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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000969-WC

TAWANDA LINDSAY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 10-WC-94935

ALCOA/REYNOLDS METALS;
HON. HOWARD E. FRASIER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND KELLER, JUDGES.

COMBS, JUDGE: Tawanda Lindsay petitions for review of an opinion of the Workers' Compensation Board that vacated in part and remanded a decision of the Administrative Law Judge (ALJ). The ALJ had awarded benefits for both temporary, total disability and permanent, partial disability. After our review, we affirm.

In 2008, Lindsay worked on the assembly line at Alcoa/Reynolds Metals. On a regular shift, she might have been expected to feed cartons into a machine, tend the line, stack boxes, or thread kitchen foil onto a spooler. Lindsay is left-hand dominant; she is 5 feet, 3 inches tall. On July 22, 2008, she was feeding a "cartoner" when she injured her left shoulder. Lindsay was seen by physicians at Occupational Physician Services of Louisville, P.S.C. (OPS) and was diagnosed with left shoulder strain. She was released to work regular duty without restrictions.

From July 23, 2008, until January 19, 2009, Lindsay worked without incident. However, on January 19, 2009, while she was at work, her left hand and arm began throbbing. She was seen again by physicians at OPS, who diagnosed left shoulder strain. She was released to work at full duty.

As of February 13, 2009, Lindsay continued to suffer with left shoulder pain. The plant's environmental health and safety manager advised her that filing a worker's compensation claim would likely prove fruitless; therefore, Lindsay decided to take a leave of absence from her employment under the provisions of the Family Medical Leave Act (FMLA).

Lindsay's request for FMLA leave was supported by paperwork submitted by her family physician, Dr. Steinbock. She received short-term disability benefits under an employer-funded plan until she reported back to full duty on July 22, 2009. Lindsay continued to follow up with Dr. Steinbock throughout this time-frame and underwent a course of physical therapy with good results.

On September 1, 2009, Lindsay re-injured her left shoulder while stacking boxes in the facility's warehouse. She was seen at OPS and was again diagnosed with left shoulder strain. She was instructed to return to regular work duty "as tolerated." On September 21, 2009, Lindsay was reassigned to a mostly automated assembly line.

On September 21, 2009, Lindsay visited the emergency room at Jewish Hospital; she was advised to return to OPS. After examination, OPS referred Lindsay to an orthopedic surgeon, Dr. Navin Kilambi. She continued on regular work duty "as tolerated."

Dr. Kilambi saw Lindsay on September 24, 2009. He noted that she had near full range of motion and diagnosed her with recurrent left shoulder bursitis and tendinitis. She was returned to regular duty.

Although Lindsay did not follow-up with Dr. Kilambi as contemplated by both doctor and patient, she called in four times over the next few weeks to report that she would be absent from work due to left shoulder pain. On October 18, 2009, Lindsay was terminated from her employment for excessive absenteeism.

Lindsay saw Dr. Kilambi again on October 28, 2009. Her left shoulder was noted as being quite tender. Dr. Kilambi suspected a small rotator cuff tear in the left shoulder and ordered an MRI. Although Dr. Kilambi was aware that Lindsay had been terminated, he noted that "work restrictions are given."

On November 12, 2009, Dr. Kilambi noted that the MRI showed an intact rotator cuff. Lindsay received a steroid injection and was restricted to modified

duty (primarily one-handed tasks). On December 11, 2009, Dr. Kilambi restricted her to one-handed duty with no overhead work. On December 24, 2009, Lindsay began collecting unemployment benefits.

On January 22, 2010, Lindsay underwent arthroscopic surgery on her shoulder. On January 28, 2010, she was restricted from work for an additional two weeks. On February 25, 2010, Lindsay was released to modified duty. Dr. Kilambi released her to regular duty on May 6, 2010, finding her to be at maximum medical improvement as of June 1, 2010. On July 8, 2010, Dr. Kilambi assessed Lindsay with a 6% whole person impairment.

On July 19, 2010, Lindsay filed a claim for workers' compensation benefits. She claimed that she had injured her left shoulder at work on July 22, 2008; January19, 2009; and September 1, 2009. Alcoa/Reynolds Metals accepted the claim as compensable but disputed the amount of compensation owed.

On November 4, 2010, Dr. Thomas Loeb, another orthopedic surgeon, performed an independent medical examination. Dr. Loeb indicated that Lindsay suffered with "mild subdeltoid bursitis and mild intermittent tendinosis or mild inflammation of the rotator cuff tendons." Dr. Loeb did not believe that any significant injury had occurred as a result of any of the alleged injuries, and he assessed a zero percent impairment rating.

Despite these conclusions, Dr. Loeb was asked (during his deposition) to rely on his review of Lindsay's medical records; her documented complaints; and documented medical examination findings to decide whether she "could have

worked in a light duty capacity during this period of February 13, 2009 through July 22, 2009." Deposition at 17. He answered as follows: "If there was one-hand assist available that you mentioned before that would be satisfactory with her – with her situation, she could have." *Id.* Dr. Loeb indicated that he would have specifically restricted Lindsay to no lifting above chest level and lifting no more than twenty pounds between waist and chest level during this period. *Id.*

A hearing on Lindsay's claims was conducted on December 16, 2010. The ALJ heard live testimony from Lindsay, and on February 1, 2011, the ALJ rendered an opinion and award. The ALJ prepared an extensive summary of the evidence and made the following findings of fact and conclusions of law:

> (1) . . . [Lindsay] has given credible testimony of three left shoulder injuries, continued symptoms, and ultimately arthroscopic surgery from which she has been released to return to regular duty. Ms. Lindsay has also given credible testimony of continued symptoms after she was last released to return to work, and her efforts to continue her education in order to become a physical therapist assistant.
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> While the employer's belief that no permanent injury had been sustained might have had some support prior to the surgery performed by Dr. Kilambi, the undersigned does not find the opinion of Dr. Loeb to be credible of no permanent injury after the date of surgery. No preexisting active condition has been identified and no other injuries or activities have been shown to have caused the need for surgery by Dr. Kilambi. In fact, the defendant's continued disbelief of any credible shoulder injury when the Plaintiff continued to miss work for medical treatment, and possibly other absences of the Plaintiff from work, resulted in her termination from employment.

Having terminated the Plaintiff due at least in part to her absences because of her shoulder injury, the Defendant cannot now complain that it might have found accommodated work for the Plaintiff during the periods of time thereafter where she had restricted duties. Further, the undersigned does not find the video demonstration or the testimony of Ms. Mudd [the employer's environmental health and safety manager] to be dispositive in regard to whether the work activities engaged by the Plaintiff were not sufficient to cause a left shoulder injury.

At only five foot three inches tall, her shoulder height is lower than most individuals who are taller, and she has given credible testimony, as verified by treatment records, of three work injuries. Moreover, Ms. Mudd appears to have made a decision after the second injury and her lay review of the MRI report that no injury took place, and from that time forward, the Defendant simply acted as if the Plaintiff's prior injuries and third shoulder injury simply did not occur. While timely notice was given, and first reports of injury were filed, the credible opinion and treatment provided by Dr. Kilambi for a work-related injury was not accepted by the Defendant.

(2) Based on a close reading of the report of Dr. Kilambi of July 8, 2010, the undersigned finds that the injury of July 22, 2008, was temporary in nature and had resolved prior to the date of the second injury. However, the undersigned finds the injury of January 19, 2009, to have caused a permanent harmful change supported by objective medical findings as reflected by the records of OPS, Dr. Kilambi, and the MRI report that found tendinosis. This second injury resulted in the need for more significant treatment. Further, Ms. Lindsay gave credible testimony that the wheel on this particular spooler machine was more difficult to turn. While this injury might have eventually resolved without any additional aggravation, the undersigned finds that the third event on September 1, 2009, was an aggravation of the prior injury, in combination with the second injury, resulted in the need for the left shoulder arthroscopy. . . on January 22, 2010.

The third event on September 1, 2009, did not appear as significant itself. However, when considered as an aggravation of the prior injury that had not completely resolved, the surgery and the resulting 6% permanent impairment, therefore, supports [*sic*] a finding that the surgery and impairment can be traced to the second injury date of January 22, 2009. Although not admitting to a work injury, Dr. Loeb admitted that certain activities could have caused the need for surgery. The undersigned finds the testimony of the Plaintiff is consistent with these types of activities, and the treatment records support a finding of a permanent harmful change related to the event of January 22, 2009.

Moreover, Dr. Loeb admitted that the surgery and impairment rating was [*sic*] appropriate. His belief that the surgery was somehow related to other activities is not supported by the evidence. While the Plaintiff did have several motor vehicle accidents, and also had symptoms during the time she was not working and was at home, no credible evidence has identified any other event that was a causal factor in the injury. As a 29 year old, no credible argument can be made of any deterioration of her joints due to aging.

The undersigned finds the Plaintiff has met her burden of showing that the injury of January 22, 2009, resulted in the need for surgery and a 6% permanent impairment. While the work activities of July 22, 2008, did result in a temporary strain, such symptoms had resolved prior to January 22, 2009. The third event of September 1, 2009, was an aggravation of the second injury, but by itself, did not result in a finding of an independent injury.

* * * * *

(5) Temporary total disability is statutorily defined 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." KRS 342.0011(11)(a). Although somewhat confusing, recent cases have stated that a two-

part analysis must be applied before awarding TTD as follows: 1) maximum medical improvement has not been reached, and 2) the injury has not reached a level of improvement that would permit a return to employment. *Magellan Behavioral Health v. Helms,* Ky.App. 140 S.W.3d 579, 580-581 (2004).

In regard to the first prong, the Kentucky Court of Appeals has provided some additional definition to MMI as "**the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over**." *Halls Hardwood Floor Co. v. Stapleton,* Ky.App., 16 S.W.3d 327, 329 (2000) (emphasis added) (citing *W.L. Harper Construction Co. v. Baker*, [Ky.App.,] 858 S.W.2d 202, 205 (1993)).

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The Kentucky Supreme Court has clarified the meaning of the second prong in *Wise v. Central Kentucky Steel,* Ky., 19 S.W.3d 657 (2000). In *Wise,* the employer argued that whenever a worker was released to return to work, even with restrictions, TTD should be terminated. However, the Supreme Court rejected this argument and found that "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**." *Wise* at 659 (emphasis added). Thus, the Supreme Court narrowly defined return to employment as customary work for that particular employee or the type of work he was performing prior to being injured.

Because the Plaintiff stipulated that she did not miss any work after her first injury, no period of TTD is owed prior to the date of the second alleged injury of January 19, 2009. In regard to the injury of January 19, 2009, the undersigned finds the Plaintiff's symptoms did not fully resolve prior to the aggravation of September 1, 2009, and her subsequent surgery, based on the medical evidence, and the Plaintiff did not reach MMI until she

> was released by Dr. Kilambi after her surgery on May 6, 2010.
>
> As to customary work, the undersigned finds that based on the stipulations of the parties, the Plaintiff continued to work through February 12, 2009. Thereafter, Dr. Steinbock, as supported both by the testimony of the Plaintiff and Ms. Mudd, restricted the Plaintiff in her work activities until July 21, 2009. After returning to work on July 22, 2009 under accommodated work activities, the plaintiff with some absences for physician visits and treatment, continued to work for the Defendant until she was terminated on October 18, 2009. Without any accommodated duty, and with worsening symptoms that ultimately resulted in surgery on January 22, 2010, the Plaintiff was not released for full duty work until May 6, 2010.
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> The Defendant's argument now that the Plaintiff would have been able to continue accommodated, and one-handed work for the Defendant, after October 18, 2009, is not consistent with the requirement that it must be shown that she could return to her former position that she held on January 19, 2009, or her customary work. Since the third injury has been determined only an aggravation of the injury of January 19, 2009, the work that Ms. Lindsay was performing after January 19, 2009, is not relevant to the award of TTD except for those periods of time where she was actually employed by the Defendant. If the Defendant had desired to limit the period of time that TTD was applicable, it should have continued to employer (sic) her instead of terminating her employment.
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> The undersigned finds that the Plaintiff is entitled to TTD benefits at the rate of $555.48 per week from February 13, 2009, until July 21, 2009, and from October 19, 2009, through May 6, 2010.

The petition for reconsideration filed by Alcoa/Reynolds Metals was denied by the ALJ, and the employer sought review of the Board. By its opinion entered

May 3, 2011, the Board vacated in part and remanded the ALJ's decision. With respect to his award of temporary total disability benefits during Lindsay's FMLA leave of absence (February 13, 2009 through July 22, 2009), the Board concluded that the ALJ erred by relying on certain medical evidence that had been mentioned by Lindsay (the reports of her family physician, Dr. Steinbock) but not included in the record. While the Board acknowledged that the deposition testimony of Dr. Loeb may well have supported the ALJ's award of benefits during the period in question, it observed that the ALJ had neither addressed this evidence nor relied upon it expressly. The Board remanded the matter for a decision on Lindsay's entitlement to temporary total disability benefits "during this period based on a correct understanding of the evidence in the record." Opinion at 34.

In remanding, the Board instructed the ALJ to "make a determination whether Lindsay, following the January 19, 2009, injury and prior to the September 1, 2009 aggravation, was at MMI." *Id.* If the ALJ were to find that Lindsay was not at maximum medical improvement, "the ALJ must determine whether Lindsay had been released to 'customary work' or the work she was performing at the time of the injury. . ." during this period. *Id.*

With respect to the ALJ's award of temporary total disability benefits for a second period (following Lindsay's termination in October through May 6, 2010), the Board determined that the ALJ had erred by drawing "a direct correlation between Lindsay's termination and his award of TTD benefits." Opinion at 36. "[B]ased on the medical evidence in the record, there is no support of the ALJ's

inference Lindsay's termination on October 18, 2009 coincided with Reynolds' inability to accommodate certain medical restrictions, since absolutely no explicit medical restrictions existed at the time of Lindsay's termination." *Id.* at 38. The Board concluded that, on remand, the ALJ *could* conclude from the medical evidence that the specific work restrictions set forth in Dr. Kilambi's November 12, 2009, report were also applicable at the time of his note of October 28, 2009, indicating that "work restrictions are given." Furthermore, the Board directed the ALJ to decide from the evidence whether Lindsay could have worked at a position provided as an accommodation to her medical restrictions had it been provided and whether that work would have qualified as "customary employment or the type of employment Lindsay was performing at the time of the injury." *Id.* at 40.

Finally, the Board noted that while Dr. Kilambi released Lindsay to full duty work on May 6, 2010, he did not consider her at maximum medical improvement until June 1, 2010. "Inquiries pertaining to MMI and a return to employment are factually and legally distinct." *Id.* at 41. The Board remanded the matter to the ALJ for proper analysis of the period between October 28, 2009, and June 1, 2010.

On appeal, Lindsay challenges the Board's decision to remand the matter to the ALJ. She observes that as the finder of fact, the ALJ has the sole discretion to determine the quality, character, and substance of evidence and is free to believe or disbelieve whatever evidence he chooses. However, upon our review, we may correct the Board *only* where we perceive that it has "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing

the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-688 (Ky.1992).

A claimant's entitlement to temporary total disability is a question of fact to be determined by the ALJ in his discretion. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky.App. 2000), *citing W.L. Harper Constr. Co., Inc., v. Baker*, 858 S.W.2d 202 (Ky.App. 1993). Nevertheless, the ALJ's decision must be supported by the evidence, and we are not persuaded that the Board erred in its assessment of the evidence in this case so as to cause gross injustice.

Having closely examined the record, the Board concluded that the ALJ's determination relative to Lindsay's award of temporary total disability benefits during her FMLA leave was not based upon a full fact consideration and accurate understanding of the evidence. While Lindsay indicates that Dr. Loeb's expert testimony alone would support an award of temporary total disability benefits for the period spanning her FMLA leave, that evidence was not specifically or directly relied upon by the ALJ in this case. The ALJ's order must set forth the factual basis for any determination that Lindsay was entitled to temporary total disability benefits for this time, and there is no indication that the ALJ chose to assign any weight to Dr. Loeb's testimony on this point. The Board did not err in remanding the matter for the ALJ's further consideration.

Next, the Board rejected the contention that the medical evidence of record permitted an inference that Lindsay's termination on October 18, 2009, coincided with the employer's inability to accommodate her medical restrictions since no

explicit medical restrictions had been provided. The Board correctly directed the ALJ on remand to make findings of fact based upon specific, pertinent medical evidence to be found in the record. The Board did not err by leaving this determination to the ALJ rather than by drawing any inferences itself.

Finally, we are not persuaded that the Board overlooked or misconstrued controlling statutes so as to result in gross injustice when it required the ALJ to consider Dr. Kilambi's determination as to maximum medical improvement. Again, Dr. Kilambi determined that Lindsay had not reached maximum medical improvement until June 1, 2010. The Board did not err in asking the ALJ to consider whether Dr. Kilambi's finding as to maximum medical improvement impacted his decision that she was entitled to temporary total disability only through May 6, 2010.

We affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE
ALCOA/REYNOLDS METALS:

Lyn Douglas Powers
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