

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 14, 2020

CLAIM NO. 201669691

TOWER INTERNATIONAL

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

AGNES MATTINGLY
and HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING IN PART AND REMANDING**

* * * * *

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

STIVERS, Member. Tower International (“Tower”) seeks review of the September 23, 2019, Opinion, Award, and Order of Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”) finding Agnes Mattingly (“Mattingly”) sustained a January 22, 2015, work-related low back injury while in the employ of Tower. The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits with enhancement by the two multiplier pursuant to KRS 342.730(1)(c)2, and

medical benefits. Tower also appeals from the October 23, 2019, Order ruling on the parties' petitions for reconsideration.

On appeal, Tower challenges the duration of the award of TTD benefits. It asserts the ALJ erred in not relying upon one of the two treating physicians' assessment of maximum medical improvement ("MMI"). Tower requests the award of TTD benefits be vacated and the claim remanded for a determination when Mattingly's TTD benefits terminate consistent with one of the treating physicians' opinions regarding MMI.

BACKGROUND

Mattingly's Form 101 alleges she sustained a January 22, 2015, low back injury while lifting totes when she "felt a sharp pain in her back that radiated into her hip and leg."

The Benefit Review Conference Order reflects the parties stipulated Mattingly sustained a work-related injury and TTD benefits were paid from August 22, 2016, through January 4, 2017. The parties also stipulated Tower paid medical expenses and the average weekly wage was \$764.75. The parties further stipulated Mattingly returned to work on August 22, 2017, for a short time "at a wage the same/greater his/her AWW" and returned to full employment in November 2017 earning the same or greater wages. The contested issues were listed as "Benefits per KRS 342.730, Unpaid or contested medical expenses, Ability to return to work, and TTD Overpayment and under." Under "Other" is "Multipliers (1 vs 3.2); MFD at to L5-S1 epidural steroid injections."

Mattingly was treated by Bardstown Ambulatory Care, Dr. Dean Collis with Advanced Regional Surgery Center, and Dr. Maxwell Boakye, a neurosurgeon, with the University of Louisville Neurosurgery Department. Mattingly was evaluated by Dr. Gregory Nazar and Dr. Michael J. Doyle.¹

Mattingly testified at a February 6, 2019, deposition and at the July 24, 2019, formal hearing. Only the lay and medical evidence concerning the issue before us will be addressed.

During her deposition, Mattingly provided the following description of what occurred on January 22, 2015:

Q: Okay. And can you describe for me what happened when this injury occurred on January 22nd, 2015?

A: Well, actually those parts I was talking about that was on the flow rack when we came in that morning, third shift had filled a bunch of them up which they're not supposed to do, and they had left them on the floor.

Q: The end totes?

A: The metal totes.

Q: Uh-huh.

A: They made a big pile of them –

Q: Okay.

A: -- full totes, which I guess the machine was down or something. So they had asked me to go pick them up and distribute them around. And when I went back there to pick them up, I expected them to weigh 20 pounds.

Q: Okay.

¹ Mattingly was seen by Dr. Nazar for an independent medical evaluation (“IME”) at the request of Mattingly and Dr. Doyle provided an IME at the request of Tower.

A: Actually, they had overfilled them and there was like 60 parts in each one, which was only supposed to have 20 parts in them.

Q: So it weighed 50 to 60 pounds, something like that?

A: Yeah, instead of the regular 20 pounds.

Q: Okay. So when – was it when you picked up the very first one?

A: No, I picked up a couple of others, I don't remember the actual, but I know it wasn't on the very first one.

Q: Okay. And were you picking them up off the floor and putting them on the cart?

A: Yes.

Q: Okay. And what kind of symptoms did you have when you picked up the totes?

A: I just had a like a real shooting pain. I couldn't stand up for a minute. It was like –

Mattingly immediately reported the injury to Lee Smith and worked the rest of the day. Mattingly worked regular duty for two months following the incident. She was then seen by Bardstown Ambulatory Care which placed her on restrictions and sent her for physical therapy and an MRI. Tower placed her in a job involving no lifting. Mattingly first missed work on August 22, 2016. She then began drawing TTD benefits. She eventually came under the care of Dr. Boakye who believed surgery was unnecessary. He referred Mattingly to Dr. Collis, who she continues to see. She received TTD benefits through January 4, 2017. She testified Dr. Collis provided off-work notes through April 17, 2017, at which time he discussed the results of the functional capacity evaluation (“FCE”) she underwent in March 2017.

Dr. Collis restricted her to no lifting over 15 pounds. She was not to stand or sit in one spot for very long. Mattingly took Dr. Collis' restrictions to personnel at Tower. She testified "months" passed before she heard whether Tower could accommodate her restrictions. She received a letter in August 2017 concerning her restrictions and met with Devon Logsdon ("Logsdon") in late August 2017.² Concerning the contents of a September 18, 2017, letter she received, she testified as follows:

Q: And then Devon Logsdon, I guess is her last name, sent you a letter on September 18th of 2017, saying that they couldn't accommodate you, based on those restrictions. Does that sound correct to you?

A: Said that they couldn't?

Q: At that time, that they couldn't accommodate you. I know you did go back later but at least – this letter from September 18th says –

A: Saying that she needed more information from Dr. Collis maybe.

Q: Well, right now, this letter just says, we can't accommodate you, we're going to try to find reasonable restrictions but we can't right now.

A: Okay.

Q: Does that – that doesn't ring a bell?

A: I just know they didn't let me come back right away.

Mattingly testified she applied for unemployment benefits in July and first received the benefits in August. She returned to full time work as a welder in November 20, 2017. Tower has accommodated all of her restrictions except for having

² Logsdon is Tower's Human Resources Manager.

someone take her place when she sits down for five minutes. Since 2017, Dr. Collis has been her primary treating physician.

The April 23, 2019, deposition of Logsdon was introduced. Logsdon reviewed Mattingly's deposition and provided the following regarding Tower's attempt to return her to work:

A: ... So I just want to reference that on April 24, 2017, there was a letter written to Ms. Mattingly. On June 28th of 2017, there was a letter written to Ms. Mattingly, both referencing that we needed additional information at her one-year time frame of being on leave which was 8-9 of '17. There was an additional letter written talking about her leave situation. And then we wrote additional letters on 8-30-2017, 9-18-2017, and 10-23-2017 to verify and to have an interactive process with Ms. Mattingly to try to return her to work and to clarify her restrictions so that we could put her to work safely. ...

So after we had an understanding of Ms. Mattingly's restrictions, we have a list of welders that we sit with Ms. Mattingly and reviewed the work and we have a list of approved and agreed welders for Ms. Mattingly to work on based on her restrictions. So there are welders that she's not currently able to work on.

Logsdon testified they received Mattingly's work restrictions on August 16, 2017. She explained why it took from August 16, 2017, to November 2017 to return Mattingly to work.

Q: Okay. And so those restrictions were received in August; is that right?

A: Yeah. Received August 16th of 2017 is what I have dated.

Q: Is there a reason it took from August to November for her to be able to return to work?

A: I can't speak to that without doing a little research.

Q: Okay.

A: One of the things that we had to do I can say specifically is we had to understand what welder she could work on. She actually came back to work. So the first time she came back to work in August, so I'd like to make sure that we understand that. Referencing my note, her first return to work date was August the 23rd of 2016. Excuse me. Let me back. My first note is that she went out on leave on August 23rd of 2016. She returned from leave, excuse me, on August the 27th of 2017. So she actually did return right after those restrictions were provided. She went out again on August the 29th because her restrictions were then changed via an office visit that she had after returning to work on August 22nd and during that period of time, we were trying to get clarification on those additional restrictions and how we could make those work with our process and how many welders that she was going to be running. So some of the letters that I referenced earlier was requesting additional information.

Q: Right. And so just to be clear, it took from August – excuse me, April of 2017 until August to accommodate her. And then when her restrictions were updated, I guess after that, it took another three months to determine that?

A: So for us, it wasn't that it took us that long to accommodate. It took us that long to understand the restriction so that we could understand if we could accommodate. We needed additional information.

Logsdon testified the job offered to Mattingly in August 2017 was based on Dr. Collis' July 27, 2017, note. Logsdon's relevant testimony is as follows:

Q: ... Am I understanding correctly that the job that was offered to Ms. Mattingly when she returned in, briefly, in August of 2017 would have been based on this note from Dr. Callis [sic] dated July 27, 2017?

A: I would have to verify that in her file.

Q: Okay. And the only reason I would say that is I think that's the last note from Dr. Callis [sic] that was provided before she returned.

A: Yes. Yes. This looks appropriate, but I would have to verify in her file to ensure that that is what we were working off of.

Q: Okay. And to be clear, the permanent restrictions he lists here are reiterating basically paragraph 2 of the FCE summary, I think; is that right?

A: I'm not sure. It is reiterating but her FCE summary references charts and grades and those are not things that we are capable of interpreting not being in the medical field.

...

Q: As far as Ms. Mattingly's return to work in 2017, Ms. Logsdon, just explain how you folks – you touched upon this, but I just want to want to make sure I'm clear on it. You explained that you guys would not try to interpret medical records and there was an investigation as to what the records actually meant, what welder she could be placed on. There's some questions about from April to August and then again when she came back in August, she was taken off by Dr. Callis [sic] or there was a record that you guys wanted to clarify if I'm understanding correctly. Just explain what you mean by that, please.

A: So when we received the FCE report, I was not currently in the HR manager role, but Ms. Coomes was trying to get interpretation because not being from the medical field or having a medical background, we wanted to ensure that any position that we were putting Ms. Mattingly in or providing her work with would be safe and within her restriction not to cause further injury or concern. Therefore, we had to make sure that the – the restrictions were very clear and easy for us to interpret that we could use that information to review each of the jobs that we had available and could understand if those jobs were going to be within or outside of the restriction.

...

Q: Is that the reason she came back in August of 2017 briefly and then was taken out, I think, a week later?

A: She came back briefly. She had a follow-up doctor's appointment, I believe with Dr. Callis [sic] but I'm not certain, and she got a greater restriction, so her restriction was changed. And at that time, we had to evaluate then what could we do, and we had to understand Dr. Callis' [sic] explanation of the restriction. So there was some

understanding or explanation needed so that we could fully understand the restriction and what it meant.

Drs. Boakye, Nazar, and Collis provided an assessment of MMI. In his November 28, 2016, record, Dr. Boakye offered the following concerning MMI:

I do not recommend neurosurgical intervention at this time; from a neurosurgical standpoint she has reached MMI. The patient should continue care with pain management and rehab to determine functional capacity. I have given the patient a medical absence form for employer until she is able to follow up with Dr. Collis on 12/21/2016.

In his initial report of March 9, 2016, Dr. Doyle stated Mattingly's restrictions would have to be assessed after she completed treatment and attained MMI. He estimated ongoing treatment to require eight to twelve weeks. At that point, Mattingly would likely be at MMI, if she completed his treatment recommendation.

In a letter dated July 7, 2017, Dr. Doyle opined, in relevant part:

1. What is her [sic] diagnosis of Ms. Mattingly's condition? My diagnosis is a lumbar strain superimposed upon lumbar degenerative disease producing a chronic axial mechanical back pain syndrome.

2. Has Ms. Mattingly reached MMI from her alleged work injury? If so on what date? It appears the patient was placed at maximal medical improvement by her treating neurosurgeon, Dr. Boakye, on November 28, 2016.

3. What is your opinion as to whether Ms. Mattingly's current complaints are causally related to her work? According to the patient's report, she had an onset of severe back pain which was much worse than anything she has experienced in the past which occurred after a lifting incident at work. Based on this history, it appears the patient did suffer a work-related injury in the form of a lumbar strain.

...

5. What is your opinion regarding the extent of any permanent functional impairment under the AMA Guidelines, 5th edition, relating to the plaintiff's work-related injury? According to the functional capacity evaluation, the patient's lumbar flexion was somewhat limited. Therefore, based on Table 15-8, Page 407 of the 5th Edition AMA Guidelines, she would be rated at 2% impairment of the whole person.

...

8. From your review of the FCE, what restrictions, if any, are necessary for Ms. Mattingly to return to her previous employment? Are any restrictions related to a work-related injury? According to the Functional Capacity Evaluation, a light physical demand category has been recommended. This includes exerting up to 20 pounds of force occasionally and up to 10 pounds of force frequently to move objects. Physical demand requirements are in excess of those for sedentary work.

In a follow up note dated May 8, 2019, Dr. Doyle stated he had previously assessed a 2% impairment rating based on range of motion limitations. Agreeing with Dr. Nazar, Dr. Doyle changed his impairment rating to 8% since Mattingly now had complaints of left leg pain. He did not offer an independent opinion regarding MMI.

In his December 7, 2018, IME report, Dr. Nazar assessed an 8% whole person impairment. Under the heading "MMI and Future Considerations and Comments," he opined:

The patient has been ongoing treatment including physical therapy and injections from Dr. Collis. She has only recently completed her injections with Dr. Collis in terms of facets, epidurals, and an SI joint injection, so because of this, she has not reached maximum medical improving until today's visit.

Further, it does not appear that further therapies other than follow up with Dr. Collis and occasional injections

(that may give her temporary relief) are advisable. Additional physical therapy will not be helpful at this point.

In a July 9, 2019, report regarding MMI, Dr. Nazar stated:

Thank you for your letter regarding an update on Ms. Mattingly's care since my recommendations following my independent medical evaluation on December 7, 2018. At that point, I had suggested that the patient had not reached maximum medical improvement and that she was still undergoing treatment with Dr. Collis with injections, following a non-surgical management strategy with a diagnosis of a lumbar strain (chronic).

Since the patient has not undergone the injections and I assume continues the same degree of pain as I saw her back in December of 2018 with the date of the injury being January 22, 2015, I would feel that she definitely would be at maximum medical improvement at this time. If nothing has changed, her impairment rating (8%), based on how it has affected her quality of life and activities of daily living would be the same.

Dr. Collis' records reveal that, due to a referral from Dr. Boakye, he first saw Mattingly on April 26, 2016. Over time, he performed facet joint injections and other procedures. His first note addressing Mattingly's return to work is dated April 17, 2017. Dr. Collis noted as follows:

Basically, I gave her a return to work note on 4/19/17 for light-duty work with restrictions outlined in her functional capacity evaluation. We will also try to get a repeat MRI scan to see why she feels like she is having increased pain and feels like she is headed in the wrong direction as far as her pain is concerned. They did give me permission to leave a message at the phone numbers provided to me in the chart once we get the radiology reports. They have asked multiple times what would happen to her if she tries to go back to work and does not feel like she can do it. I told her that is her prerogative. If she does not feel like she can do the work, we can continue with an off-work note; however, she has participated in a functional capacity evaluation that stated that they believe that she can do light-duty work.

She says that she does not feel like she spent really an adequate amount of time there, and again I was not there during the visit and don't know how much time she spent actually at the facility. We will cross that bridge once we get there as far as getting her back to return to work if there is a spot at work that can accommodate the restrictions as outlined in the functional capacity evaluation.

In his June 23, 2017, note, Dr. Collis stated as follows:

She says that there has been no change in her overall health, and her review of systems is stable. ... We had tried to get her back to return to work, and I'm not exactly sure what the issue is. Basically, her restrictions are what have been outlined in her formal functional capacity evaluation. It tells exactly what she can and cannot do. She says that they want us to, what sounds, like just almost read the functional capacity evaluation for the place of work. She is willing to supply a copy of the functional capacity evaluation, and she says that she was willing to do so on the last visit.

...

I did give her a return to work made on 6/26/17³ with the restrictions provided in the functional capacity evaluation and put in the note that the patient is willing to provide those restrictions. We will see her back in the office in two months or sooner if needed.

In his July 27, 2017, note, Dr. Collis addressed MMI and work restrictions stating as follows:

I would say she reached maximal medical improvement on February 27, 2017, when she was seen in follow up and had been released by her neurosurgeon at that time. As far as permanent restrictions, I would say that the patient can occasionally lift up to 15 pounds floor to waist, 15 pounds from waist to shoulder, carry up to 12 pounds, push up to 30 pounds, and pull up to 35 pounds.

³ On June 23, 2017, Dr. Collis prepared a return to work slip stating Mattingly could return to work on June 26, 2017.

Her restrictions are also outlined in her functional capacity evaluation which also lists her physical abilities.

At that time, Dr. Collis also assessed a 5% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”).

On August 25, 2017, Dr. Collis noted the following regarding Mattingly’s work restrictions:

She returned to work a few days ago. She says that there has been no change in her overall health, and her review of systems is stable. ... I reviewed her functional capacity evaluation, and it did say that the restrictions that we had placed on her were for an 8-hour day, so we will limit her work day to an 8-hour day and also put on there that she is able to change positions frequently which was addressed in the functional capacity evaluation as well.

Dr. Collis’ October 20, 2017, note reveals his continued impression of lumbar facet disease with myofascial pain. He provided the following regarding Mattingly’s work restrictions:

The last set of restrictions that we wrote for her was in addition to her current restrictions. We will add the patient is limited to an 8-hour work day and able to change positions sitting and standing as needed. She says that was too vague for work. She says that there was a person, Devin, that was telling her this. The patient did give me the okay to speak with Devin regarding restrictions and her medical care. This was on 9/27/17. We never did get a phone call from Devin. I told the patient the best thing to do would be to either have that person call me or send me a note asking exactly what questions they want answered. As long as she does not abuse the restrictions of trying to take a seat multiple times in an hour, I would think within reason they should allow her to be able to sit for a short period of time once an hour. Again, if they need something more concrete than that, I am more than happy to try to work with them on that. We can always order another functional capacity

evaluation to see if her restrictions have changed. She says that there has been no change in her overall health, and her review of systems is stable.

In a July 17, 2019, letter Dr. Collis wrote, in relevant part, as follows:

I have been treating Ms. Mattingly in my office since 4/26/2016. We have been treating her for her low back pain issues. We had put her at maximum medical improvement in 2107; however, I do believe that she will continue to need treatment requiring medications and injective therapy as well. She has exacerbations which can increase her pain. I think the injections have given her a good response in the past.

Although not introduced at Logsdon's deposition, a copy of her October 23, 2017, letter to Dr. Collis is contained within his records. Regarding Mattingly's return to work, it reads in relevant part:

We are currently engaged in an interactive process with Ms. Mattingly to help to determine whether we can accommodate her physical limitations and find a job for her that fits within the restrictions you have provided. With that in mind, we wanted to make sure that we are working with a full and complete understanding of those restrictions.

Specifically, we would like to confirm the nature of Ms. Mattingly's sitting restriction. In your August 28, 2017 note, you stated that Ms. Mattingly needs a position where she is "able to change positions sitting/standing as needed." Our current understanding of this restriction is that Ms. Mattingly must have a position where (1) she can choose to sit or stand any time she desires and (2) she can switch between sitting and standing at will.

Is this understanding correct? If not, can you please advise more specifically what you mean by a position where Ms. Mattingly is "able to change positions sitting/standing as needed"?

Please respond as soon as possible, but no later than October 30, 2017.

Dr. Collis' records also contain off-work slips. A December 21, 2016, note reveals Mattingly was to be off work from December 21, 2016, until February 21, 2017. Another off-work slip dated February 17, 2017, directed Mattingly remain off work from February 17, 2017, until April 1, 2017. An off-work slip dated March 21, 2017, states Mattingly is to be off work from April 1, 2017, through April 17, 2017. On April 17, 2017, Dr. Collis wrote: "Ok to return to light duty work under restrictions/limitations outlined in the functional capacity evaluation. Ok to return on 4/19/17." In a June 23, 2017, note, Dr. Collis wrote: "Ok to return to work 6/26/17 with restrictions outlined in her functional capacity evaluation. Patient has copy and willing to provide." On August 28, 2017, Dr. Collis provided another slip stating as follows: "In addition to current restrictions, will add that patient limited to 8 hour work day and able to change positions sitting/standing as needed."

In her September 23, 2019, decision, relying upon the opinions of Drs. Doyle and Nazar, the parties' IME doctors, the ALJ found Mattingly sustained a lumbar work injury generating an 8% impairment rating. After performing an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), the ALJ determined enhancement by the two multiplier contained in KRS 342.730(1)(c)2 was appropriate reasoning as follows:

KRS 342.730 (1) (c) (1) is not appropriate based on the facts at hand. Mattingly is not capable of performing the job she was at the time of her injury. She has returned to work for Tower but under restrictions, which prevent her from performing all the duties she had prior to the work injury of February 22, 2015. The parties stipulated she is back at work earning greater wages. The ALJ is not convinced Mattingly will be unlikely to continue earning equal or greater wages for the indefinite future.

Despite Mattingly's continuing back problems and restrictions, Tower has accommodated her restrictions so that she can maintain employment. She is working a 40-hour week working within her restrictions. Although her restrictions have been changed, Tower has just recently complied with her updated restrictions on July 18, 2019. Despite her change in restrictions, Mattingly testified her medication or doses of medication have not changed. Mattingly admitted she would take a different job within her restrictions if one became available, but until that time should present itself, she plans to stay at Tower for the foreseeable future.

The ALJ provided the following findings of fact and conclusions of law pertaining to the award of TTD benefits:

The ALJ finds Mattingly is entitled to TTD benefits from August 22, 2016 through November 19, 2017 at a rate of \$509.86. KRS 342.0011 defines temporary total disability as the condition of an employee who has not reached a level of improvement that would permit a return to employment.

Although Dr. Boakye placed Mattingly at MMI on November 28, 2016, his opinion on MMI is contradicted by the remainder of his report and therefore not credible. Dr. Boakye placed Mattingly at MMI on November 28, 2016; however, specifically continued her off work until December 21, 2016. Moreover, he specifically recommended she continue treatment with pain management and rehab to determine her functional capacity. Dr. Collis' treatment records indicate her condition continued to worsen with the development of left leg pain and numbness. Dr. Collis continued to administer active treatment including therapy and various injections. Dr. Collis released her to return to work with restrictions on February 17, 2017, but Tower did not accommodate her restrictions and permit her return to employment until November 20, 2017.

Based on the foregoing, the ALJ finds that Mattingly is entitled to TTD benefits from August 22, 2016 through November 19, 2017.

Both parties filed petitions for reconsideration. Mattingly's petition for reconsideration pertained to the applicable interest rate to be paid on unpaid income benefits. In its petition for reconsideration, as it does on appeal, Tower argued TTD benefits are not owed beyond one of the MMI dates as provided by Drs. Boakye and Collis. It noted Dr. Boakye found MMI was attained on November 28, 2016, and Dr. Collis concluded MMI was reached on February 17, 2017. Tower requested the ALJ to review and make specific reference to the latest MMI date of Dr. Collis in explaining her award of TTD benefits. Tower also requested the ALJ reconsider the award of TTD benefits and terminate the award no later than the MMI date assessed by either Dr. Boakye or Dr. Collis. The ALJ sustained Mattingly's petition for reconsideration regarding the interest rate to be paid on her past due benefits. The ALJ overruled Tower's petition for reconsideration reasoning as follows:

The ALJ did not find Dr. Collis' MMI date of February 17, 2017, credible. Like Dr. Boakye, Dr. Collis' MMI date was inconsistent with his treatment records. As stated in the opinion, Dr. Collis' treatment records indicate Mattingly's condition continued to worsen with the development of left leg pain and numbness. He continued to actively treat Mattingly with therapy and various injections. Further, in the actual February 17, 2017 treatment note Dr. Collis does not actually state Mattingly is MMI as of that day. In fact, on that date he continued her off work until April 1, 2017 and discussed the need for an FCE. The ALJ explained the reasoning for her findings.

Tower contends MMI occurred either on November 28, 2016, or February 17, 2017, the dates provided by separate treating physicians. Thus, as a matter of law, the ALJ erred in awarding TTD benefits through November 19, 2017. Tower argues Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016)

prohibits an award of TTD benefits beyond the date MMI is assessed. Tower requests remand for a determination of which date of MMI she will rely upon in awarding TTD benefits.

ANALYSIS

KRS 342.0011(11)(a) defines temporary total disability as follows:

‘Temporary total disability’ means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court further explained that “[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.” Id. at 659. In other words, where a claimant has not reached MMI, TTD benefits are payable until

such time as the claimant's level of improvement permits a return to the type of work she was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he/she remains disabled from her customary work or the work he/she was performing at the time of the injury. The Court in Helms, *supra*, stated:

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.

. . .

The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court further elaborated with regard to the standard for awarding TTD as follows:

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing'

argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, *supra*, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform ‘any type of work.’ See KRS 342.0011(11)(c).

...

Central Kentucky Steel v. Wise, *supra*, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than ‘the type that is customary or that he was performing at the time of his injury’ does not constitute ‘a level of improvement that would permit a return to employment’ for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

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

As the Court explained in *Advance Auto Parts v. Mathis*, No. 2004-SC0146-WC, 2005 WL 119750, at (Ky. Jan. 20, 2005), and we reiterate today, *Wise* does not “stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.”

Two months after rendering Livingood v. Transfreight, LLC, *supra*, the Supreme Court rendered Zappos.com v. Mull, 2014-SC-000462-WC, rendered October 29, 2015, Designated Not To Be Published, specifically rejecting the Court of Appeals’ interpretation of “a return to employment” as set forth in KRS 342.0011(11)(a).⁴ There, the ALJ awarded TTD benefits during a period Mull had not returned to her regular employment but worked light duty. TTD benefits were

⁴ A determination of the existence of “a return to employment” necessarily requires a finding of whether the employee was performing customary work.

awarded during the period Mull had not attained MMI and had not reached a level of improvement which would permit her to return to her regular customary employment. Zappos.com appealed to this Board and we reversed the award of TTD benefits. The Court of Appeals reversed the Board and reinstated the award of TTD benefits. In reversing the Court of Appeals, the Supreme Court stated:

The Board held:

Here, Zappos accommodated Mull's restrictions with a scanning position, which she testified was a normal part of her employment prior to the injury. Zappos correctly notes Mull acknowledges she was capable of continuing to perform the light duty work but ceased her employment with Zappos for personal reasons completely unrelated to the work injury. Nothing in the record establishes the light duty work constituted 'minimal' work and she worked regular shifts while under restrictions. She was also capable of performing, and continued to perform for more than one year post-injury, her primary fulltime employment with Travelex. Given Mull was capable of performing work for which she had training and experience, and voluntarily ceased her employment for reasons unrelated to her injury or the job duties, substantial evidence does not support the award of TTD benefits and we therefore reverse.

Mull subsequently appealed to the Court of Appeals, which reversed the Board and reinstated the award of TTD benefits. The Court of Appeals held that the phrase "return to employment," as found in KRS 342.0011(11)(a), "was only achieved if the employee can perform the entirety of her pre-injury employment duties within the confines of the post-injury medical restrictions." Thus, since Mull no longer retained the physical ability to perform any activities requiring

gripping and grabbing with her right hand, and her pre-injury employment required such tasks, the Court of Appeals held she was entitled to TTD benefits. We disagree, and reverse the Court of Appeals.

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

As stated above, pursuant to KRS 342.0011(11)(a), in order for a claimant to be entitled to TTD benefits, she must satisfy a two-prong test: (1) she must not have reached MMI; and (2) she must not have reached a level of improvement that would permit her return to employment. *Double L Constr., Inc. v. Mitchell*, 182 S.W.3d 509, 513 (Ky. 2005). *Wise* stands for the proposition that TTD benefits for a claimant should not be terminated just because she is released to perform minimal work if it is not the type of work that was customary or that she was performing at the time of his injury. 19 S.W.3d at 657. However, “*Wise* does not ‘stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.’ ” *Livingood v. Transfreight, LLC*, — S.W.3d — (Ky. 2015). Accordingly, the ALJ must analyze the evidence in the record and determine whether the light duty work assigned to the claimant is not minimal and is work that she would have performed before the work-related injury.

In *Livingood*, the claimant, a forklift driver, could not drive a forklift due to his light duty work restrictions.

Instead, while on light duty restrictions he changed forklift batteries, monitored bathrooms for vandalism, and checked to make sure freight was correctly placed around the facility. The ALJ determined that since Livingood had performed those tasks before, and the work was not a make-work project, he had returned to employment and was not entitled to TTD benefits. *Id.* at _____. The ALJ's findings were affirmed by this Court.

In this matter, Mull satisfied the first prong of the TTD benefit test because she had not reached MMI. But, the ALJ did not perform an in depth analysis of the second requirement, whether the light duty work Mull performed was a return to her regular and customary employment. However, despite the lack of an in depth analysis the facts of this matter are relatively clear, and we must agree with the Board that substantial evidence does not support the ALJ's award of TTD.

Prior to her injury, Mull's job tasks included retrieving a product, scanning it, and placing it in a shipping box. Mull was trained in all of these tasks. After the injury, Mull was restricted to scanning items. Mull testified that scanning was a normal part of her pre-injury employment. The light duty work is not a significant diversion from her original employment and there is no indication the work was minimal. Mull also received the same hourly wage. Mull returned to her regular and customary employment at Zappos and she does not satisfy the second requirement to receive TTD benefits.

Slip Op. at 2-3.

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

The Court of Appeals in this case held that Tipton was entitled to TTD while she was working full-time for Trane and earning the same hourly rate. This holding by the Court of Appeals was based on a misunderstanding of

Bowerman and an understandable misinterpretation of what "return to employment" means.

The Supreme Court also delved into the Court of Appeals' holding in *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858 (Ky. App. 2009), relied upon by the ALJ in this case, explaining as follows:

However, as noted above, the Court of Appeals only held that *Bowerman* was entitled to additional TTD for part of the period his claim was in abeyance, a period when he was not working. It did not hold that he was entitled to TTD for the period before his claim was placed in abeyance and during which he had worked.

The Supreme Court provided the following clarification regarding the standard to be applied in determining when an employee has not reached a level of employment that would permit "a return to employment":

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

As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise*, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits,

to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALA 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.

Based on this standard, the Supreme Court determined the ALJ and this Board had correctly decided Tipton was not entitled to additional TTD benefits reasoning as follows:

Applying the preceding to this case, we must agree with the ALJ that Tipton was not entitled to TTD during the period in question. Tipton's physician released her to perform light and sedentary work, which Trane provided for her. Additionally, although Tipton had not previously assembled circuit boards, she had assembled the air conditioning units and had tested them. Furthermore, she did not produce any evidence that assembling circuit boards required significant additional training or that it was beyond her intellectual abilities. In fact, it appears that Tipton was certainly capable of and wanted to perform the circuit board assembly job because she bid on and was awarded the job after her release to full-duty work. Thus, there was ample evidence of substance to support the ALJ's denial of Tipton's request for additional TTD benefits, and we reverse the Court of Appeals.

Id. at 807.

Because the ALJ did not perform the two-prong analysis as required by the statute and applicable case law, we vacate the award of TTD benefits and remand the claim for the requisite analysis. In awarding TTD benefits from August 22, 2016, to November 9, 2017, the ALJ did not specifically determine when Mattingly reached MMI. The ALJ rejected the opinions of Drs. Boakye and Collis regarding the date of MMI but made no finding regarding MMI. To be clear, the ALJ may reject an opinion concerning the presence of MMI, but there must be a sufficient basis for the rejection. In rejecting Dr. Collis' date of MMI, the ALJ noted he released Mattingly to return to work with restrictions on February 17, 2017, but Tower did not accommodate the restrictions and would not allow her to return to employment until November 20, 2017. The ALJ did not provide her reasoning for rejecting Dr. Collis' assessment of MMI. Without determining the date of MMI, the ALJ found Mattingly was entitled to TTD benefits beginning August 22, 2016, through November 19, 2017.

Tower does not dispute the beginning date of the award of TTD benefits. However, it insists the ALJ must rely on either Dr. Boakye or Dr. Collis regarding MMI. We disagree, as Dr. Nazar also provided an independent assessment of MMI in his July 9, 2019, letter. Therein, Dr. Nazar reiterated that, in his December 7, 2018, report, he suggested Mattingly had not reached MMI because she was still undergoing treatment with Dr. Collis. He went on to state since Mattingly had not undergone injections and he assumed continues in the same degree of pain as when he saw her in December 2018, she was then at MMI. Dr. Nazar's July 9, 2019, letter reflects his belief Mattingly had attained MMI on December 7, 2018. Thus, on remand

the ALJ is not limited to choosing the date of MMI based on the opinions of Drs. Boakye and Collis.

In her Order ruling on Tower's petition for reconsideration, the ALJ provided reasons for her rejection of Dr. Collis' date of MMI. She stated Dr. Collis noted Mattingly's condition had continued to worsen with leg pain and numbness, and she was actively treating with Dr. Collis with therapy and various injections. The ALJ rejected Tower's assertion that Dr. Collis stated in his February 17, 2017, treatment note that Mattingly attained MMI as of that date. Apparently, the basis for this conclusion was because Dr. Collis continued to place Mattingly off work through April 1, 2017, and discussed the need for an FCE evaluation. We disagree with the ALJ's interpretation of Dr. Collis' February 17, 2017, treatment note, as he plainly stated Mattingly reached MMI as of February 17, 2017. The fact that he continued to place her off work and discussed the need for an FCE was an effort to determine Mattingly's vocational aptitude based on her physical restrictions which pertained to the second prong of the TTD analysis – i.e. a return to employment.

The date of MMI and the date Mattingly reached a level of improvement which would permit a return to employment are two different issues. Although not raised by Tower, in formulating an award of TTD benefits the ALJ did not discuss the second prong of the statutory test – i.e. whether Mattingly had reached a level of improvement which would permit a return to employment. In awarding TTD benefits, the ALJ was required to determine at what point Mattingly had reached a level of improvement permitting her to return to employment. In making that determination, the records of Dr. Collis recited herein are germane.

On remand, the ALJ must determine when Mattingly attained MMI and when she reached a level of improvement which permitted her to return to employment prior to attainment of MMI. The date that an injured worker reaches MMI and the assessment of a permanent impairment rating under the AMA Guides are medical questions to be answered by the medical experts.” Kroger v. Ligon, 338 S.W.3d 269, 274 (Ky. 2011). We repeat, the ALJ is not required to accept a medical opinion as to the specific date of MMI if she provides a sufficient reason for rejecting that date. However, the ultimate determination of MMI by the ALJ must be based upon the medical evidence. Then to be entitled to TTD benefits, Mattingly must not have been at MMI and must not have improved enough to return to the type of employment “that was customary or that she was performing at the time of [her] injury.” Central Kentucky Steel v. Wise, at 657.

During the hearing, Mattingly testified she was returned to work by Dr. Collis earlier than November 2017 and Dr. Collis’ records support her testimony. Dr. Collis’ note of April 17, 2017, returned Mattingly to work for light duty with restrictions as outlined in an FCE. On June 23, 2017, Dr. Collis reaffirmed those restrictions and indicated Mattingly could return to work on June 26, 2017. Consistent with his June 23, 2017, note, Dr. Collis provided a June 23, 2017, off-work slip stating that Mattingly could return to work on June 26, 2017. On July 27, 2017, Dr. Collis opined Mattingly had attained MMI and outlined her restrictions again referencing the FCE results. On August 25, 2017, Dr. Collis noted Mattingly had attempted to return to work a few days ago. We note the parties stipulated Mattingly returned to work on August 22, 2017, for a short time. In his August 25, 2017, record, Dr. Collis

added additional restrictions. In awarding TTD benefits, the ALJ must determine the date of MMI and consider the contents of Dr. Collis' notes in determining at what point Mattingly reached a level of improvement which permitted a return to employment.

Finally, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Significantly, in the award the ALJ made no provision for enhancement of Mattingly's PPD benefits by the two multiplier in accordance with KRS 342.730(1)(c)2 and Livingood v. Transfreight, LLC, *supra*. Thus, on remand, in the award the ALJ must insert the language that Mattingly is entitled to the two multiplier when the circumstances as outlined in the statute and Livingood v. Transfreight, LLC, *supra*, occur.

Accordingly, that portion of the award of TTD benefits as set forth in the September 23, 2019, Opinion, Award, and that portion of the October 23, 2019, Order reaffirming that award are **VACATED**. This claim is **REMANDED** to the ALJ for an amended award of TTD benefits based on the statute, applicable case law, and the views expressed herein. Further, the ALJ must recite the appropriate language in the award concerning the two multiplier. We express no opinion as to the outcome on remand.

ALVEY, CHAIRMAN, CONCURS.

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