

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: May 18, 2023

CLAIM NO. 201974005

WESTROCK

PETITIONER

VS.

APPEAL FROM HON. AMANDA PERKINS,  
ADMINISTRATIVE LAW JUDGE

RONALD LIVERS  
and HON. AMANDA PERKINS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and MILLER, Members.

**STIVERS, Member.** Westrock appeals from the December 19, 2022, Opinion, Award, and Order and the January 12, 2023, Order ruling on the Petition for Reconsideration of Hon. Amanda Perkins, Administrative Law Judge (“ALJ”). The ALJ awarded Ronald Livers (“Livers”) permanent partial disability (“PPD”) benefits, temporary total disability (“TTD”) benefits from March 6, 2021, through November 2, 2021, and medical benefits for his work-related low back injury.

On appeal, Westrock asserts the ALJ's award of TTD benefits from March 6, 2021, through June 27, 2021, was patently erroneous. As the issue on appeal is confined to the ALJ's award of TTD benefits, only those portions of the record pertinent to the duration of TTD benefits to which Livers is entitled will be cited in this opinion.

### **BACKGROUND**

The Form 101 alleges Livers sustained work-related injuries to multiple body parts on June 26, 2019, in the following manner: "Driving a red tag trailer to trailer lot. The trailer broke in two bringing the truck up and then slamming down. This caused injury to his back, buttocks and legs."

Livers was deposed on March 15, 2021. He started working for Westrock as a box truck driver in 2008. At the time of his injury, Livers was working as a "yard jockey" moving trailers in and out of the yard. Following the June 26, 2019, injury, Livers was moved to light duty work. He testified as follows:

Q: Okay. So following the work injury up until the period where you went off for COVID quarantine, were you doing a light – were you work [sic] in a different position?

A: Yes, sir. I was in the office and they called it a scale master. Where I scale people in and scale them out. Whether it be a local person just dropping off cardboard, or some semi going down the road, which we had extra paperwork for, I had to find out what load he was picking up, and his numbers had to match my numbers.

Then I would call a supervisor and say, Hey, this certain person is here to pick up cardboard or paper or plastic or cans. And he would put them in a dock, load them up, they would come back to the scale and I'd weigh them out, finish all their paperwork look it over, make sure

everything is right, shove it through a window, off they went.

Q: Were you paid the same hourly rate?

A: I was.

Q: Did you typically work the same number of hours?

A: I did. Well, they took away my overtime. You know, I couldn't get no overtime. They paid me a little bit here and there, but not like what I would have got if I was still driving.

I would have got 45, close to 50 hours. And then when I went in the office, it was 40, slash. And then if you got over that, the office manager would throw a fit. Which she always did throw a fit.

Q: From a physical standpoint only, were you able to do that light duty position?

A: Yes. Because I could sit down, I could stand up, I could walk around. If I started hurting, you know, normally it's like clockwork, right at noon I would take a pain pill to make it through the day from standing or sitting, hurting so bad.

Livers was deposed again on October 4, 2021. He testified a spinal cord stimulator was inserted on June 28, 2021. He described his physical condition since the surgery:

A: I guess about the same. The SI joint that they were supposed to fix still bothers me, sitting down on a toilet and stuff, and the pain down my leg has eased up some from the stimulator, yes, but the SI joint that's been pinched from this accident, that pain is still there and is still kicking.

Q: And that SI joint pain, is it there constantly?

A: Yes. Burning. It don't matter if I'm standing, sitting, and now the little electrical shocks, that part comes and goes. Now, if I go to sit down on the toilet, I'll feel a

little pinch like and it sends a shock down me; maybe putting my socks on or trying to put on a pair of shorts; just little things. When I bend over slightly or turn slightly, it'll send a shock wave. But the burning and the irritation is there constantly.

Livers also testified at the October 19, 2022, hearing. Regarding his light-duty tasks, Livers testified as follows:

A: They asked me to come back to work. And they said due to – I'm on Workman's [sic] Comp. They want me to sit in the breakroom. So I sat there for four months. And the office manager come in and said, well, it's time for you to go to the scale house and start working over there. And they asked me to go and start pushing a button every time somebody come on to – to weigh them in or out.

And I told him no at first because I'm dyslexic, and I can't read very well. And – And the lady said, well, that's no problem. All you're going to do is push a button. So I go over there and then she comes in and was trying to pile more stuff on to me and I told her I could not do it. She took that as insubordination, so she wrote me up. And I think it was in her master plan to get rid of me, so.

Q: Was that the job you ended up doing until March 5, 2021?

A: Yes.

...

Q: Since the injury you've been training people to do your job?

A: I've trained two people.

Q: Was that at Westrock?

A: That was at Westrock.

Q: Is that part of your light duty position?

A: No, it wasn't. I was just asked to do it.

Q: But I mean, was that during the period there where you were on light duty?

A: Yes.

Q: Okay. So you were training other employees on how to –

A: Talking them through it. I was never in the truck.

Q: Okay.

A: They wouldn't allow me in the truck. Jose, I trained Jose. I trained Bruce. I don't know Bruce's last name. He ended up quitting. Both of them did.

Q: Were there any other things that you did other than the scale – is it scale master; is that the –

A: That's the title they gave me, yes.

Q: Other than the scale master and the occasional training of employees, were there any other things, duties, tasks that you did during that light period – light duty period?

A: The mail would come in. They brought it in and put it on my desk. I'd open the box, put toilet paper away, the light stuff. The heavy stuff, the – the ladies normally took care of.

Q: In the scale master job, is that something – were you doing tasks that would have to be accomplished regardless of whether you were doing it or someone else was doing it?

A: Yeah, it – it had to be done. Yeah. It was weighing in trucks and weighing out trucks.

On March 5, 2021, Livers was terminated from his employment at Westrock for allegedly bringing Covid into the workplace.

Livers introduced the August 17, 2021, correspondence of Dr. Patricia Habimana indicating Livers had a dorsal column neurostimulator implanted on June 28, 2021.

Relevant to the issue on appeal is Dr. Jonathan Hodes' November 2, 2021, report in which he expressed the opinion Livers achieved maximum medical improvement ("MMI") on November 2, 2021, following the spinal cord stimulator implantation.

The September 14, 2022, Benefit Review Conference Order and Memorandum lists the following contested issues: "Work-related injury/causation; Credit/offset for: overpayment of TTD as to duration; TTD Benefits (duration); KRS 342.730 benefits (including permanent total disability); Pre-existing disability and/or impairment; Vocational rehabilitation benefits; Proper use of the AMA Guides; and Medical Benefits (including filed medical disputes)." The parties stipulated Westrock paid TTD benefits in the amount of \$697.95 per week from June 28, 2021, through November 30, 2021.

The ALJ's findings concerning the award of TTD benefits are set forth *verbatim* as follows:

Temporary total disability is defined in KRS 342.0011(11)(a) as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement which would permit a return to employment. *Magellan Health v. Helms*, 140 SW 2d 579 (Ky. App. 2004).

In *W. L. Harper Const. Co., Inc., v. Baker*, 858 S.W. 2d 202 (Ky. App 1993), the Court explained temporary total disability benefits were payable until medical evidence established the recovery process, including any treatment reasonably rendered to improve the claimant's

condition was over, and the underlying condition has stabilized such that the workers' compensation claimant was capable of returning to his job, or to some other employment which he was capable and was available in the local labor market.

Livers' spinal cord stimulator was placed on June 27, 2021, and Westrock paid temporary total disability benefits from June 28, 2021, through November 30, 2021. Dr. Hodes placed Livers at MMI on November 2, 2021, and indicated that the recovery process after a spinal cord stimulator is complete by the six-month mark. Dr. Nazar placed him at MMI as of January 4, 2022. However, Dr. Nazar did not provide any reasoning for the two-month difference between his date of MMI and Dr. Hodes' date of MMI. Additionally, there is no medical treatment during that period to indicate his condition had not stabilized by November 2, 2021. Thus, the ALJ finds Livers reached MMI as of November 2, 2021.

Livers is entitled to TTD benefits in the weekly amount of \$697.95 from March 6, 2021, through November 2, 2021. Westrock shall take credit for benefits previously paid.

Westrock filed a Petition for Reconsideration requesting additional findings of fact regarding the ALJ's award of TTD benefits from March 6, 2021, the day after Livers' employment at Westrock ceased, through June 27, 2021, the day before his spinal cord stimulator was implanted.

In the January 12, 2023, Order, the ALJ supplied the following additional findings which are set forth *verbatim*:

Defendant filed a petition for reconsideration of the Opinion, Award and Order entered on December 19, 2022. Defendant requested additional findings of facts related to the award of temporary total disability benefits from March 6, 2021, through November 2, 2021. Specifically, Defendant requested additional findings for the TTD benefits awarded from March 6, 2021, when Defendant terminated Plaintiff, through June 28, 2021, the date Plaintiff's spinal cord stimulator was implanted.

KRS 342.281 provides that an ALJ is limited on review on petition for reconsideration to the correction of errors patently appearing upon the face of the award, order, or decision. The ALJ may not reweigh the evidence and change the findings of facts on a petition for reconsideration. *Garrett Mining Co. v. Nye*, 122 S.W.3d 513 (Ky. 2003). Defendant has not asserted the ALJ committed a patent error. Thus, its petition for reconsideration is denied. However, the ALJ will further explain her findings related to Plaintiff's entitlement to TTD benefits.

Temporary total disability is defined in KRS 342.0011(11)(a) as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement which would permit a return to employment. *Magellan Health v. Helms*, 140 SW 2d 579 (Ky. App. 2004).

It is undisputed that Plaintiff was not at maximum medical improvement during the period in question, March 6, 2021, through June 28, 2021. The disagreement between the parties was whether Plaintiff was entitled to TTD benefits after he was terminated from his position as a scale clerk on March 6, 2021. Defendant alleged Plaintiff could return to his customary employment during this period; thus, he did not meet the second requirement for TTD.

The Court in *Trane Commercial Systems v. Tipton*, 481 S.W.3d 800, 807 (Ky. 2016), addressed entitlement to TTD benefits after a Plaintiff has returned to employment, although not to the same job where he or she was injured, but is not at MMI.

In *Trane*, Tipton returned to a different, less physically demanding job after the injury at the same hourly rate of pay. Tipton argued 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 in original).

Here, Plaintiff did not return to his pre-injury job as a truck driver, instead, he worked as a scale clerk for Defendant until he was terminated for allegedly violating Covid-19 protocols on March 5, 2021. It appears that his work as a scale clerk was work for which he had the experience, training, and education to perform. However, the *Trane* Court required a return to employment as part of its test to determine entitlement to TTD benefits. Once Defendant terminated Plaintiff, the ALJ found he no longer returned to employment as contemplated and required by *Trane*.

Additionally, the *Trane* Court held, “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.” Here, unlike the circumstances in *Trane*, Plaintiff was not awarded TTD benefits for a period he also earned wages. Instead, Plaintiff was awarded TTD benefits for the period after Defendant terminated him and before he reached MMI.

Defendant cited *Kleier v. Macy's*, 2019-SC-0684-WC, 2021 WL 234923, (Ky. Jan. 21, 2021), to support its argument that TTD benefits were not appropriate once Plaintiff stopped working. Notwithstanding its unpublished designation, the circumstances in *Kleier* and here are different. In *Kleier*, Plaintiff quit working for Defendant. Here, Defendant fired Plaintiff. Second, it does not appear that the *Kleier* Court's holding was a mandate that it contemplated applying in all cases with similar fact scenarios. This is evident by its unpublished designation and the language it used to affirm the ALJ's decision:

Based on the above facts, there was sufficient evidence of probative value to support the ALJ's denial of Kleier's request for additional TTD benefits. Although evidence existed that may have supported a different decision by the ALJ, that evidence was not so overwhelming as to compel a finding in her favor.

*Id.* at 3.

Based on the above, Defendant's petition is denied.

On January 31, 2023, the parties submitted a Form 110 Settlement Agreement which reveals the parties agreed Westrock would pay the amount of \$17,963.41 in settlement of Livers' entitlement to future PPD benefits. The Form 110 indicates that TTD benefits were paid at the rate of \$697.95 per week from June 28, 2021, through November 30, 2021. The Form 110 further notes the disputed award of TTD benefits is on appeal to this Board. By order dated February 14, 2023, the ALJ approved the Form 110 Settlement Agreement.

On appeal, Westrock asserts the ALJ erred by awarding TTD benefits from March 6, 2021, the date after Livers last worked at Westrock for alleged Covid-19 protocol violations, through June 27, 2021, the day before his spinal cord stimulator surgery. It notes the ALJ determined Livers' return to light-duty work constitutes a return to customary employment. Westrock claims that once an employee returns to customary employment, entitlement to TTD benefits ceases and cessation of that employment does not change one's entitlement to TTD benefits. It further asserts that Livers' entitlement to TTD benefits began only after the spinal cord stimulator was implanted on June 28, 2021, and runs through the date Livers achieved MMI on November 2, 2021, as opined by Dr. Hodes. We vacate the ALJ's award of TTD benefits from March 6, 2021, through June 27, 2021, and remand for additional findings and analysis.

Temporary total disability is statutorily defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement ("MMI") from an injury and has not reached a level of

improvement that would permit a return to employment[.]” In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Kentucky Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits as long as he/she remains disabled from his/her customary work or the work he/she was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, “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.” Thus, a release “to perform minimal work” does not constitute a “return to work” for purposes of KRS 342.0011(11)(a).

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury. The Court stated, “... we reiterate today, Wise does not ‘stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.’” Id. at 254.

In Trane Commercial Systems v. Tipton, 481 S.W3d 800 (Ky. 2016), the Supreme Court clarified when an award of TTD benefits is appropriate in cases where the employee returns to modified duty. The Court stated:

We take this opportunity to further delineate our holding in *Livingood*, and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we 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).

Significantly, Westrock concedes Livers is entitled to TTD benefits starting on June 28, 2021, the date the spinal cord stimulator was implanted, and running through November 2, 2021, the date he achieved MMI per Dr. Hodes' opinion. The record indicates Westrock paid voluntary TTD benefits during this time

period. The award of TTD benefits during this period of time is not being contested on appeal.

At issue is Livers' entitlement to the TTD benefits awarded by the ALJ beginning March 6, 2021, the day after Livers last worked for Westrock, through June 27, 2021, the day before his surgery. As held in the above-cited case law, entitlement to TTD benefits requires a finding that the claimant has not yet reached MMI *and is unable to return to customary employment*. In the January 12, 2023, Order, the ALJ determined Livers' work as a scale clerk following the June 26, 2019, work injury "was work for which he had the experience, training, and education to perform." That finding by the ALJ in the January 12, 2023, Order pursuant to the holding in Trane, *supra*, negates an award of TTD benefits during the period Livers worked as a scale clerk. In Trane, the Supreme Court explained:

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.

Id. at 807.

The ALJ addressed Westrock's request for additional findings regarding whether Livers' work constituted customary employment as defined in Trane as being work within a claimant's physical restrictions and for which he has the experience, training, and education. Consequently, prior to termination, Livers was not eligible to receive TTD benefits because, as found by the ALJ, he had returned to customary employment during this period of performing light duty work.

Trane at 807. Livers was not terminated due to an inability to continue engaging in the scale clerk work for which he had the experience, training, and education to perform. Thus, before awarding TTD benefits from and after March 6, 2021, through June 27, 2021, the ALJ must first determine whether Livers retained the capacity to perform the scale clerk work which is work for which she found he had the experience, training, and education to perform. As pointed out by Westrock, the ALJ failed to address this portion of the TTD analysis in determining whether Livers was entitled to TTD benefits during the period in question. The ALJ failed to render any findings regarding Livers' capabilities following his termination on March 5, 2021, for allegedly violating Covid-19 protocols and not due to his inability to continue to engage in work for which he had the experience, training, and education to perform.

This Board acknowledges Westrock's request for additional findings in its December 22, 2022, Petition for Reconsideration regarding whether Livers' light duty work constitutes "customary employment." However, the definition of "customary employment" in Trane, as being work within a claimant's physical restrictions and for which he has the experience, training, and education reveals Livers indeed returned to "customary employment" during his period of light duty work per the ALJ's explicit findings in her January 12, 2023, Order. Trane at 807. The ALJ failed to render any findings regarding Livers' capabilities *following his termination on March 5, 2021*, for, as acknowledged by the ALJ in both the December 19, 2022, Opinion, Award, and Order and the January 12, 2023, Order, reasons unrelated to his ability to continue working.

We note the following language as set forth in the January 12, 2023, Order: “However, the Trane Court required a return to employment as part of its test to determine entitlement to TTD benefits. Once Defendant terminated Plaintiff, the ALJ found he no longer returned to employment as contemplated and required by Trane.” While the ALJ is correct in her statements, these statements have no bearing on the need to perform a complete analysis of Livers’ entitlement to TTD benefits from March 6, 2021, through June 27, 2021. As correctly noted by the ALJ, the analysis set forth in Trane is applicable when a claimant has returned to work following a work-related injury. That said, Livers’ termination from Westrock does not neutralize the need for the ALJ to fully and completely analyze Livers’ entitlement to TTD benefits from the date of termination through the June 28, 2021, surgery under all applicable case law, particularly since his termination, as correctly noted by Westrock in its Petition for Reconsideration, had no relationship to the work injury. In other words, the ALJ must make a determination as to whether Livers was *still* capable of returning to customary employment after being terminated on March 6, 2021, and before his surgery on June 28, 2021. If the ALJ determines Livers was indeed capable of returning to customary employment during this time period, she cannot award TTD benefits.

Accordingly, the ALJ’s award of TTD benefits from March 6, 2021, through June 27, 2021, as awarded in the December 19, 2022, Opinion, Award, and Order and affirmed in the January 12, 2023, Order, is **VACATED** and the claim is **REMANDED** to the ALJ for additional findings in accordance with the views set forth herein and, if appropriate, an amended Award.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

HON JO ALICE VAN NAGELL  
HON BRIAN W DAVIDSON  
300 E MAIN ST STE 400  
LEXINGTON KY 40507

**LMS**  
**LMS**

**COUNSEL FOR RESPONDENT:**

HON HOWARD BALLERSTEDT  
2451 CRITTENDEN DR  
LOUISVILLE KY 40217

**LMS**

**ADMINISTRATIVE LAW JUDGE:**

HON AMANDA PERKINS  
MAYO-UNDERWOOD BUILDING  
500 MERO ST 3<sup>RD</sup> FLOOR  
FRANKFORT KY 40601

**LMS**