

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 3, 2022

CLAIM NO. 201997527

SOURCEHOV

PETITIONER

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

ANNA BUSTLE and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

ALVEY, Chairman. Sourcehov appeals from the December 21, 2021 Opinion, Award, and Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded Anna Bustle ("Bustle") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits pursuant to KRS 342.020 for a work-related right knee injury with a psychological

component she sustained on November 7, 2018. Sourcehov also appeals from the January 19, 2022 Order denying its Petition for Reconsideration.

On appeal, Sourcehov argues the ALJ's decision is arbitrary, capricious, and clearly erroneous based on reliable, probative, and material evidence in the record. It argues the ALJ considered factors unrelated to the work injury in finding Bustle is entitled to PTD benefits. It maintains the ALJ's analysis as required by City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015) is flawed because Bustle's inability to work is unrelated to her work injury, but rather is due to issues stemming from her bout with COVID. Sourcehov argues Bustle returned to and continued to work there until she was taken off due to her unrelated illness. We determine the ALJ, although requested, failed to address the impact of Bustle's unrelated health issues and limitations stemming from her bout with COVID. We likewise determine the ALJ failed to fully address the five-step analysis required by City of Ashland v. Stumbo, *supra*. We additionally note the ALJ improperly awarded simultaneous TTD and PTD benefits commencing on the injury date.

We therefore vacate the ALJ's decision and remand for a determination regarding TTD benefits, permanent partial disability ("PPD") benefits, and PTD benefits based upon the entirety of the evidence, considering Bustle's unrelated health issues, and further based upon a full consideration of her ability to work. The ALJ must also perform the complete five-step analysis contained in City of Ashland v. Stumbo, *supra*, including determining whether she is permanently totally disabled because of the work injury without consideration of her current health condition attributable to other factors. The ALJ must also perform the

appropriate analysis regarding Bustle's entitlement to TTD benefits. The ALJ must also determine whether Bustle may be entitled to PPD benefits during the period she returned to work for Sourcehov after her injury. We do not direct any particular result, and the ALJ may make any determination based upon the evidence and after consideration of the appropriate factors.

Bustle filed a Form 101 on July 24, 2020, alleging she sustained a right knee injury on November 7, 2018 when she tripped on a rug and fell onto her right leg, right knee, and right arm. The Form 104 reflects Bustle's employment history includes working as a deputy jailer, laborer for a plumbing supply company, cashier, and counter help at a fast-food restaurant. She filed a motion to amend her claim to include a psychological injury on November 16, 2020, and the ALJ entered an Order amending the claim on November 20, 2020.

Bustle testified by deposition on November 6, 2020, and at the hearing held October 26, 2014. Bustle was born on February 2, 1970 and she resides in Mount Vernon, Kentucky. She completed the tenth grade, and subsequently obtained a GED. She later received an Associate's degree in medical billing, coding, and as a clinical office specialist. She additionally obtained a real estate license that has now lapsed. She also received some training in tax preparation. In addition to the jobs listed in the Form 104, she has worked on a factory assembly line removing parts and packing them for shipping. She has also worked as a secretary, operated the fuel desk at a truck stop, as a sales associate at a furniture store, as a babysitter, and as a caregiver for handicapped residents. She also worked at a forklift factory where she applied stickers, oiled, and cleaned the equipment.

Bustle began working for Sourcehov in August 2016 as a general clerk primarily entering data into a computer system. Sometimes she took boxes and paperwork to co-workers. She lifted up to 30 pounds when performing those activities. On November 7, 2018, she tripped on a rug while going on break. She fell primarily onto her right side, hitting her right knee, arm, and leg. She completed an accident report, then sought treatment at an emergency room. She was primarily treated for right knee problems. She denied experiencing any previous right knee problems. She was initially referred to Bluegrass Physical Therapy. An MRI revealed she had a lateral meniscus tear. Dr. Wallace Huff performed right knee surgery on May 10, 2019. She had additional physical therapy afterward. Bustle testified the surgery did not help, and in fact made her knee more painful. Likewise, a subsequent injection did not provide any relief. She testified she experiences constant right knee pain on the inside portion of her knee and across the kneecap. She testified her right knee buckled in December 2020 causing her to fall. She applied for Social Security disability benefits after the knee-buckling incident.

She props her knee up when it becomes too painful. She also takes over-the-counter Tylenol three times per day. She testified she is restricted to lifting no more than ten pounds, and she is unable to perform the physical aspects of the job she performed on the date of her injury. She testified she is unable to work due to using oxygen frequently and needing to elevate her right knee.

Bustle testified she had no psychological or mental problems prior to her accident. At her deposition, Bustle testified she has depression and complains of being agitated and frustrated. She takes medication for anxiety. At the hearing, she

testified her anxiety and depression are not improving despite taking medication. She has seen a psychiatrist once for her mental conditions, and prior to that, she took Prozac prescribed by her family physician. She has not been prescribed any medication for treatment of her right knee.

Bustle testified she returned to work at Sourcehov in July 2019 without restrictions. At her deposition, Bustle testified she continued to work for Sourcehov, albeit from home due to COVID protocols beginning in March or April 2020 until December 2020. At the hearing, she testified she is not currently working due to continuing respiratory problems she has had since she contracted COVID-19 in December 2020. Her illness required a five-day hospitalization, and she continues to treat for lung problems. She uses oxygen, a nebulizer, and inhalers for ongoing problems associated with that disease.

In support of her claim, Bustle filed the report of Dr. Frank Burke who evaluated her at her attorney's request on June 29, 2020. Dr. Burke outlined her November 7, 2018 accident and subsequent treatment. He noted she has a large osteochondral defect in addition to the lateral meniscus tear Dr. Huff repaired. She exhibited an antalgic gait during his evaluation. He found Bustle sustained an impaction injury of the superolateral aspect of her right patella and the PF joint with an osteochondral injury of the lateral facet of the patella involving articular cartilage loss. He noted she had been treated with chondral debridement and osteochondral drilling. He determined she had reached maximum medical improvement ("MMI") by the date of the evaluation. Dr. Burke assessed a 5% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of

Permanent Impairment (“AMA Guides”). Of that rating, he attributed 4% to the patellofemoral joint space narrowing, and 1% to the partial lateral meniscectomy. He also advised her to avoid uneven surfaces.

In a supplemental report dated June 28, 2021, Dr. Burke noted Bustle’s continued complaints of chronic right knee pain, even without use. She reported her knee problems worsened with stair climbing. She advised her right knee locks up and feels unreliable when she arises from a seated position. She complained her knee pain interferes with her sleep. He stated her impairment rating has increased to 7% based upon the AMA Guides due to her limited range of motion. He noted her mobility is limited due to having to use oxygen because of her COVID.

Dr. Dennis Sprague, Ph.D., a licensed psychologist, evaluated Bustle at her attorney’s request on October 19, 2020. Dr. Sprague noted the examination consisted of an interview, mental status examination, psychological testing, and the generation of a report. Bustle complained of nervousness, sleep problems, low energy, lack of concentration, loneliness, loss of libido, unhappiness, depression, anxiety, and right knee pain. Dr. Sprague diagnosed a depressive disorder due to a general medical condition, an unspecified anxiety disorder, somatic symptom disorder, post-injury occurring on November 7, 2018, and chronic pain. Dr. Sprague indicated Bustle had not returned to work since the work injury.

Dr. Sprague noted Bustle reported no previous mental health problems. He did not believe she has the psychological ability to return to work. Dr. Sprague assessed a 5% impairment rating based upon the AMA Guides, 2nd Edition.

Dr. Huff examined Bustle on November 14, 2019 as a follow-up to her right knee surgery. He indicated she was doing well, and he released her to return to work without any restrictions. On April 29, 2021, Dr. Huff noted Bustle can perform sedentary work only, with occasional walking, and lifting or carrying no more than ten pounds.

Dr. Robert Roman, who specializes in environmental and occupational medicine, evaluated Bustle on August 25, 2021 at Sourcehov's request. He noted the November 2018 work injury. He diagnosed her with a right knee osteochondral defect due to the work injury. He found her meniscus tear was due to degeneration. He found she reached MMI on November 14, 2019 when Dr. Huff released her to return to work. He assessed a 5% impairment rating pursuant to the AMA Guides. He did not believe she needs any additional treatment, and he found no basis to recommend any restrictions. He disagreed with Dr. Burke's impairment assessment. He stated there should be no impairment assessed for gait derangement.

In a supplemental report dated October 23, 2021, Dr. Burke noted he had reviewed Dr. Roman's report, and disagreed with his findings. He stated Bustle's knee condition is progressive and permanent. He further opined Bustle will be a candidate for a right total knee replacement when her COVID restrictions resolve.

Dr. Douglas Ruth evaluated Bustle on January 19, 2021 at Sourcehov's request. In his January 21, 2021 report, Dr. Ruth noted the November 7, 2018 work injury. He diagnosed Bustle with a major depressive disorder, single episode, in partial remission, caused, in part, by the work injury. He assessed a 4%

impairment rating based upon the AMA Guides, 2nd Edition. He opined half of the impairment is due to the work injury, and half is the result of her COVID. He found she responded well to treatment with anti-depressant medication. He also stated she could return to her pre-injury job from a mental health standpoint. Dr. Ruth noted Dr. Sprague incorrectly stated Bustle had not returned to work since the date of the accident. He noted she continued to work as of the date of Dr. Sprague's evaluation.

A Benefit Review Conference was held on October 26, 2021. The parties stipulated Bustle sustained a work-related injury on November 7, 2018. The parties also stipulated Bustle was paid TTD benefits from November 27, 2018 to June 12, 2019. The contested issues preserved for determination included benefits per KRS 342.730, work-relatedness/causation for her psychological condition, unpaid/contested medical expenses, TTD, apportionment for psychological claim, compensability of laser treatment, proper use of the AMA Guides, whether Bustle is permanently totally disabled, and whether she retains the physical capacity to return to the type of work performed at the time of the injury.

In the Opinion, Award, and Order issued December 21, 2021, the ALJ stated he found Bustle's testimony credible. The ALJ initially indicated he found Dr. Roman's opinions most credible, but in the next paragraph found the exact opposite. He stated Dr. Burke's opinion regarding range of motion is most consistent with Bustle's testimony. Relying upon Dr. Burke, the ALJ determined Bustle has a 7% impairment rating because of her work injury. He also noted Dr. Burke credibly determined Bustle is prevented from returning to the job she performed at Sourcehov due to her inability to walk long distances, kneel, or stoop. Therefore, he determined

Bustle does not retain the physical capacity to return to the work she performed at the time of the injury.

Regarding Bustle's claim for a psychological injury, the ALJ found Dr. Sprague more credible than Dr. Ruth. The ALJ found Dr. Ruth's criticism of Dr. Sprague regarding whether Bustle had returned to work is misleading, "because while she did return, it was on light duty from home." The ALJ found credible the 5% impairment rating Dr. Sprague assessed, and his determination Bustle could not return to work from a psychological standpoint. The ALJ specifically awarded income benefits as follows:

1. The Plaintiff, Anna Bustle, shall recover from the Defendant, Sourcehov, and/or its insurance carrier temporary total disability benefits in the weekly amount of \$354.89, **from November 7, 2018, through June 12, 2019**, and the sum of \$354.89 per week for 100% permanent disability **commencing on November 7, 2018**, and continuing for so long as she is so disabled, together with interest at the rate of 6% per annum on all due and unpaid installments of such compensation, but to be interrupted by any applicable corresponding periods of temporary total disability. The Defendant shall take credit for any payment of such compensation heretofore made, including those payments of temporary total disability benefits already made. All benefits shall terminate pursuant to KRS 342.730(4) as of the date on which the Plaintiff attains the age of seventy years.

[Emphasis added]

Sourcehov filed a Petition for Reconsideration on January 4, 2022, arguing the ALJ misstated Dr. Huff's release to return to work in his November 24, 2019 note. The ALJ stated Dr. Huff released Bustle to return to work on an "as needed basis" when the release actually stated she could go "back to full duty work without restrictions." Sourcehov also indicated the ALJ's decision is internally

inconsistent in his determination of which medical opinion is most credible. It also argued the ALJ failed to acknowledge Dr. Huff specifically noted she has no impairment. Sourcehov also argued the ALJ had a misunderstanding regarding Bustle's return to work. It argued she returned to work at Sourcehov in July 2019 and did not begin working from home until later due to COVID protocols in March or April 2020. It argued she continued working until she contracted COVID in December 2020. It also argued the ALJ erred in finding she returned to only light-duty work since Bustle testified she had returned to her job full-time at the same pay rate in July 2020. Sourcehov additionally argued the ALJ erred in finding Dr. Sprague's opinion more credible, despite his statement she had not returned to work since the injury. Dr. Sprague specifically did not acknowledge she was continuing to work for Sourcehov on the date of his evaluation. It also argued the ALJ erred in finding she is permanently totally disabled due to the right knee injury since she was able to perform her regular job, albeit from home after March or April 2020 due to COVID protocols, and only ceased working after contracting that condition.

The ALJ entered an Order on January 19, 2022 overruling the Petition for Reconsideration. He stated the Petition for Reconsideration failed to point to any patent error. However, he filed an Amended Opinion and Award to "correct clerical errors." The amended decision did not substantially change the ALJ's original decision, and did not address the concerns raised by Sourcehov in its Petition for Reconsideration.

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). An 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, such proof 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 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). However, the ALJ is required to perform an appropriate analysis based upon the facts and law applicable to the claim.

That said, we find the ALJ's analysis regarding Bustle's entitlement to TTD benefits is inadequate. 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 permitting 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 if 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, supra, the 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

The ALJ did not provide an adequate analysis concerning entitlement to TTD benefits for Bustle’s right knee injury. Bustle testified she returned to work in July 2019 and continued working until she contracted COVID in December 2020. When she returned to work at the Sourcehov facility in July 2019, she had no restrictions and continued working there until March or April 2020 when she was required to work from home due to the pandemic. The ALJ found Bustle was

entitled to TTD benefits, then PTD benefits during a period she was working for her employer without restrictions, at the same pay rate, and essentially performing her customary job. Therefore, on remand, the ALJ is directed to perform an analysis pursuant to Trane Commercial Systems v. Tipton, supra, in determining the appropriate period to which Bustle may be entitled to an award of TTD benefits. The ALJ shall also consider whether Sourcehov is entitled to a credit for any earnings Bustle received during any period of TTD benefits awarded as set forth in KRS 342.730(7).

If the ALJ determines on remand that Bustle is not entitled to either TTD or PTD benefits after she returned to work in July 2019, he may still award PPD benefits. This is like the situation discussed in Dolt & Dew, Inc. v. Smith, 493 S.W.2d 711 (Ky. 1973). There, Smith was injured while working for Dolt & Dew, Inc. He returned to light duty work afterward and continued in that employment until the company went out of business. Smith was awarded PPD benefits for the period he returned to work, and PTD benefits afterward. The Kentucky Court of Appeals, predecessor of the Kentucky Supreme Court, noted:

In summary, we conclude that the Board was justified in determining that Smith's disability, the effects of which were not fully realized, permanent and partial so long as he was afforded work by his employer that he was able to do, proved to be total and permanent when his employer went out of business ...

Id. at 713.

...

The Board was justified in determining that Smith's disability, the effects of which were not fully realized, [was both] permanent and partial so long as he was afforded work by his employer that he was able to do,

proved to be total and permanent when his employer went out of business and no other work was available to him in the area's labor market.

This same situation was recently addressed by the Kentucky Court of Appeals in T-Rad North America v. Shannon Brown, 2021-CA-0522-WC (May 20, 2022)(Designated Not to be Published). On remand, if the ALJ determines Bustle is not entitled to either TTD or PTD benefits during the period she worked for Sourcehov after her return to work in July 2019, he must consider whether she is entitled to a period of PPD benefits, along with the application of any multipliers supported by the evidence.

Finally, the ALJ must perform an accurate analysis regarding Bustle's entitlement to PTD benefits. We note the ALJ identified the correct steps required by City of Ashland v. Stumbo, *supra*, in determining whether an individual is permanently total disabled, including, "the claimant suffered a work-related injury resulting in an impairment rating, whether the claimant is able to perform any type of work, and whether the total disability is the result of the work injury." Although the ALJ determined Bustle is permanently totally disabled, he failed to address the impact of her subsequent bout with COVID on her ability to work, and whether she is totally disabled due to that condition or the work injury. Bustle testified she continued working until December 2020 when she contracted that disease. The evidence reflects she has been unable to work since she became ill, in part due to that condition since she struggles with breathing difficulty and is required to use oxygen. The ALJ's determination regarding PTD benefits must be based upon the effects of the injury, not Bustle's subsequent unrelated condition.

This is particularly important when there are medical conditions, both work-related and nonwork-related which may lead to a finding of permanent total disability. 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 & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). The ALJ need not engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. However, there is a requirement that the decision must adequately set forth 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. Chaffins, 502 S.W. 2d 526 (Ky. 1973).

Accordingly, the Opinion, Award, and Order rendered December 22, 2021, and the January 19, 2022 Order denying Sourcehov's Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are **VACATED** and this claim is **REMANDED** for determinations in accordance with the directions set forth above.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON KIMBERLY D NEWMAN
301 EAST MAIN STREET, SUITE 400
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

LMS

HON MICHAEL THOMAS KUNJOO
309 NORTH BROADWAY
LEXINGTON, KY 40508

ADMINISTRATIVE LAW JUDGE:

LMS

HON JONATHAN R WEATHERBY
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601