

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: June 21, 2019

CLAIM NO. 201897825

VETCO BUILDERS

PETITIONER

VS.

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

DARREN MEDDERS AND  
HON. R. ROLAND CASE,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART,  
VACATING IN PART AND REMANDING  
AND ORDER  
\*\*\*\*\*

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

**ALVEY, Chairman.** Vetco Builders (“Vetco”) appeals from the Opinion, Award and Order rendered February 6, 2019 by Hon. R. Roland Case, Administrative Law Judge (“ALJ”), awarding temporary total disability (“TTD”) and temporary medical benefits to Darren Medders (“Medders”). The ALJ determined Medders sustained a work-related shock/electrocution on January 11, 2018 while assisting with moving

metal rods. Vetco also appeals from the February 27, 2019 order denying its petition for reconsideration.

On appeal, Vetco argues the ALJ's decision regarding the causation of Medders' complaints is not based upon substantial evidence. It also argues Medders was never taken off work by a physician, and is thus not eligible for TTD benefits. Vetco additionally argues the ALJ erred in determining Medders sustained a harmful physical touching. We affirm the ALJ's determination that Medders sustained a work-related injury; however, we vacate the award of TTD benefits, and remand for additional analysis.

Medders filed a Form 101 on June 26, 2018 alleging he was injured on January 11, 2018 when he encountered electrical currents while moving steel rods, and was electrocuted while working for Vetco in Richmond, Kentucky. In the Form 104, Medders noted that at the time of the incident he was an ironworker, which involved erecting steel buildings.

Medders testified by deposition on September 4, 2018, and at the hearing held December 14, 2018. At the time of the deposition, Medders was a resident of Berea, Kentucky. He had moved to Richmond, Kentucky by the time of the hearing. Medders testified he had previously been electrocuted in 1996. Afterward, he was diagnosed with post-traumatic stress disorder ("PTSD") for which he was treated for several years.

Medders worked as a handyman performing general household repairs in Arizona, prior to moving to Kentucky in 2017. He began working for Vetco in 2017, and last worked there on January 11, 2018 when he received an electrical

shock. He later worked as a part-time carpenter for Tussy Builders. At the time of the hearing, he was working part-time building houses for B. J. Blankenship.

On January 11, 2018, Medders was assisting his foreman, David Kidd (“Kidd”) with moving steel rods. Kidd was driving a lull, or all-terrain forklift, at the time of the incident. They were moving several metal rods, suspended from the lull by a nylon strap or sling. Medders was walking beside the lull, with his hands on the rods to stabilize them, and was acting as Kidd’s spotter. He swung the load to accommodate a narrower space when the lull struck a power line. Medders testified he saw a flash, and experienced a burning sensation in the right arm to the elbow. He next recalled sitting and shaking several feet from the incident location, with Kidd standing over him. He testified the shock he experienced was not as intense as the electrocution he sustained in 1996. He was taken to the emergency room at St. Joseph’s Hospital. He underwent testing, and was prescribed pain medication and Valium.

Medders testified that prior the accident, the PTSD he had experienced after the 1996 episode had diminished. However, he saw Kim Edwards, APRN (“Nurse Edwards”) prior to the January 11, 2018 accident for depression, anxiety attacks, and night terrors due to the recent deaths of several family members. He testified his PTSD intensified after the work incident, and he treated with Nurse Edwards and Katherine Self (“Ms. Self”), a counselor, for several months after the incident. He quit treating with them on his own when he believed they were no longer helping him. He testified he continues to have night tremors and anxiety

attacks. Medders did not work after the accident until he began working for Tussy Builders in August 2018.

Kidd testified by deposition on October 29, 2018. Kidd was Medders' foreman/supervisor at Vetco. He testified that at the time of the accident on January 11, 2018, Medders was assisting him with moving leveling rods to the back side of a building. Medders was holding onto the rods on his right side. Medders was supposed to be a lookout, and to warn of any dangers. When Kidd raised the rods to clear the tops of some trucks and racks, he impacted some power lines. Afterward, he could not locate Medders until he backed up from the wires. He saw Medders sitting on the ground. He did not observe any burn marks or visible evidence of injury. Kidd called the general contractor, and then had another worker take Medders to the hospital. Kidd reviewed a video of the accident, which purportedly showed him striking the power lines, and Medders moving out of the camera view.

In support of his claim, Medders filed the January 24, 2018 and January 31, 2018 records of Nurse Edwards from the White House Clinic. In the January 24, 2018 record, she noted Medders had complained of headaches since his recent electrocution accident. She also noted his anxiety had improved, but he still had bouts of shaking. She diagnosed him with hypertension, insomnia, depression, and anxiety. On January 31, 2018, she noted he was still having a right hand tremor. She noted his previous 1996 onset of PTSD had resolved and was in remission until the January 11, 2018 electrocution. She noted he complained of aching in the base of his skull, dizziness, right hand shaking and anxiety attacks.

Medders also filed the report of Dr. Dennis Sprague, Ph.D., a psychologist who examined him on July 2, 2018. Dr. Sprague performed an interview, conducted a mental status examination, and administered/interpreted a battery of tests. He noted Medders suffers from emotional symptoms consistent with electrocution on the job on January 11, 2018. Dr. Sprague diagnosed Medders with major depressive disorder, moderate; disorder due to medical condition post status injury date, January 11, 2018; somatic symptom disorder with predomination pain; history of marijuana and IV drug use; and symptoms of antisocial behavior disorder. Dr. Sprague stated that within reasonable psychological probability, Medders' psychological conditions directly resulted from the work injury. "This man was electrocuted, which caused significant emotional overlay in the form of depression, anxiety, as well as PTSD symptoms. He had a previous experience in the 1990s and this condition exacerbated his original injury, although it was previously in abeyance." Dr. Sprague stated that pursuant to the 2<sup>nd</sup> and 5<sup>th</sup> Editions of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Medders has a 10% impairment rating, of which 3% is due to his pre-existing active condition. He noted that since the electrocution, Medders continues to have tremors, headaches, bedwetting, wakefulness, nightmares, and other symptoms. He stated Medders should not work consistently.

Vetco filed the January 11, 2018 emergency room record from St. Joseph Hospital, Berea. Those records reflect Medders was electrocuted on January 11, 2018 when a forklift carrying metal rods contacted a power line. Medders advised he experienced a shock in his right hand. He reported he felt anxious and

nervous in the right upper extremity. Medders was allowed to go home when it was determined that his condition had stabilized.

Vetco also filed December 26, 2017, January 4, 2018, and January 10, 2018 records from the White House Clinic. Medders reported a history of anxiety, depression and PTSD from an electrical shock he had previously experienced in Arizona. That previous electrocution caused him to lose his left index finger, and the current exited through his right leg. He continued to experience vivid images of bodily injury. He also reported that six of his family members had died in 2017. Nurse Edwards referred him to Dr. Barry Rebek for treatment of his PTSD. On January 4, 2018, Medders presented with complaints of depression and anxiety. He was diagnosed with depression, single episode, moderate, generalized anxiety disorder, and PTSD chronic (rule out). On January 10, 2018, Medders reported left knee pain stemming from an old injury. He also reported he had no new problems, but he was tired and felt chronically fatigued from insomnia due to PTSD.

Dr. Timothy Allen, M.D., a psychiatrist from Lexington, Kentucky, evaluated Medders on October 3, 2018, and prepared a report on October 9, 2018. Dr. Allen noted the January 11, 2018 injury date when Medders was assisting a foreman with moving steel rods by using a forklift. Medders tugged on the rods to avoid hitting a rack. He heard a noise and noticed the forklift was pushing on a power line. He then experienced “residual current” in his right hand. Afterward, he reportedly experienced a brief period of memory loss, and he was taken to the hospital in Berea, Kentucky. After the incident, he reportedly experienced resurgent nightmares from a 1996 electrocution incident, which resulted in the loss of a finger.

Medders reported the residuals from the previous electrocution incident had diminished until the January 11, 2018 incident. Dr. Allen noted that on the date of the examination, Medders demonstrated a slight right hand tremor.

Dr. Allen diagnosed Medders with PTSD, pre-existing major depressive disorder, and generalized anxiety disorder. He noted Medders still experienced residual PTSD symptoms with insomnia and fatigue in December 2017. He noted Medders experienced a resurgence of PTSD and worsened nightmares after the January 11, 2018 incident. He stated Medders had reached maximum medical improvement (“MMI”) from the January 11, 2018 incident, and he would impose no restrictions. Dr. Allen assessed a 10% impairment rating pursuant to the 2<sup>nd</sup> and 5<sup>th</sup> Editions of the AMA Guides. He apportioned half of the rating to the PTSD, and the other half to the major depression, but stated none of the impairment was due to the January 11, 2018 work incident.

A Benefit Review Conference (“BRC”) was held on November 14, 2018. The BRC memorandum reflects that the contested issues included physical capacity to return to the type of work performed at the time of the injury, work-related injury, TTD benefits, medical expenses unpaid/contested, wages upon return to work, exclusion for pre-existing impairment permanent income benefits per KRS 342.730 including multipliers.

In the Opinion, Award and Order rendered February 6, 2019, the ALJ determined Medders was electrocuted on January 11, 2018 when the forklift touched overhead electrical wires. The ALJ noted Medders reported experiencing some current at the time of the incident, and he was then taken to the hospital. The ALJ

found notice was clearly provided at the time of the incident. The ALJ noted Medders' previous electrocution, and problems with PTSD. The ALJ awarded TTD benefits from the date of the accident until October 3, 2018 when Dr. Allen stated Medders had reached MMI. The ALJ relied upon Dr. Allen's opinions in finding Medders was not entitled to an award of permanent partial disability benefits. The ALJ also determined Medders was only entitled to medical benefits stemming from the January 11, 2018 event through the duration of the award of TTD benefits.

Vetco filed a Petition for Reconsideration arguing the ALJ erred in awarding Medders a period of TTD benefits. It argued there is no medical evidence establishing entitlement to such award. It also argued the ALJ erred in finding Medders sustained a work-related injury caused by the January 11, 2018 incident. Interestingly, Medders filed a response to the petition, and attached a previously unfiled note from Ms. Self, dated February 6, 2018, excusing him from work from February 6, 2018 until further notice. This note was not filed into evidence, and could not be considered by the ALJ.

The ALJ denied the petition for reconsideration in an order entered February 27, 2019. He specifically found as follows:

The ALJ would first note the Petition is really nothing more than an attempt to reargue the case. The Defendant/employer first argues the period of temporary total is incorrect. Attention is directed to the section in the Opinion on temporary total disability on pages 9 & 10. The ALJ found the period of temporary total based on the Plaintiff's testimony and the opinion of Dr. Allen. The ALJ specifically noted he found the Plaintiff credible concerning the period of disability and relied on Dr. Allen for the date of maximum of[sic] medical improvement and a return to baseline. Based on the opinions of Dr. Allen, the ALJ remains persuaded

the Plaintiff suffered a temporary exacerbation of his pre-existing PTSD. During this period of exacerbation, the Plaintiff's testimony, as well as the reports of Dr. Allen and Dr. Sprague, would indicate the Plaintiff was temporarily totally disabled. He was not at MMI and not able to return to his regular employment and although he did return to some work, it was not on a regular and consistent basis.

The Defendant/employer next argues on the issue of causation. This issue was addressed under the section entitled Work-Related Injury on pages 7 through 9 of the Opinion. The uncontroverted evidence indicates the Plaintiff was holding onto rods at the time of the injury. The forklift touched overhead electrical lines. The ALJ, in the original Opinion, noted the evidence could be considered conflicting as to whether or not the Plaintiff received an electrical injury at that time. Regardless, the accident occurred, the Plaintiff reported feeling some current, and he was taken to the hospital. Dr. Sprague felt the injury produced permanent impairment while Dr. Allen felt that it exacerbated a pre-existing condition. Both physicians however felt the accident either produced an impairment or aroused a pre-existing condition. These opinions do not depend on whether the Plaintiff actually received an electrical shock.

On appeal, Vetco essentially argues the ALJ erred in determining Medders sustained a harmful physical touching, his decision is not supported by substantial evidence, and there is no evidence of record establishing his entitlement to an award of TTD benefits. As the claimant in a workers' compensation proceeding, Medders had the burden of proving each of the essential elements of his claim. *See* KRS 342.0011(1); Snowder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful in his burden regarding whether he sustained a work-related injury, the question on appeal is whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

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

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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). An ALJ is vested with broad authority in determining causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, this is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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

otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

An ALJ's discretion is not unlimited. 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, and as noted above the determination must be based upon substantial evidence. 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).

The ALJ determined Medders sustained a work-related injury on January 11, 2018 for which he awarded TTD and medical benefits. The evidence clearly establishes that the forklift driven by Kidd struck a power line on January 11, 2018 as Medders was touching metal rods that were being moved. That determination is supported by testimony from both Medders and Kidd. This is further supported by the fact that Medders was subsequently taken to the emergency room, and followed up with treatment from Ms. Edwards. It was reasonable for the ALJ to conclude, based upon the totality of the evidence, that Medders sustained a work-related injury from electrocution on January 11, 2018, based upon not only his own testimony, but also the findings by Ms. Edwards in her office notes, and the reports by Drs. Sprague and Allen. Vetco noted that both Drs. Sprague and Allen are psychologists, and any conclusion they may have regarding causation is outside their area of expertise. We first note that Dr. Allen, who evaluated Medders at Vetco's request, is a psychiatrist, not a psychologist. We also note that both are

considered physicians as defined by KRS 342.0011(32). Therefore, their opinions regarding causation fall “within their respective bailiwicks”. Because the ALJ’s decision regarding causation is supported by substantial evidence, which he adequately outlined and explained the basis for his reliance, his determination on that issue will not be disturbed.

However, that said, we vacate the ALJ’s determination regarding entitlement to TTD benefits, and remand for additional findings. In his decision, the ALJ determined regarding TTD benefits, as follows:

Temporary total disability is defined in KRS 342.001(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 which would permit a return to employment. The Courts have noted that in order for temporary total disability benefits to be payable the plaintiff must not have reached maximum medical improvement and must not have reached a level of improvement that would permit a return to employment. Magellan Health v. Helms, 140 S.W.2nd 579 (Ky. App. 2004).

The defendant paid no temporary total disability benefits to the plaintiff following the January 11, 2018 incident. The ALJ finds the plaintiff credible concerning the period of disability. The ALJ has reviewed the medical evidence concerning the date of maximum medical improvement. Dr. Allen opined the plaintiff had reached maximum medical improvement and had returned to baseline by October 3, 2018.

In view of the plaintiff’s testimony and the opinions of Dr. Allen, the ALJ is persuaded that the plaintiff reached maximum medical improvement as of October 3, 2018 when he returned to baseline as found by Dr. Allen.

Therefore, the appropriate award of temporary total disability benefits will be entered from the date of the injury January 11, 2018 through October 3, 2018 the

date on which Dr. Allen felt the plaintiff had returned to baseline and had reached maximum medical improvement.

Based upon the plaintiff's average weekly wage of \$337.19 the appropriate temporary total disability rate is \$224.79 per week. Therefore, the plaintiff will be entitled to temporary total disability benefits from January 11, 2018 to October 3, 2018 at the rate of \$224.79 per week with the defendant employer taking credit for any such compensation heretofore paid.

We find the ALJ failed to provide a sufficient analysis supporting the award of TTD benefits. The ALJ determined Medders sustained a work-related injury on January 11, 2016, and that he reached MMI on the date he was examined by Dr. Allen. However, other than Medders' own testimony, there is no evidence of record establishing he was in fact temporarily totally disabled from working. TTD is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]" In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, "It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." Thus, a release "to perform minimal work" does not constitute a "return to work" for purposes of KRS 342.0011(11)(a).

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury. The Court stated, “. . . we reiterate today, Wise does not ‘stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.’” Id. at 254. In Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the Supreme Court clarified when TTD benefits are appropriate in cases where the employee returns to modified duty. The Court stated:

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

Id. at 807

Here the ALJ awarded TTD benefits from the date of the accident until he was evaluated by Dr. Allen, although he performed some work during that time period. There is no evidence of record indicating any physician took Medders off work or that he had restrictions preventing him from working. Likewise, there is minimal evidence of his post-injury treatment which Medders admittedly stopped because it was providing no benefit. The ALJ made no analysis regarding whether Medders could perform his usual work, whether he had any restrictions, or the basis for such award. On remand, the ALJ is directed to perform an appropriate analysis regarding an award of TTD benefits for Medders' condition. 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). The evidence must support any determination by the ALJ after performing the appropriate analysis.

Accordingly, the February 6, 2019 Opinion, Award, and Order, and the February 27, 2019 Order on 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** for additional determinations as set forth above.

Vetco requested oral arguments be held. After having reviewed this matter, **IT IS HEREBY ORDERED AND ADJUDGED** oral arguments are unnecessary in arriving at a decision, and therefore the request is **DENIED**.

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MICHAEL W. ALVEY, CHAIRMAN  
WORKERS' COMPENSATION BOARD

ALL CONCUR.

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