

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NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-001055-WC

JACK COOPER TRANSPORT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-12-87924

RICKY D. WIGGINTON; HON.  
CHRIS DAVIS, ADMINISTRATIVE  
LAW JUDGE ; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

ACREE, CHIEF JUDGE: The narrow issue presented is whether the Workers' Compensation Board erred when it partially reversed the opinion and order of an Administrative Law Judge which had found, *inter alia*, that Appellee Ricky

Wigginton had reached maximum medical improvement (MMI) as of a certain date. We find no error by the Board and affirm.

### **I. Facts and Procedure**

Wigginton began working as a truck driver for FNBC Acquisitions Group<sup>1</sup> in February 2000. Appellant Jack Cooper Transport purchased FNBC in 2010 or 2011, and Wigginton became a Jack Cooper employee. A normal workday for Wigginton consisted of driving a truck loaded with automobiles to different dealerships around the United States, loading and offloading vehicles using a wench and ramps, and securing vehicles for transport.

In 2007, while employed by FNBC, Wigginton sustained a work-related low back and left leg injury. Wigginton treated with several physicians. A lumbar MRI, performed on October 15, 2007, showed congenital spinal stenosis and spondylosis and posterior disc protrusions at L4-5 and L5-S with bilateral foramina narrowing. Dr. Jules J. Barefoot performed an independent medical exam (IME) on July 8, 2008. He diagnosed degenerative disc disease of the lumbar spine. Wigginton eventually settled all his claims for a lump sum payment and, in exchange, waived his rights to reopen the claim and to employer-paid medical treatment.

On April 19, 2012, Wigginton was unloading trucks at a dealership. This required him to climb in and out of the cab of his super-duty truck multiple times. As the day progressed, Wigginton experienced the onset of left hip pain.

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<sup>1</sup> FNBC Acquisitions Group is also referred to in the record as Active Transportation. For purposes of this appeal, Active Transportation and FNBC Acquisitions Group are the same.

He treated at several clinics and underwent physical therapy, which resolved his hip pain. Wigginton was paid temporary total disability (TTD) benefits from April 19, 2012, through May 19, 2012. He returned to full-duty work on May 20, 2012.

A few days later, on May 22, 2012, Wigginton injured his low back while lifting a skid ramp to unload a truck at a dealership in Illinois. He was initially treated at Baptist Urgent Care and then at BaptistWorx, both in Louisville, Kentucky. A lumbar x-ray revealed degenerative facet changes. BaptistWorx diagnosed an acute lumbar strain, and referred Wigginton to Dr. Ellen Ballard.

Wigginton first treated with Dr. Ballard on July 20, 2012. He complained of low-back pain and left leg numbness. At Dr. Ballard's request, Wigginton underwent an MRI, which showed a 2-3 millimeter broad-based disc protrusion with associated facet degenerative changes; a 3-4 millimeter broad-based disc protrusion predominantly left paracentral; a 2-3 millimeter disc protrusion predominantly left posterolateral; and a small disc bulge at L2-3. Dr. Ballard compared the 2007 lumbar MRI and the 2012 lumbar MRI, and found the studies unchanged. She diagnosed a temporary exacerbation of degenerative changes or a strain which had resolved, and recommended a work-conditioning program. Dr. Ballard last saw Wigginton on August 8, 2012. At that time, Wigginton reported that he was "feeling much better." The doctor's examination showed no pain to palpation, normal range of motion, and normal neurologic evaluation. Dr. Ballard released Wigginton to return to full, regular-duty work on August 13, 2012.

Wigginton resumed his prior duties as a truck driver with Jack Cooper. On February 25, 2013, he filed a Form 101 seeking compensation for the work-related injuries of April 19, 2012 and May 22, 2012. At the request of Wigginton's attorney, Dr. Barefoot conducted an IME on March 8, 2013. His examination revealed tenderness to palpation in the paralumbar musculature, and limited range of motion to the lumbar spine, but no focal motor or sensory deficits. Dr. Barefoot diagnosed degenerative disc disease of the lumbar spine, and opined that the May 2012 injury resulted in an increased impairment. The doctor issued work restrictions and assigned an 18% whole-person impairment rating. Of that, he attributed 10% to Wigginton's May 2012 work-related injury and the remaining 8% to the prior 2007 injury. Dr. Barefoot did not address Wigginton's MMI status.

Dr. Martin Schiller conducted an IME at the request of Jack Cooper on May 29, 2013. Wigginton reported sporadic back pain, right leg pain, and right foot numbness. An examination revealed a negative straight raising test, normal motion in the hips, diminished but symmetrical knee jerks, normal muscle strength and sensory examinations of the legs, and no local tenderness of the low back. Dr. Schiller diagnosed chronic low back pain secondary to degenerative disc disease of the lumbar spine, specifically noting that degenerative disease is not caused by an injury. The doctor opined that the work injuries caused no permanent impairment and, instead, were temporary, soft-tissue injuries or strains, and that Wigginton's right-leg symptoms were unrelated to the work incidents. Dr. Schiller disagreed

with Dr. Barefoot's conclusion that the May 2012 work injury resulted in a 10% increased whole person impairment.

In the meantime, Wigginton was treating with Dr. Stacie Grossfeld for a prior, unrelated right knee injury, and during one of his visits, mentioned his right leg and foot pain. Dr. Grossfeld obtained an x-ray of Wigginton's back that showed multilevel disc degeneration with grade 3 changes to the L5-S1. The doctor diagnosed symptomatic degenerative disc disease in Wigginton's lumbar spine, and recommended conservative treatment. Wigginton returned to Dr. Grossfeld on July 19, 2013, at which time the doctor restricted Wigginton from work and referred him to Dr. Thomas Altstadt, a neurosurgeon. Dr. Grossfeld did not think Wigginton had yet reached MMI.

Dr. Altstadt evaluated Wigginton on August 13, 2013. Wigginton reported constant and severe low back pain and paresthesias in the right leg. An examination revealed tenderness to the right glute, absent bilateral ankle jerk, and antalgic gait. Dr. Altstadt diagnosed degeneration of the lumbosacral intervertebral disc and mild spinal stenosis of the lumbar region. The doctor restricted Wigginton from work and ordered an updated MRI.

A formal hearing on Wigginton's workers' compensation claim was conducted on September 18, 2013. At the hearing, Wigginton testified he currently had no left-hip problems or symptoms, he began experiencing right-leg symptoms in May 2013, and he continued to suffer from back stiffness and spasms. He stated he sought no treatment for his back from August 13, 2012, through May 9, 2013.

The ALJ entered an order on October 31, 2013, finding Wigginton to be permanently partially disabled. The ALJ first found that Wigginton had sustained a temporary left hip injury in April 2012 that did not result in a permanent impairment and did not warrant permanent income or medical benefits. The ALJ further determined that Wigginton sustained a work-related injury on May 22, 2012, that resulted in a permanent impairment. Relying on Dr. Barefoot's medical opinion, the ALJ concluded Wigginton had an 18% permanent impairment rating, of which 10% was attributable to the May 2012 injury and 8% was attributable to his pre-existing, active low-back condition. The ALJ also found Wigginton reached MMI on March 8, 2013, stating:

TTD dates and dates of MMI are somewhat problematic. It is well known and virtually beyond dispute that in many instances the date of MMI is more arbitrary and akin to an educated guess and undisputed. Given the length of time since his injury, the type of injury, the type of treatment received, and the fact that a continuation of palliative treatment does not preclude a finding of MMI, I find it irrational that he has not yet reached MMI or had not yet reached [it] as of Dr. Grossfeld's last examination of him.

Rather, since as a matter of fact and law an impairment rating cannot be given, or at the least accepted, until a patient reaches MMI the undersigned finds [Wigginton] reached MMI, for his low back, on March 8, 2013, the date Dr. Barefoot examined him and assigned a rating. He was first taken off work on May 25, 2012.

The ALJ awarded permanent partial disability benefits, enhanced by multipliers contained in KRS<sup>2</sup> 342.730(1)(c)1, and awarded TTD benefits from May 25, 2012, through March 8, 2013.

The parties filed competing petitions for reconsideration. We need not recount every argument raised by each side. Relevant to this appeal, Jack Cooper argued the ALJ erred in awarding TTD benefits from August 13, 2012, through March 8, 2013, because Wigginton had resumed his former job duties on August 13, 2012. Wigginton agreed. This issue also brought back before the ALJ the issue of MMI. Despite Wigginton's acquiescence, the ALJ denied Jack Cooper's petition and refused to amend its MMI finding. Jack Cooper filed a second petition for reconsideration, again contesting the award of TTD. Before the ALJ ruled on the second petition, appeals were taken to the Board. The Board held the appeals in abeyance and partially remanded for the ALJ to address the second reconsideration petition. The ALJ issued an order on January 21, 2014, finding Wigginton was not entitled to TTD benefits from August 2012 through March 2013 "as he was performing full time work and earning a greater wage during that time."

The matter was now ripe for review by the Board. In an Opinion entered on May 30, 2014, the Board upheld the ALJ's decision to rely on Dr. Barefoot's impairment rating, but vacated the ALJ's MMI finding. It reasoned:

Here, the ALJ specifically found Wigginton did not reach MMI until March 8, 2013, relying upon Dr. Barefoot's

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<sup>2</sup> Kentucky Revised Statutes.

opinion of that date, despite having been released to return to work without restrictions on August 13, 2012, and having worked his regular job thereafter. Again, it is noted Dr. Barefoot provided no determination as to when Wigginton reached MMI. In his October 31, 2013 decision, the ALJ awarded TTD benefits during the time Wigginton had actually returned to work at his regular job. This was pointed out in the petition for reconsideration, and Wigginton acknowledged he was not entitled to TTD benefits from August 13, 2012 through March 8, 2013 as awarded. In his order on reconsideration, the ALJ reiterated his award of TTD benefits. After the appeal was filed, and on partial remand, the ALJ amended his award of TTD benefits; however, his determination regarding the date Wigginton reached MMI was not modified. Because it is unclear why the ALJ chose March 8, 2013 as the date Wigginton reached MMI, we vacate the ALJ's determination on that issue. On remand, we direct the ALJ to make a determination of when Wigginton reached MMI in light of the fact that he was released without restrictions in August, 2012, and in fact returned to his regular job. We direct no particular result, however the ALJ is requested to determine when Wigginton reached MMI in light of the amendment of his TTD benefits, and provide the rationale or basis for his determination.

From this order, Jack Cooper appealed.

## **II. Standard of Review**

This Court's role in reviewing a decision of the Board "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." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).



Where, as here, the claimant succeeds before the ALJ and the employer appeals a finding to the Board, the employer must “show that no substantial evidence supported the finding, *i.e.*, that it was unreasonable under the evidence.” *Id.* (footnote omitted). Evidence is substantial if, when taken alone or in light of all the evidence, it has probative value to induce conviction in the mind of a reasonable person. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002). Thus, we review an ALJ’s award to determine whether his findings were reasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). “[A] finding that is unreasonable under the evidence is subject to reversal on appeal.” *Lizdo v. Gentec Equipment*, 74 S.W.3d 703, 705 (Ky. 2002).

### **III. Analysis**

Jack Cooper contends it was error for the Board to reverse the ALJ’s finding that Wigginton reached MMI on March 8, 2013. It argues the ALJ’s MMI determination was supported by substantial evidence – that is, Dr. Barefoot’s medical opinion – and should not have been disturbed by the Board. In response, Wigginton asserts that Dr. Barefoot’s medical opinion cannot amount to substantial evidence to support the ALJ’s finding of MMI because Dr. Barefoot never opined that Wigginton had reached MMI.

There is little evidence in the record of when Wigginton indeed reached MMI, if at all. In fact, Dr. Grossfeld was the only physician to issue an unequivocal MMI estimation; he was of the opinion that, as of October 2013,

Wigginton had not yet achieved MMI. No physician stated Wigginton was at MMI on March 8, 2013. How, then, did the ALJ reach this conclusion?

A careful review of the ALJ's opinion and order reveals the ALJ inferred MMI from Dr. Barefoot's assignment of an impairment rating on March 8, 2013. Stated differently, because Dr. Barefoot assessed an impairment rating on March 8, 2013, the ALJ inferred that Wigginton also reached MMI as of that date. In light of this, the issue before us can be framed as follows: "Is it reasonable to infer, solely from the fact that a physician issued a permanent impairment rating on a certain date, that the claimant reached maximum medical improvement as of that date?" We do not think so.

KRS 342.285 designates the ALJ as the finder of fact and, in that role, empowers him "to determine the quality, character and substance of the evidence," and any inferences to be drawn from the evidence. *American Greetings Corp. v. Bunch*, 331 S.W.3d 600, 602 (Ky. 2010) (footnote omitted). "As the finder of fact, the ALJ was authorized to consider the available evidence, to draw reasonable inferences from it, and to make reasonable findings." *Affordable Aluminum, Inc. v. Coulter*, 77 S.W.3d 587, 591 (Ky. 2002). The salient point to be drawn from these authorities is that any inferences reached must be reasonable. *Lizdo*, 74 S.W.3d at 705 (an unreasonable finding or inference may be reversed on appeal).

Jack Cooper correctly points out that, under Kentucky law, "MMI is a *prerequisite* for the evaluation of permanent impairment." *Hall v. Hospitality Res., Inc.*, 276 S.W.3d 775, 781 (Ky. 2008); *Colwell v. Dresser Instrument Div.*,

217 S.W.3d 213, 217 (Ky. 2006). “Once an impairment has reached MMI [then] a permanent impairment rating may be performed.” *Hall*, 276 S.W.3d at 781 (quoting Linda Cocchiarella & Gunnar B.J. Anderson, *Guides to the Evaluation of Permanent Impairment* 19 (5th ed. 2000)). Consequently, Jack Cooper asserts that the ALJ made a reasonable inference that Wigginton reached MMI on March 8, 2013, the day Dr. Barefoot evaluated Wigginton and issued an impairment rating.

We do not think it reasonable for an ALJ to infer MMI solely from the assessment of an impairment rating because the issuance of an impairment rating does not, in and of itself, indicate a patient has reached MMI. The authorities identified above make it clear that, in Kentucky, a finding of MMI must precede an impairment rating. *Hall*, 276 S.W.3d at 781; *Colwell*, 217 S.W.3d at 217. We do not presume, however, that every physician in the Commonwealth is intimately familiar with our workers’ compensation statutory scheme. It is certainly possible for a physician to find a claimant has reached MMI and yet simply fail to note that in his or her medical records before assessing an impairment rating. It is also equally possible for a physician to mistakenly assign an impairment rating despite the claimant having not yet achieved MMI status.

Regardless of whether this particular appeal arises because of a clerical or legal error, or something else, we find it legally unsound to, in effect, equate an impairment rating with a finding of MMI when there is no other corroborating evidence that the claimant reached MMI as of the date of the impairment rating. In other words, it might be reasonable to infer MMI from the issuance of impairment

rating if that inference is supported by other facts in the record, such as the claimant's own testimony or other contemporaneous medical opinions. But that is not this case. At the very least, the ALJ here identified no such other evidence and appears to have relied on none. Instead, the ALJ looked solely to Dr. Barefoot's assessment of an impairment rating as evidence that Wigginton must have reached MMI on March 8, 2013, the date the impairment rating was given. We do not think that Dr. Barefoot's issuance of an impairment rating, in and of itself, constitutes substantial evidence to support the ALJ's inference and finding that Wigginton reached MMI. In light of this conclusion, we are unable to find that the Board "committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

#### **IV. Conclusion**

For the foregoing reasons, we affirm the Board's May 30, 2014 order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, RICKY D.  
WIGGINTON:

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