

RENDERED: NOVEMBER 8, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-000553-WC

LEXINGTON-FAYETTE URBAN  
COUNTY GOVERNMENT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-11-01196

FRANKLIN BRIGHT; HON. ROBERT L.  
SWISHER, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: The Lexington-Fayette Urban County Government (LFUCG) appeals from an opinion and award of the Workers' Compensation Board (Board) affirming an opinion and award of the Administrative Law Judge (ALJ) awarding Franklin Bright temporary total disability (TTD) benefits and

permanent partial disability benefits. The only issue presented concerns the award of TTD benefits for a period when Bright was on administrative leave from his employment for misconduct. We conclude Bright is not precluded from receiving TTD benefits because of his misconduct. The ALJ's finding that Bright was temporality totally disabled is not so unreasonable under the evidence that it is erroneous as a matter of law and the award of TTD benefits does not violate public policy.

Bright is 51 years old and obtained a GED in 1979. He had been employed with LFUCG since 1999. At the time of his injury, his job duties included removing electronic items from trucks, stacking them on pallets, wrapping them to be stored and loading them on a truck.

On June 29, 2011, he slipped and fell while attempting to put ice in a cooler. He was treated at the Urgent Treatment Center and placed on light lifting restrictions but returned to work the following day. Subsequently, Bright was treated by Dr. Dirk Franzen who restricted him from lifting over ten pounds and prolonged standing or sitting. He did not release Bright to return to regular duty work until February 15, 2012. Bright continued his employment at LFUCG with light duty restrictions.

At some point after his injury, Bright was called to the office of James McCarty, his supervisor, and suspended without pay for 128 hours as a result of leaving the worksite without permission. A week later, Bright was arrested for terroristic threatening based on a voicemail left on McCarty's telephone.

Bright testified he continues to have sharp pain in his lower back and unable to find work. He further testified that after his injuries, he worked with restrictions and was unable to perform his customary duties. He was still considered to be on leave and, although LFUCG offered him a job working on a garbage truck, he could not perform that work. He did not believe he could return to his prior employment even if LFUCG offered him a position.

Form 107 completed by Dr. James Owen was submitted. He diagnosed persistent back pain with two-level minor vertebral body fractures and chronic pain attributable to Bright's work injury and assigned a 15% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment 5th Edition (AMA Guides). He opined Bright was at maximum medical improvement (MMI) and unable to return to his previous work.

Dr. Franzen testified an MRI revealed slight compression of the endplates at L2 and L3. He saw Bright on August 16, 2011, and placed Bright on light duty restriction. In a February 15, 2012, office note, Dr. Franzen indicated Bright was at MMI and could return to work without restrictions. He assigned a 5% impairment rating pursuant to the AMA Guides but did not anticipate further medical treatment.

LFUCG submitted the report of Dr. Gregory T. Snider who evaluated Bright on November 11, 2011. Dr. Snider diagnosed sprain/strain, possible mild L2 compression or contusion, and low back pain. He recommended a ten-pound lift/push/pull limit with no repetitive bending or lifting and opined Bright could

return to restricted duty work. He opined Bright would be at MMI within 30 days and assessed a 5% impairment rating based on the AMA Guides.

McCarty testified he had been Bright's supervisor since April 2011, and completed an accident report following Bright's work injury. He was aware of Bright's restrictions following his injury and made arrangements to accommodate Bright but testified that Bright did not follow his restrictions. McCarty was unable to confirm or deny whether Bright was paid while on administrative leave.

After finding Bright sustained a work-related injury, the ALJ awarded TTD benefits from July 27, 2011, through February 15, 2012, and permanent partial disability benefits based on Dr. Owens's 15% impairment rating with the 2 multiplier pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(c)(2).

Regarding TTD benefits, the ALJ found that Dr. Franzen placed Bright on light or modified duty work restrictions from August 16, 2011, until he pronounced him at MMI with no work restrictions on February 15, 2012. Because of his work restrictions and the requirements of his duties at LFUCG, the ALJ found:

[B]etween July 27, 2011, the date which his employment was suspended for non-injury-related issues up until his full duty release by Dr. Franzen on February 15, 2012, [Bright] did not reach a level of improvement which would have allowed a return to his regular and customary duties at the E-waste facility with [LFUCG] and [Bright] is, therefore, entitled, to an award of temporary total disability benefits from July 27, 2011 through February 15, 2012, at the rate of \$327.20 per week.

LFUCG filed a petition for reconsideration. In an order overruling the petition, the ALJ made the following ruling regarding TTD benefits:

Regardless of the fact that [Bright] had returned to work at light or modified duty prior to the suspension for disciplinary reasons, at the time he was suspended, July 27, 2011, he had not reached [MMI] and had not reached a level of improvement which would have allowed a return to his full regular duties with [LFUCG]. Thereafter [Bright] was restricted against working his full regular duties by Dr. Franzen until he issued a full duty release on February 15, 2012. The undersigned finds no error, therefore, in the award of temporary total disability benefits for the period awarded even though [Bright] had returned to work at modified duty.

LFUCG appealed arguing, in part, that the award of TTD benefits was erroneous. After the Board affirmed, LFUCG appealed to this Court challenging the award of TTD benefits.

LFUCG presents two issues on appeal. First, it contends Bright did not qualify for TTD benefits during the period in question because he was assessed restrictions that allowed return to his customary duties and Bright returned to his customary employment until placed on leave for misconduct. Second, it contends the award of TTD benefits violates public policy because it permits Bright to recover TTD benefits and receive his salary.

Our standard of review when considering questions of fact in workers' compensation cases is as follows:

Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Although a party may note evidence which would have supported a conclusion

contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.

*Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000) (citations omitted).

Our review is not so limited when the issue is one of statutory interpretation, which is matter of law. “[C]ourts are not bound by the ALJ’s or the Board’s interpretation of a statute. Indeed, it is the appellate court’s province to ensure that ALJ decisions, and the Board’s review thereof, are in conformity with the Workers’ Compensation Act.” *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 874 (Ky.App. 2009)(citations omitted). Our initial inquiry is whether, as matter of law, Bright is precluded from recovering TTD benefits because of his misconduct.

As a threshold matter, implicit in the ALJ’s decision and the Board’s opinion is that Bright’s suspension from employment for misconduct does not preclude an award of TTD benefits. We agree a claimant who returned to light duty work following a work-related injury and, subsequently, suspended or terminated from that employment for misconduct is not automatically precluded from receiving benefits.

It is the general rule that our Workers’ Compensation Act is to be “liberally construed to effect [its] humane and beneficent purposes.” *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 802 (Ky.App. 1995). As explained in *Double L. Const., Inc.*

*v. Mitchell*, 182 S.W.3d 509, 514 (Ky. 2005), “[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.” However, when an employee is suspended or terminated from employment for misconduct after a return to light duty work following a work injury, whether the worker is entitled to disability benefits requires a fact-intensive analysis to determine the cause of the workers’ inability to work. The quandary created by such circumstances was concisely summarized by the Louisiana

Appellate Court:

[A]n employer cannot create a job accommodating the restrictions placed on the injured employee and then fire that employee, without cause, to avoid paying benefits. On the other hand, we recognize that an injured employee cannot refuse to accept the employment or blatantly violate company policy without the possibility of recourse by the employer.

*Palmer v. Alliance Compressors*, 917 So.2d 510, 513 (La.Ct.App. 2005). In *Palmer*, the Court affirmed the denial of benefits on the basis that the job was no longer available to the claimant “solely due to her own actions” and was “no different from refusing to accept the job in the first place[.]” *Id.* at 514.

It is sound reasoning that if an employee is terminated based solely on misconduct, TTD benefits should be denied. However, it is also sound reasoning that if an employee is temporarily totally disabled as a result of a work-related injury, he should not be denied benefits because of misconduct. The rule stated in *Interstate Scaffolding, Inc. v. Illinois Workers’ Compensation Comm’n*, 236 Ill.2d

132, 923 N.E.2d 266, 337 Ill. Dec. 707 (2010), serves the purpose of our Workers' Compensation Act and preserves the right of an employer to terminate an at-will employee. Focusing on the purpose of workers' compensation to provide a worker injured in the workplace with financial protection, the Court held:

It remains the law . . . that an at-will employee may be discharged for any reason or no reason. Whether an employee has been discharged for a valid cause, or whether the discharge violates some public policy, are matters foreign to workers' compensation cases. An injured employee's entitlement to TTD benefits is a completely separate issue and may not be conditioned on the propriety of the discharge.

[W]e hold that an employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged—whether or not the discharge was for “cause.” When an injured employee has been discharged by his employer, the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits.

*Id.* at 149, 923 N.E.2d at 276, 337 Ill. Dec. at 717 (citation omitted.)

We find the Illinois Court's reasoning persuasive and hold an employee's termination or suspension for misconduct does not preclude an award of TTD benefits if he remains unemployed as a result of his temporary total disability as defined under Kentucky's Workers' Compensation Act.

Whether a workers' compensation claimant is temporarily totally disabled is a question of fact. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 329



(Ky.App. 2000). Accordingly, the ALJ's finding must be affirmed unless it was so unreasonable under the evidence that it was erroneous as a matter of law. *Ira A. Watson Dep't Store*, 34 S.W.3d at 52.

Although Kentucky law provides for temporary total disability, it does not provide for awards of temporary partial disability. *Clemco Fabricators v. Becker*, 62 S.W.3d 396, 397 (Ky. 2001). Pursuant to KRS 342.0011(11)(a), to receive TTD benefits, a claimant must not have "reached maximum medical improvement from an injury" and "not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Whether a claimant has reached MMI is normally discernable from the medical testimony. However, the second inquiry, whether a claimant can return to employment, is more often a determination based on multiple factors.

In *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000), our Supreme Court explained the statutory definition and its application in determining the duration of an appropriate award of TTD benefits. Wise's treating physician testified Wise could return to work on July 11, 1997, with a five-pound lifting restriction but that he did not reach MMI until October 28, 1997. Wise returned to work for a different employer at the end of September, 1997. The employer asserted benefits should have terminated on July 11, 1997, because Wise was released to return to work with a five-pound lifting restriction. The Court held to the contrary stating "[i]t would not be reasonable to terminate the benefits of an employee when he was released to perform minimal work but not the type that is

customary or that he was performing at the time of his injury.” *Id.* at 659. Noting Wise returned to work in September and did not reach MMI until October 28, the Court concluded substantial evidence supported the ALJ’s decision to award TTD benefits until September 30, 1997. *Id.*

Cases subsequent to *Wise* have emphasized a release “to perform minimal work does not constitute a return to work for purposes of KRS 342.0011(11)(a).” *Bowerman*, 297 S.W.3d at 874 (internal citations omitted). The phrase “return to employment” means “a return to the type of work which is customary for the injured employee or that which the employee has been performing prior to being injured.” *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579, 581 (Ky.App. 2004).

The two-pronged test announced in *Wise* is consistent with the purpose of awarding TTD benefits when a worker has not reached MMI but is released to return to minimal work but not work that is customary or that he was performing at the time of his injury. TTD is not based on a finding of an AMA impairment, or on an inability to perform *any* type of work. *Double L. Const. Inc.*, 182 S.W.3d at 515.

LFUCG argues the TTD award was erroneous because Bright returned to his employment and performed his customary duties. Although Bright returned to his employment, there was evidence he was unable to perform his customary duties. Bright’s employment at LFUCG required that he stand for prolonged periods of time and lift in excess of ten pounds. Until his release to full

duty on February 15, 2012, Bright had not reached MMI and worked with restrictions. As noted by the ALJ, Bright testified he was not provided work within his restrictions and was unable to perform his customary duties. Although there was certainly evidence to the contrary and a different result would have been reasonable, under the appropriate standard of review, this Court is unable to say that the ALJ's finding that Bright was temporarily totally disabled from July 27, 2011, through February 15, 2012, is so unreasonable that it must be reversed.

LFUCG's final contention that the TTD award creates a windfall to Bright because he received his salary for much of the same period is without factual basis. Bright testified he did not receive any income from LFUCG while on leave. Although LFUCG asserts that McCarty testified that Bright remained on paid leave at least until April 26, 2012, McCarty actually testified as follows:

Q. And are you aware of what—I think he—when he testified, he said that he was still employed, but he was not receiving a salary; do you know what that status is?

A. He's on administrative leave. All I can tell you, by the information that I can see of, our time-keeping records, Kronos, it does show that he is getting paid. But I cannot confirm or deny that.

McCarty's testimony was simply that he did not know if Bright was paid and LFUCG did not present documentation or other evidence to establish Bright was paid while on leave. Consequently, there is no evidence Bright received any financial windfall as a result of the TTD award.

Based on the foregoing, the opinion of the Workers' Compensation Board is affirmed.

NICKELL, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

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