

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-000270-WC

SOMERSET SCRAP METAL CO.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-67372

DAVID WHITAKER; WORKERS' COMPENSATION
BOARD; and J. KEVIN KING, Administrative
Law Judge

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BAKER, COMBS, and SCHRODER, Judges.

COMBS, JUDGE. Somerset Scrap Metal Company ("Somerset")

petitions for review of a decision of the Workers' Compensation Board which affirmed an award of permanent, partial disability benefits as well as temporary, total disability benefits by the Administrative Law Judge ("ALJ") for David Whitaker's work-related hand injury. We are not persuaded that the Board erred by accepting the ALJ's determination with respect to the

claimant's entitlement to temporary, total disability benefits. Thus, we affirm.

The parties stipulated that Whitaker suffered a severe work-related crush injury to his left hand on August 24, 1999. Following a failed re-plantation procedure, the middle fingers of Whitaker's injured hand were amputated. Whitaker continued to suffer disabling pain. He remained under doctor's care and was prescribed a TENS unit and physical therapy.

On October 19, 2000, Whitaker underwent a functional capacity evaluation ordered by Dr. Luis R. Scheker, his treating physician. At that time, permanent work restrictions were imposed, and an impairment rating of 31% permanent whole body was assigned.

Dr. Scheker examined Whitaker again in January 2001. Following the examination, he recommended that Whitaker visit a pain management clinic and referred him to another physician, Dr. Howard W. Lynd. Dr. Lynd, a pain management specialist, examined Whitaker on February 6, 2001.

Dr. Lynd recommended that Whitaker undergo a series of stellate ganglion blocks for both diagnostic and therapeutic purposes. Following the course of treatment, Dr. Lynd concluded that the blocks had helped Whitaker's condition only marginally. He suggested that Whitaker undergo a spinal stimulator placement.

On May 29, 2002, Dr. Robert Jacobs, an orthopedic surgeon, performed an independent examination of Whitaker. Dr. Jacobs concluded that Whitaker had reached maximum medical improvement and assigned a 19% whole body impairment rating. He did not recommend any additional surgical procedure or spinal cord implants.

Following an evidentiary hearing, the ALJ determined that Whitaker was entitled to temporary, total disability benefits from August 25, 1999, through May 30, 2001; from that point on, Whitaker was entitled to permanent, partial disability benefits based upon a 69.75% permanent disability rating.

On appeal to the Board, Somerset contended that the ALJ's temporary, total disability award was erroneous. The employer argued that the medical evidence established conclusively that Whitaker had reached maximum medical improvement ("MMI") as of October 19, 2000. Therefore, it contended that the temporary, total disability benefits should have been replaced by permanent, partial disability benefits as of that date rather than May 30, 2001. The Board disagreed and affirmed the award. The Board reasoned as follows:

We agree with Somerset that MMI is a medical question and, for that reason, it was incumbent upon Whitaker to produce competent evidence, based on a reasonable medical opinion, to establish the period or periods of his temporary total disability. Markwell & Hartz, Inc. v.

Pigman, Ky., 473 S.W.2d 842 (1971);
Snawder v. Stice, Ky. App., 576 S.W.2d 276
(1979). TTD is statutorily defined in KRS
342.0011(11)(a) as "[t]he condition of an
employee who has not reached maximum
medical improvement from an injury and has
not reached a level of improvement that
would permit a return to employment[.]"
Of course, this determination is a
question of fact. See Central Kentucky
Steel v. Wise, Ky., 19 S.W.3d 657 (2000);
Hall's Hardwood Floor Co. v. Stapleton,
Ky. App., 16 S.W.3d 327 (2000).

* * * * *

While it is true Dr. Scheker specifically
addressed MMI and opined Whitaker attained
that status on October 19, 2000, Dr.
Scheker did not stop there. He continued
to see Whitaker and, almost three months
later, decided a referral to a pain
management (sic) was appropriate. The
referral was made and Dr. Lynd embarked on
a course of treatment designed to
therapeutically improve Whitaker's
condition.

In W.L. Harper Construction Co. v. Baker,
Ky. App., 858 S.W.2d 202, 205 (1993), the
court of appeals instructed "TTD is
payable until the medical evidence
establishes the recovery process,
including any treatment reasonably
rendered in an effort to improve the
claimant's condition, is over, or the
underlying condition has stabilized such
that the claimant is capable of returning
to his job or some other employment. . . .
(Emphasis added). It does not matter that
the ganglion blocks administered by Dr.
Lynd, as well as other conservative
treatment post-October 19, 2000, proved
unsuccessful. If medical treatment is
administered in the hope of improving an
injured worker's condition, the subsequent
discovery that there is no permanent

improvement does not preclude a finding that the healing period continued throughout the entire period of reasonable medical treatment. Id. at 204. Although Somerset has noted evidence of record that would have supported the conclusion it seeks, such evidence does not constitute an adequate basis for reversal on appeal. KRS 342.285; McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

Opinion at 6 - 8.

On appeal to this Court, Somerset contends that the Board erred by affirming the ALJ's award of temporary, total disability benefits from August 25, 1999, through May 30, 2001. Somerset claims that Whitaker reached maximum medical improvement as of October 19, 2000, according to Dr. Schecker and that the ALJ was compelled to accept this date in awarding temporary, total disability benefits. We disagree.

We are persuaded that the Board's reasoning on this point is wholly sound. Entitlement to temporary, total disability benefits is an issue of fact. W.L. Harper Construction Co. v. Baker, Ky. App., 858 S.W.2d 202, 205 (1993). The medical evidence offered in this case did not establish that Whitaker's healing process had been completed by October 19, 2000. On the contrary, the evidence showed affirmatively that it had not. Since Whitaker continued to undergo medical treatment aimed at improving his condition and aiding his recovery, the ALJ was entitled to determine that Whitaker was

eligible to receive temporary, total benefits until May 10, 2001.

The function of the Court of Appeals in reviewing a decision of the Workers' Compensation Board is to correct the Board only where the Court perceives that the Board has overlooked or misconstrued statutes or precedent or that it has flagrantly erred in assessing the evidence so as to cause a gross injustice. Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992). We find no such errors in this case.

Therefore, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Louisville, Kentucky

BRIEF FOR APPELLEE:

Joel R. Smith
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