

RENDERED: AUGUST 14, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2014-CA-001844-WC

THE HARPER COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-11-76267

JOSHUA L. ZURBORG;  
HONORABLE CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION  
BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: MAZE, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: The Harper Company ("Harper") petitions this court for review of the Workers' Compensation Board ("Board") opinion which affirmed the Administrative Law Judge's ("ALJ") award of temporary total disability ("TTD") benefits to Joshua L. Zurborg. For the following reasons, we affirm.

Zurborg worked as a laborer for Harper on two separate occasions, with the most recent employment beginning in August 2011. On August 30, 2011, Zurborg injured his back on the job while unloading concrete forms. He immediately sought treatment at the United Methodist Hospital emergency room in Henderson. Zurborg did not return to work after he was released from the hospital, but when he later sought treatment at St. Elizabeth Physicians in Florence, he was denied medical treatment and advised that he had been terminated by Harper. He was terminated as a result of medicine being found in his cooler, which Zurborg claims was over-the-counter heartburn medicine.

Zurborg next sought treatment with the Chambers Medical Group in April 2012 where he was treated by Drs. Fadel, Jedlicka, and Zaacks. While none of the treating physicians at the Chambers Medical Group explicitly included work restrictions in their records, Zurborg was treated for injuries to his back and Dr. Jedlicka noted that Zurborg was “working and doing things he shouldn’t do.” At the time, Zurborg was working part time as a pizza delivery driver, but he testified that he was still in pain and unable to work full time. After multiple attempts to collect workers’ compensation benefits, Zurborg underwent an independent medical exam (“IME”) with Dr. Rozen on August 20, 2012. Dr. Rozen opined “to reasonable degree of medical certainty, the claimant’s herniated disk with L5-S1 lumbar radiculopathy in the left lower extremity is causally related to the work

incident of August 30, 2011.” Following the IME, Harper began voluntarily paying Zurborg TTD benefits on November 28, 2012.<sup>1</sup>

The ALJ, in an order on reconsideration, ultimately awarded Zurborg permanent partial disability benefits, medical benefits, and TTD benefits from August 30, 2011 through February 26, 2013. The Board affirmed the ALJ’s decision and offered a thorough analysis of the medical evidence supporting the award of TTD benefits:

Substantial evidence exists supporting the ALJ’s determination Zurborg was temporarily totally disabled from the date of the injury on August 30, 2011 through the date he attained MMI [maximum medical improvement] on February 26, 2013 is supported by substantial evidence of record [sic]. We acknowledge the records from the Chambers Medical Group and the Mayfield Clinic during the time period in question do not indicate Dr. Jedlicka, Dr. Fadel or Dr. Zaacks imposed restrictions on Zurborg’s work activities. Likewise, the same records do not indicate any of the three physicians released Zurborg to regular duty work with no restrictions. In fact, the medical records of Zurborg’s treating physicians do not discuss the imposition of restrictions, or lack thereof, at all. Therefore, the medical records of Zurborg’s treating physician are of little value on the issue of entitlement to TTD benefits since they do not discuss restrictions.

However, the subsequent September 12, 2013 report prepared by Dr. Fadel constitutes substantial evidence supporting the ALJ’s determination Zurborg is entitled to TTD benefits beginning August 31, 2011 through February 26, 2013. In summarizing Zurborg’s treatment history, Dr. Fadel noted he became involved with his

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<sup>1</sup> Some confusion exists concerning the start date of the voluntarily paid benefits. The Harper Company notes that voluntary TTD benefits were only paid from November 28, 2012, through March 2013, and that the August 28, 2012 date given by Zurborg is the result of an error in the benefit review conference memorandum.

case in May 2012. He noted Zurborg also treated with Dr. Zaacks, but was subsequently discharged due to lack of improvement and transferred to a chronic pain management physician. Dr. Fadel noted Zurborg had not returned to work at the time of his evaluation. Dr. Fadel assessed a 5% impairment rating for Zurborg's work-related lumbar condition pursuant to the AMA Guides. Dr. Fadel restricted Zurborg from lifting no more than thirty pounds occasionally and to avoid repetitive bending, twisting, crawling and stooping. He also opined Zurborg could not "return to that type of construction work in my medical opinion." Dr. Fadel's report constitutes substantial evidence upon which the ALJ may rely in awarding TTD benefits from the date of injury until the undisputed time Zurborg attained MMI on February 26, 2013.

Harper's arguments on appeal are unpersuasive in light of the findings provided by its own evaluating physician, Dr. Rozen, who examined Zurborg on August 20, 2012, which is during the time period in question and prior to its voluntary commencement of TTD benefits. In his September 2, 2012 report, Dr. Rozen diagnosed Zurborg with a herniated lumbar disc with L5-S1 radiculopathy in his left lower extremity due to the August 30, 2011 work incident. Dr. Rozen opined Zurborg had not yet reached MMI, and stated "At this point in time I do not feel that he is capable of sustained remunerative employment even in a sedentary capacity and should proceed with additional diagnostic evaluation." He also noted Zurborg does not retain the physical capacity to return to the type of work being performed at the time of injury, and recommended further treatment, including additional diagnostic studies. Upon his second examination of Zurborg on November 13, 2013, Dr. Rozen found Zurborg attained MMI on the date of his last MRI and assessed a 5% impairment rating pursuant to the AMA Guides. He restricted Zurborg from lifting over 30 pounds, and from repetitive squatting and bending, pulling, pushing, or twisting. Dr. Rozen again opined Zurborg does not retain the physical capacity to return to the same type of concrete work he

was performing at the time of this injury, but could work in a light to medium PDL Category.

Harper argues that the Board erred in affirming the ALJ's award of TTD benefits for the time prior to November 28, 2012, when Harper began voluntary payments of TTD benefits. Further, Harper claims that because Zurborg was working as a pizza delivery driver during the time of his alleged disability, he should be disqualified from receiving benefits.

The well-established standard of review for the appellate courts of a workers' compensation decision "is to correct the [Workers' Compensation] 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." *E.g., W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992); *Butler's Fleet Serv. v. Martin*, 173 S.W.3d 628, 631 (Ky. App. 2005); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky. App. 2004). *See also Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that some substantial evidence supported the decision); *cf. Gray v. Trimmer*, 173 S.W.3d 236, 241 (Ky. 2005) (if the ALJ finds against the party having the burden of proof, the appellant must "show that the ALJ misapplied the law or that the evidence in her favor was so overwhelming that it compelled a favorable finding[]").

Harper argues that TTD benefits should not have been awarded prior to November 28, 2012, or the date upon which it voluntarily began paying Zurborg benefits. Harper claims that the Methodist Hospital records indicate that Zurborg was released to regular duty work on September 2, 2011, and after that date, none of Zurborg's treating physicians assigned work restrictions. Accordingly, Harper insists that Zurborg did not meet his burden in proving his entitlement to TTD benefits prior to November 28, 2012. We disagree.

Zurborg did have the burden of proving each of the elements of his cause of action, including his entitlement to TTD benefits. *See* KRS 342.0011(1); *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979). KRS 342.040(1) provides that income benefits, when disability continues for over two weeks, shall be paid from the first day of disability. In this case, Zurborg's burden was to prove that he was disabled from the time of his injury until he reached MMI.

We agree with the Board's conclusion that the ALJ's decision was supported by substantial evidence. Dr. Fadel and Dr. Rozen's opinions are sufficient to establish that Zurborg was unable to return to his work with Harper following his injury on August 30, 2011 despite the lack of restrictions included in earlier reports from other treating physicians. Thus, Zurborg was entitled to TTD benefits from the time of his injury until he reached MMI on February 26, 2013.

Next, Harper argues that Zurborg should not receive TTD benefits because he was working as a pizza delivery driver during the time he was disabled. The condition of "temporary total disability" continues until two prongs are met: 1) the

worker reaches MMI, and 2) the worker reaches a level that would permit a return to employment. KRS 342.011(1)(a); *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579, 581 (Ky. App. 2004). “In *Central Kentucky Steel v. Wise*, [19 S.W.3d 657 (Ky. 2000)], 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.* In this case, pizza delivery is clearly not the same type of work which was customary for Zurborg prior to his injury. Hence, Zurborg’s job as a delivery driver did not render him ineligible to receive TTD benefits.

For the above reasons, the Workers’ Compensation Board’s opinion is affirmed.

ALL CONCUR.

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