

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 20, 2020

CLAIM NO. 201797124

REV-A-SHELF

PETITIONER

VS.

APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

DEBORAH ROBBINS and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

* * * * *

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

ALVEY, Chairman. Rev-A-Shelf appeals from the Opinion, Award, and Order rendered September 12, 2019, by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). The ALJ found Deborah Robbins ("Robbins") sustained a compensable left shoulder injury when she tripped over a pallet at work on January 13, 2017. The ALJ awarded temporary total disability ("TTD") benefits, permanent partial

disability (“PPD”) (enhanced by the two-multiplier contained in KRS 342.730 (1)(c)2), and medical benefits. Rev-A-Shelf also appeals from the October 31, 2019 order denying its petition for reconsideration.

On appeal, Rev-A-shelf argues the ALJ erred in finding Robbins returned to work at the same or higher rate of pay entitling her to the two-multiplier contained in KRS 342.730(1)(c)2. Rev-A-Shelf also contends the ALJ erred by awarding additional TTD benefits from August 30, 2017 through October 2, 2017. Because we determine the ALJ failed to provide the proper analysis regarding Robbins’ return to work, entitlement to additional TTD benefits, and enhancing the award of PPD benefits by the two-multiplier contained in KRS 342.730(1)(c)2, we affirm in part, vacate in part, and remand for additional determinations.

On December 7, 2018, Robbins filed a Form 101 alleging she caught her foot in a skid while working on January 13, 2017, causing her to fall forward onto her outstretched left arm. She alleged she injured her left wrist, elbow, and shoulder when she fell. She immediately reported the accident to her supervisor. She ultimately underwent a SLAP lesion repair surgery to her left shoulder. In the Form 104 filed in support of her claim, Robbins noted her previous work history includes working as an LPN, nurse’s aide, brief service in the United States Marine Corps, bank verification clerk, and as a surgical technician.

Robbins testified by deposition on February 25, 2019, and at the hearing held July 25, 2019. Robbins is a resident of Louisville, Kentucky. She is a high school graduate, and received specialized training to obtain certifications as an LPN and as a surgical technician. She began working for Rev-A-Shelf on July 25,

2016, and last worked there on October 17, 2018. At the time of her accident, she worked as a line leader. She returned to work as an assembler after her injury earning a dollar less per hour. She has provided private healthcare for an elderly paraplegic individual, essentially as a home health aide, earning \$140.00 per week since July 2018. In that position, she cleans, cooks, checks his blood pressure and blood sugar, assists with feeding and bathing, and empties his catheter.

Robbins testified she previously sustained injuries in motor vehicle accidents, including a left wrist fracture requiring a cast, and a neck injury requiring surgery. She also has a history of multiple gastric surgeries, including treatment for kidney stones and gallbladder removal. She also treats for a rapid heartrate. She additionally underwent ulnar transposition surgery at the left elbow in 2006, and had right finger injuries at home in 2018, when she caught them in a window.

On January 13, 2017, Robbins was moving from one workstation to another to use a computer terminal. When she attempted to step over a pallet that was not properly stored, her shoelace caught on a nail causing her to fall. She fell onto her outstretched left arm, and immediately experienced pain in her left wrist, elbow, and shoulder. She eventually recovered from the left wrist and elbow injuries, and reported she no longer experiences problems with either. She continues to have problems in her left arm when she attempts to lift it above shoulder level. She also has problems with lifting. Robbins alleged a safety violation against Rev-A-Shelf because the pallet was not properly stored. She testified that pallets were supposed to be stored in specific locations, and she had admonished employees working for her

in the past for improperly storing them. She admitted that ensuring the proper storage of pallets was part of her job as line leader.

After the accident, she attempted to treat her problems with Ibuprofen and Tylenol. When the problems persisted, she went to the emergency room. Her left wrist was placed in a cast, and she had an MRI. Physical therapy was ordered, which she could not undergo until after her surgery due to the left shoulder popping. Robbins eventually treated with Dr. Michael Salamon with Ellis & Badenhausen Orthopaedics. She underwent left shoulder surgery on June 2, 2017 due to popping and clicking. She continued to work until April 25, 2017. She testified Dr. Salamon released her to return to work in November 2017 with no restrictions and no impairment.

The testimony regarding when Robbins returned to work for Rev-A-Shelf is inconsistent. At her deposition, she testified she returned to work on August 30, 2017, and continued to work for Rev-A-Shelf until she resigned in 2018. She specifically testified as follows:

Q. Then you were off work from April 26, 2017 until August 29, 2017. Does that sound right?

A. Sounds right.

Q. Okay. You received some workers' compensation payments for the time that you were off work from April to August; is that right?

A. Yes ma'am.

Q. Did you miss time from work as a result of your accident and not receive workers' compensation benefits?

A. No, Ma'am.

Q. So, you were paid for the time you were off?

A. Yes, Ma'am.

Q. So then, you went back to work for Rev-A-Shelf somewhere around August 30, 2017 and you continued working until your resignation in 2018; is that right?

A. Yes, Ma'am.

At the hearing, Robbins testified at follows:

Q. Okay. How long were you off work after your surgery?

A. They sent me back I want to say somewhere in August or September. And since I couldn't perform the job duties, he put me back off from work until November.

...

Q. Following your work accident and your surgery that Dr. Salamon did, you went back to work in August of 2017, correct?

A. Correct.

Q. And you continued working until October of 2018; is that correct?

I have that you resigned somewhere around October 27, 2018.

A. I was thinking it was September, but - - I'm not exactly sure of the date.

Robbins testified she is unable to return to the job performed at the time of her injury due to lifting required above shoulder level, and the repetitive nature of the work. When she returned to work after the surgery, co-workers assisted with her assembly job duties. Robbins also testified she is unable to mop or do

laundry due to her ongoing left shoulder problems. Robbins testified Voltaren provides some relief, but she gets no benefit from using ice or heat.

Robbins filed treatment records from Ellis & Badenhause Orthopaedics for seven office visits between February 13, 2017 and October 2, 2017. The notes reflect Robbins complained of left shoulder pain. She initially complained of left wrist pain, but it eventually resolved. On March 13, 2017, Dr. Salamon noted her complaints of left shoulder pain, and stated she had a superior glenoid labrum lesion of the left shoulder. He found the MRI demonstrated no evidence of a left rotator cuff tear. He also stated she did not have a frozen shoulder. On June 2, 2017, Dr. Salamon performed a left type II SLAP lesion repair. He noted she did well post-operatively, but still complained of left shoulder pain. On August 28, 2017, Dr. Salamon noted Robbins had made good progress with physical therapy. He indicated she could perform light duty work with no lifting greater than fifteen pounds, and no pushing or pulling. On October 2, 2017, Dr. Salamon stated Robbins had full forward flexion, but lacked a little internal and external rotation.

Robbins also filed Dr. Mark Barrett's May 4, 2018 evaluation report. Dr. Barrett diagnosed Robbins with left shoulder weakness, status post SLAP tear. Dr. Barrett stated Robbins has a 9% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He also indicated Robbins should not engage in overhead work, or any lifting greater than five pounds at chest level or higher with her left arm. He additionally indicated she would have difficulty doing lateral side-to-side work greater than ten pounds.

Robbins filed Dr. Salamon's May 14, 2019 note. He agreed with the 9% impairment rating assessed by Dr. Barrett.

Rev-A-Shelf filed additional records from Dr. Salamon, including his interpretation of the March 10, 2017 MRI, indicating she had a nondisplaced SLAP type II tear. On November 5, 2017, Dr. Salamon stated Robbins had reached maximum medical improvement ("MMI") as of October 2, 2017. He stated she has no impairment pursuant to the AMA Guides based upon objective findings. On November 27, 2017, Dr. Salamon noted Robbins continued to complain of left shoulder pain. Dr. Salamon stated he would not recommend any restrictions other than no overhead use of the left arm for two months.

Rev-A-Shelf stipulated Robbins' pre-injury average weekly wage ("AWW") was \$440.41, stipulated her return to work AWW was \$410.40, and TTD was paid at the rate of \$292.62 per week from April 26, 2017 to August 29, 2017. Rev-A-Shelf also stipulated it had paid over twenty thousand dollars in medical benefits, but objected to ongoing treatment with Hydrocodone, or a referral to Dr. Krupp (no first name) for additional orthopedic treatment.

A Benefit Review Conference was held on June 27, 2019. The issues preserved for determination included whether Robbins retains the capacity to return to the type of work performed on the date of the injury, TTD benefits, unpaid/contested medical expenses, permanent income benefits per KRS 342.730, including multipliers, retroactivity, and credit for post-injury wages.

In his September 12, 2019 decision, the ALJ summarized the evidence, and determined Robbins sustained a work-related left shoulder injury on January 13,

2017 when she fell while working at Rev-A-Shelf. The ALJ summarized Robbins' testimony as follows:

The plaintiff indicated she continued working after her accident until April 25, 2017 at which time she was off work through August 30, 2017 and was released to regular duty work on October 2, 2017. The plaintiff worked at full duty from October 2, 2017 through September 17, 2018. The plaintiff testified she was currently employed as a home health aide for a private individual since July 2018 and provides CNA care for a paraplegic person assisting him with bathing, feeding, changing bed linens and keeping him company.

The ALJ determined Robbins reached MMI on October 2, 2017, and determined, “[t]herfore, the appropriate award of temporary total disability benefits will be entered from April 26, 2017 through October 2, 2017.” The ALJ additionally determined Robbins is entitled to an award of PPD benefits based upon the 9% impairment rating assessed by Dr. Barrett, and adopted by Dr. Salamon. Utilizing the earnings Robbins received from her private sitting on the weekends, the ALJ enhanced her award by the two-multiplier contained in KRS 342.730(1)(c)2 from and after September 17, 2018. The ALJ also dismissed Robbins' allegation of a safety violation. He additionally awarded medical benefits, but did not address the referral to Dr. Krupp, or any contested medical treatment.

Rev-A-Shelf filed a petition for reconsideration regarding the ALJ's award of additional TTD benefits, and the enhancement of the award of PPD benefits by the two-multiplier. Rev-A-Shelf argued the evidence is uncontroverted that Robbins returned to work on August 29, 2017, and continued to work until she resigned, and is therefore not entitled to an additional period of TTD benefits. Rev-A-Shelf argued the ALJ failed to perform the tests set forth in Magellan Health v.

Helms, 140 S.W.2d 579 (Ky. App. 2004), W.L. Harper Construction Co. v. Baker, 658 S.W.2d 202 (Ky. App. 1993), and Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000) in awarding additional TTD benefits. It also argued the ALJ erred in enhancing Robbins' benefits by the two-multiplier after the date of her resignation, citing to Hale v. Bell Aluminum, 986 S.W.2d 152 (Ky. 1998), Wright v. Fardo, 587 S.W.2d 269 (Ky. App. 1979), Holman Enterprise Tobacco Warehouse v. Carter, 536 S.W.2d 461 (Ky. 1976), and Fields v. Twin City Drive-In, 534 S.W.2d 457 (Ky. 1976). It argued Robbins did not establish her earnings from caring for the paraplegic individual were covered by the Act.

The ALJ denied the petition by order dated October 31, 2019. He specifically stated as follows:

The Defendant/employer asserts that it is not disputed the Plaintiff returned to work on August 30, 2017 and, therefore, temporary total disability benefits should cease at that time rather than the date of maximum medical improvement on October 2, 2017. In the employer's brief, it is pointed out that the plaintiff's testimony in her discovery deposition supports that allegation. However, at the hearing, on Page 24, attention is directed to line 19 to-wit:

Q. Okay. How long were you off work after your surgery?

A. They sent me back I want to say somewhere in August or September. And since I couldn't perform the job duties, he put me back off work until November.

Most significantly, however, attached to the Notice of Disclosure filed by the Defendant/employer on January 18, 2019 is the pre and post-injury earnings. The ALJ is persuaded by this document, which indicates no earnings in August 2017, September 2017, October 2017 nor November 2017. The first earnings are reflected in the week of December 28, 2017. Therefore, based on

the Plaintiff's testimony at the hearing supported by the earnings record, the ALJ remains persuaded that the Plaintiff should receive temporary total disability benefits through the date of maximum medical improvement on October 2, 2017.

The remaining issued[sic] raised by the Defendant/ employer is the award of the 2 factor. The ALJ should note the issue of benefits pursuant to KRS 342.730 was preserved as an issue and this obviously would include whether the Plaintiff is entitled to 1, 2 or 3 factor. The ALJ's award of the 2 factor is discussed on Page 8 of the original Opinion. Quite simply, the ALJ is persuaded that Plaintiff returned to work at equal or greater wages and has ceased to do so and is therefore entitled to the 2 factor.

On appeal, Rev-A-Shelf argues the ALJ erred by awarding Robbins TTD benefits through October 2, 2017. It also argues the ALJ erred by enhancing Robbins' award of PPD benefits by the two-multiplier contained in KRS 342.730 (1)(c)2.

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 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.

We find the ALJ's award of TTD benefits is predicated upon an insufficient analysis. 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, *supra*, 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, *supra*, 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. 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

Before the ALJ can award the additional period of TTD benefits, he must first determine when Robbins returned to work. Although the ALJ cited to Robbins' hearing testimony, he did not reference her previous testimony, or for that matter, the discrepancy in her testimony at the hearing. The ALJ also referenced post-injury wage records submitted by Rev-A-Shelf. While those records indicate Robbins' earnings starting near the end of December 2017, they alone do not establish that she had no earnings prior to that date. On remand, the ALJ must provide additional findings supporting his determinations. If the ALJ in fact determines from the evidence Robbins did not return to work at the end of August 2017, he must provide a basis for his determination based upon the entirety of the evidence. If he determines Robbins indeed returned to work, the ALJ must perform the analysis as set forth above. 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.

We also vacate the ALJ's enhancement of Robbins' award of PPD benefits by the two-multiplier contained in KRS 342.730(1)(c)2. We note that KRS 342.140(5) states, "[w]hen the employee is working under concurrent contracts with two (2) or more employers **AND the defendant employer has knowledge** of the employment prior to the injury, his or her wages from all the employers shall be considered as earned from the employer liable for compensation." (Emphasis added). As noted by Rev-A-Shelf, there is no evidence it was ever notified of Robbins' concurrent employment. Robbins bore the burden of proving Rev-A-Shelf was aware of her concurrent earnings, but there is no evidence establishing she sustained her burden. While KRS 342.140(5) concerns pre-injury concurrent employment, we believe satisfying this requirement is equally true in calculating post-injury wages. We note the holding in Ball v. Big Elk Creek Coal Co., Inc., 25 S.W.3d 115 (Ky. 2000) requires pre-injury and post-injury wages to be calculated similarly. Therefore, it would appear the requirements for applying concurrent wages pursuant to KRS 342.140(5) equally applies in both situations.

We additionally note the lack of evidence regarding whether Robbins engaged in the patient sitting activities as an employee, or as an independent contractor. Again, Robbins bore this burden. When computing an AWW, case law clearly instructs that money earned as an independent contractor does not fall within the ambit of workers' compensation coverage. Hale v. Bell Aluminum, 986 S.W.2d 152 (Ky. 1998). There, the Kentucky Supreme Court stated:

Employments not within act, or not insured. In case of concurrent employments, each employment considered must be such as would come within the scope of the act; and where in his employment by one employer the employee is not covered by compensation insurance, his salary therein will not be included with his salary in another employment with another employer, in which he is covered by such insurance, in determining the basis of the payment of compensation for an injury in the latter employment.

Wright v. Fardo, Ky. App., 587 S.W.2d 269 (1979) at 274.

Since it has previously been determined that independent contractors are not employees and, thus, fall outside the scope of the Workers' Compensation Act, we agree with the Court of Appeals that claimant's earnings as an independent contractor per his own aluminum siding company, Stephen & Son, should not be added to his wages earned per Bell in order to compute his average weekly wage. See Fields v. Twin-Cities Drive In, Ky., 534 S.W.2d 457 (1976). (Emphasis original.)

There is no evidence Robbins provided her services to the quadriplegic individual in any capacity other than as an independent contractor. She did not state she was employed by an agency, and did not list this in her Form 104 employment history. Robbins provided no pay stubs or other information establishing her entitlement to claim her earnings as concurrent employment as contemplated by the Kentucky Workers' Compensation Act. Since independent contractors are not employees, any such earnings fall outside the scope of the Workers' Compensation Act. As such, Robbins' earnings as a "private sitter" with the paraplegic individual could not be added to her wages in accordance with Hale v. Bell Aluminum, *supra*. We must therefore vacate the ALJ's enhancement of the award of PPD benefits by

the two-multiplier set forth in KRS 342.730(1)(c)2, and remand for a determination in accordance with the requirements set forth above.

Accordingly, the September 12, 2019 Opinion, Award and Order, and the October 31, 2019 Order denying Rev-A-Shelf's petition for reconsideration, rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** to the Administrative Law Judge for additional determinations as set forth above.

ALL CONCUR.

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