the July 26, 2021 Opinion, Award, and Order, the ALJ noted he had reviewed additional evidence, and he again determined Kidd sustained a work-related right knee injury on June 26, 2018, but dismissed the alleged right shoulder injury claim. The ALJ awarded PPD benefits based upon the 3% impairment rating Dr. Farrage assessed, enhanced by the 3.4 multiplier set forth in KRS 342.730(1)(c)1. Regarding the award of TTD benefits, and when Kidd reached MMI, the ALJ found as follows *verbatim*:

The next issue becomes whether plaintiff is now entitled to any additional TTD benefits beyond those already paid. The defendant maintains plaintiff is not entitled to TTD benefits based only on his compensable right knee claim prior to May 26, 2020. Prior to that date, the defendant maintains plaintiff was off work only because of his noncompensable right shoulder condition. However, noting in the record indicates plaintiff's right condition after the injury was any better than he was on May 26, 2020. In other words, the meniscal tear he suffered on the date of injury remained and he was not at maximum medical improvement until after he recovered from the corrective surgery. As such, plaintiff was off work, not at maximum medical improvement, and not able to perform his regular or customary duties from September 19, 2018 until the date he was released by Dr. Smith on September 2, 2020. Accordingly, plaintiff is entitled to TTD benefits at the rate of \$557.02 per week from September 19, 2018 through September 2, 2020, with the defendant to take a cred for all amounts paid in TTD to date, and with interest at 6% on all past due amounts.

Regal filed a Petition for Reconsideration arguing the ALJ erred by improperly shifting the burden of proof regarding the award of TTD benefits. It argued the ALJ cited no evidence establishing Kidd was unable to work beginning

September 19, 2018 due to his work injury. It argued any inability to work during that period is attributable to Kidd's right shoulder problems, not his work-related right knee injury. It also argued the ALJ erred by improperly reversing his previous determination pursuant to Bowerman v. Black, supra. The ALJ denied the Petition for Reconsideration in an Order issued August 16, 2021, finding Regal failed to point to any patent errors.

We initially find the holding in Bowerman v. Black, supra is inapplicable. In Bowerman v. Black, the Court determined the Court of Appeals held the reversal of prior dispositive factual findings rendered by an ALJ in an interlocutory opinion, absent introduction of new evidence, fraud, or mistake, is arbitrary, unreasonable, unfair, and unsupported by sound legal principles. Here, in the interlocutory decision, the ALJ did not determine Kidd was not entitled to TTD benefits for his right knee condition. He merely determined that at the time the Interlocutory Opinion & Order was issued, the evidence primarily related to the alleged right shoulder injury, not the knee injury. However, the ALJ left the door open for a request for TTD benefits related to the right knee condition. Therefore, we do not find Kidd was foreclosed from making a request for those benefits, and the ALJ was not prevented from making such an award.

Kidd bore the burden of proving each of the essential elements of his cause of action, including entitlement to TTD benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful in his burden, the question on appeal is whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence"

is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact finder by superimposing its own appraisals as to weight and credibility, or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

TTD is statutorily defined in KRS 342.0011(11)(a) as “the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]” In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, “It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.” Thus, a release “to perform minimal work” does not constitute a “return to work” for purposes of KRS 342.0011(11)(a).

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury. The Court stated, “... we reiterate today, Wise does not ‘stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.’” Id. at 254. Most recently in Trane Commercial Systems v. Tipton, 481 S.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 Court stated:

We take this opportunity to further delineate our holding in Livingood, and to clarify what standards the

ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.*, 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.

As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.  
Id. at 807

In determining Kidd's entitlement to TTD benefits, the ALJ was required to provide an adequate basis to support his determination. Cornett v. Corbin

Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). While an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result, he is required to adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

The ALJ determined Kidd had not reached MMI until after he recovered from his May 26, 2020 knee surgery, when Dr. Smith released him on September 2, 2020. The ALJ additionally determined Kidd was unable to work from September 19, 2018 until he reached MMI. The ALJ noted the right knee MRI from Hardin Memorial Hospital dated August 22, 2018 revealed a complex tear of the medial meniscus, tri-compartmental osteoarthritis, and a strain of the popliteal muscle with tenosynovitis. The ALJ acknowledged Regal's argument that Kidd was not entitled to TTD benefits prior to May 26, 2020 when he underwent right knee surgery. However, the ALJ found Kidd could not perform his regular work duties after September 19, 2018 based upon Dr. Krueger's off work slip. While Kidd actually returned to work on October 31, 2018 until May 9, 2019, his activities were restricted, and he worked significantly fewer hours per week. In his interlocutory decision, the ALJ determined Kidd was actually receiving right knee treatment, including injections, beginning September 19, 2018. Therefore, we find the ALJ

properly exercised his discretion in awarding the additional TTD benefits contested on appeal, and affirm.

Accordingly, the Opinion, Order and Award rendered on July 26, 2021, and the Order denying Regal's Petition for Reconsideration rendered August 16, 2021 by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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