

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000861-WC

AGI TRANSPORTATION, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-01880

ORLANDO ADKINS;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD OF KENTUCKY

APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** * * * * *

BEFORE: COMBS, D. LAMBERT AND SMALLWOOD, JUDGES.

COMBS, JUDGE: Appellant, AGI Transportation, Inc. (AGI), appeals from an Opinion of the Workers' Compensation Board affirming an award of temporary total disability (TTD) benefits following a remand to the Administrative Law

Judge (ALJ). For the reasons set forth below, we affirm in part, vacate in part, and remand.

We limit our discussion of the record to the issue before us. On December 8, 2013, Appellee, Orlando Adkins (Adkins), was injured in the course and scope of his employment with AGI. Following the injury, he performed light duty work until July 2, 2014, when his increasing restrictions could no longer be accommodated. Adkins earned \$8.00 per hour on light duty, an amount far less than his \$906.55 average weekly wage (AWW) prior to his injury. AGI's workers' compensation carrier voluntarily paid Adkins temporary partial disability benefits¹ while he was on light duty.²

By Opinion, Award and Order rendered November 3, 2016, the ALJ concluded that Adkins was not entitled to an award of TTD benefits when he was on light duty, citing *Trane Commercial Systems v. Tipton*, 481 S.W.3d 800 (Ky. 2016) (Absent extraordinary circumstances, TTD award inappropriate where worker released to return to customary employment and returned to work). The ALJ did award a subsequent period of TTD benefits after Adkins stopped working

¹ “[A]lthough Kentucky law provides for temporary total disability, it has not provided for awards of temporary, partial disability for some time.” *Clemco Fabricators v. Becker*, 62 S.W.3d 396, 397 (Ky. 2001).

² As Appellant explains in its Statement of Facts, AGI's workers' compensation carrier agreed to voluntarily make up the difference between Adkins' lower light duty wage and the TTD rate when his earnings on light duty fell short of the TTD rate.

light duty until he reached maximum medical improvement (MMI) -- as well as permanent partial disability (PPD) benefits with a credit for benefits previously paid.

Adkins appealed to the Board and argued, *inter alia*, that the ALJ utilized an incorrect standard in denying TTD benefits while he was on light duty and in allowing AGI a credit for temporary partial disability benefits voluntarily paid for that period.

By Opinion rendered April 28, 2017, the Board affirmed in part, vacated in part, and remanded. On remand, the Board directed the ALJ to

set forth a complete analysis of Adkins' entitlement to TTD benefits during the time he performed light duty work in accordance with the standard articulated in Trane . . . whether extraordinary circumstances exist to justify an award of TTD benefits.

The Board disagreed with Adkins's argument that the ALJ erred in allowing AGI a credit for the temporary partial disability benefits voluntarily paid while Adkins was on light duty. The Board explained that AGI is entitled to a credit for the indemnity benefits paid by AGI over and above the wages earned; however, AGI "is not entitled to a credit for the *bona fide* wages paid to Adkins during the period in question[.]"

In his January 21, 2018, Order on remand, the ALJ analyzed the TTD issue as instructed by the Board. The ALJ concluded that there is a rational

relationship between the work of a truck driver delivering freight (the job that Adkins performed at the time of his injury) and the light duty job he performed in the yard cleaning and moving tractors. The ALJ further concluded that keeping the motor yard clean and orderly with clean and serviceable tractors and trailers for delivery of goods was a necessary part of AGI's business. The ALJ held that:

The plaintiff's light duty work performing this task bears a reasonable and rational relationship to the defendant's business. However, the plaintiff's wages were greatly decreased to \$8.00 per hour from the \$906.55 [AWW] he was earning at the time of his injury. The TTD rate for that [AWW] provides for a [TTD] rate of \$604.37. This [TTD] rate is nearly twice as much as the plaintiff's earnings while working in the yard.

The ALJ explained that:

[T]he ALJ infers [that the Board] believes that since the plaintiff's wages during the period of light duty employment were approximately half of the TTD rate, this qualifies as an extraordinary circumstance.... regardless of the voluntary temporary partial disability benefits paid to make up the difference, as there is no authorization for temporary partial benefits in KRS Chapter 342. As such, the ALJ finds the plaintiff is entitled to TTD benefits from January 24, 2014 through June 2, 2014

On remand, the ALJ ordered that "defendant is given credit for benefits paid against past due benefits awarded herein."

AGI appealed. The Board affirmed by Opinion rendered May 11, 2018. The Board stated that "[t]he sole issue AGI raises on appeal is whether the

ALJ erred in awarding TTD benefits from January 24, 2014 through June 2, 2014.”

The Board concluded there was no error. “Because the ALJ performed the appropriate analysis, and his decision is supported by substantial evidence, we affirm.”

The Board went on to determine that AGI was not entitled to a credit for the wages paid to Adkins while he was on light duty. The Board explained that there was no applicable authority under KRS Chapter 342 allowing such a credit,³ nor was there any evidence that the wages were intended to replace TTD benefits, noting *Millersburg Military Inst. v. Puckett*, 260 S.W.3d 339, 342 (Ky. 2008) (“Wages are paid for performing labor; income benefits are paid for work-related disability. . . . [E]vidence did not permit a reasonable finding that the employer intended to pay [wages] in lieu of workers' compensation benefits.”).

In the appeal before us now, AGI submits that the ALJ’s original decision denying TTD benefits was correctly analyzed under *Trane* and that it should be reinstated.

In *Trane*, the claimant returned to a different, less physically demanding job after the injury but, unlike the case before us, *at the same hourly*

³ The Board utilized the version of KRS Chapter 342 in effect at that time; however, as discussed below, the Workers’ Compensation Act has been amended recently.

rate of pay. The claimant argued that she was entitled to TTD until she reached MMI and was released to her pre-injury job. Our Supreme Court disagreed:

[W]e 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 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 (emphasis added).

In the case before us, the ALJ determined that Adkins's light duty wages qualified as an extraordinary circumstance because they were approximately one-half of the TTD rate. The ALJ could not award temporary partial disability benefits to compensate Adkins for the income he lost while on light duty because KRS Chapter 342 does not recognize temporary partial disability. "Workers' compensation is a creature of statute, and the remedies and procedures described therein are exclusive. When an employer and employee submit themselves to the provisions of the act, their rights and liabilities are henceforth to be measured by the terms of the act." *Williams v. Eastern Coal Corp.*, 952 S.W.2d 696, 698 (Ky. 1997) (internal citation omitted).

The Board concluded that the ALJ performed the appropriate analysis under *Trane* and that his decision is supported by substantial evidence. The function of our review is to correct the Board only where we perceive 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, 687–88 (Ky. 1992). We find no error with respect to the award of TTD benefits and affirm the Board's opinion in that regard.

Regardless of whether AGI raised it as an issue on this appeal, the Board determined that AGI was not entitled to a credit for *bona fide* wages under the law in effect at that time. However, KRS Chapter 342 has been amended. On March 30, 2018, the Governor signed House Bill 2, which became effective on July 14, 2018. Section 13 provides that KRS 342.730 is amended to read as follows, in relevant part:

(7) Income benefits otherwise payable pursuant to this chapter for temporary total disability during the period the employee has returned to a light-duty or other alternative job position shall be offset by an amount equal to the employee's gross income minus applicable taxes during the period of light-duty work or work in an alternative job position.

Section 20 provides:

(2) Sections 2, 4, and 5 and subsection (7) of Section 13 of this Act are remedial and shall apply to all claims irrespective of the date of injury or last exposure, provided that, as applied to any fully and finally adjudicated claim, the amount of indemnity ordered or awarded shall not be reduced and the duration of medical benefits shall not be limited in any way.

Thus, KRS 342.730(7) applies to this claim. Accordingly, we are compelled to vacate that portion of the Board's Opinion holding that AGI is not entitled to a credit for the *bona fide* wages paid. "[W]hether an award conformed to Chapter 342 was a question of law that a court should review, regardless of

whether contested by a party” *Sidney Coal Co., Inc. v. Kirk*, 364 S.W.3d 168, 171 (Ky. 2012).

The Opinion of the Workers’ Compensation is affirmed in part, vacated in part, and remanded to the ALJ for entry of an amended award in accordance with the current version of KRS 342.730(7) – to wit, that the award of “temporary total disability during the period the employee has returned to a light-duty or other alternative job position shall be offset by an amount equal to the employee's gross income minus applicable taxes during the period of light-duty work or work in an alternative job position.”

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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