RENDERED: FEBRUARY 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky
# Court of Appeals

NO. 2002-CA-001237-WC

DOROTHY BISHOP — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-01254

THE APPAREL GROUP-ENRO,
AS INSURED BY ROYAL & SUNALIANCE AND
AS INSURED BY AIK COMP AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER and BUCKINGHAM, Judges; and JOHN D. MILLER, Special Judge.[1]

BARBER, JUDGE: Dorothy J. Bishop ("Bishop") seeks review of an Opinion of the Workers' Compensation Board, affirming the Administrative Law Judge's award of temporary total disability benefits ("TTD"). At issue is the duration of the TTD award. Finding no error, we affirm.

[1]Senior Status John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

We shall refer to the record only as necessary to resolve the issue before us. Bishop, a t-shirt inspector, for The Apparel Group-Enro, alleged a January 28, 1999 left shoulder injury. Dr. Gary Bloemer, treating surgeon, released her to return to one-handed duty on August 10, 1999, and to light duty with no over-the-shoulder work/no lifting over 20 pounds with the left arm on October 7, 1999; no restrictions were placed on the right arm. Dr. Bloemer believed Bishop had reached maximum medical improvement ("MMI") as of April 17, 2000, the date he last treated her.

The Administrative Law Judge (ALJ) awarded TTD benefits from July 6, 1999 through October 7, 1999, finding that Bishop "had reached a level of improvement that would have permitted a return to employment on 10/7/99." The ALJ relied upon Dr. Bloemer's testimony that he would have released Bishop to return to work on October 7, 1999, with the restrictions that were ultimately made permanent. The ALJ also awarded Bishop permanent partial disability benefits to commence October 8, 1999.

Bishop appealed to the Board and argued that the ALJ erred in terminating her TTD benefits before she had reached MMI. The Board affirmed the ALJ's decision in a unanimous opinion rendered May 8, 2002:

> On appeal, Bishop argues the ALJ erred in terminating her temporary total disability

> benefits on a date prior to her reaching maximum medical improvement. Bishop does not believe it appropriate to terminate benefits until she had both reached maximum medical improvement and reached a level of improvement that would permit a return to employment. She contends the case of Central Kentucky Steel vs. Wise, 19 S.W.3d 657 (2000) supports this position. Bishop notes the Supreme Court stated it would not be reasonable to terminate benefits when the employee was released to perform minimal work but not the type that was customary or that he was performing at the time of injury. Thus, Bishop believes it was not appropriate to terminate temporary total disability until April 17, 2000, the date Dr. Bloemer stated she had reached maximum medical improvement.

The Board cited the standard of review -- whether the evidence compelled a finding in her favor, Bishop having the burden of proof on the issue of TTD.[2] The Board affirmed, because the evidence fell "far short" of compelling a finding that Bishop was entitled to a longer period of TTD than awarded by the ALJ.

Bishop appeals. She relies upon KRS 342.1100(11)(a) and *Central Kentucky Steel*[3] to support the argument she was entitled to TTD through April 17, 2000. KRS 342.1100(11)(a) provides: "'Temporary total disability' means 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

[2] *Paramount Foods, Inc. v. Burkhardt*, Ky., 695 S.W.2d 418 (1985).

[3] *Supra.*

permit a return to employment.'" Although Bishop -- according to Dr. Bloemer -- had not reached MMI by October 7, 1999, she had reached a level of improvement that would permit her return to employment. Therefore, Bishop was no longer temporarily totally disabled, as defined by the statute.

*Central Kentucky Steel* is distinguishable. There, the Supreme Court held that it would not be reasonable to terminate TTD where the employee was released to return to a type of minimal work which was neither customary, nor the type of work performed at the time of injury. Bishop does not argue about the type of work to which she was released, only that she was not yet at MMI.

We agree with the Board that the evidence does not compel a contrary finding, and affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEFS FOR APPELLEE:

BRIEF FOR APPELLEE, THE APPAREL GROUP-ENRO, AS INSURED BY AIK COMP:

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