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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000653-WC

RICHARD WILLIAMS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-02017

FEI INSTALLATION; HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Richard Williams has petitioned for review of the February 25, 2005, opinion of the Workers' Compensation Board which affirmed the administrative law judge's denial of benefits for permanent partial disability (PPD), prospective denial of medical benefits, and limited the award of temporary

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

total disability (TTD) benefits. Having concluded that the Board's decision regarding the award of PPD is correct, we affirm on that issue. Having further concluded that the Board erred by not reversing the ALJ's refusal to award future medical benefits and TTD benefits from August 24, 2003, to November 17, 2003, we reverse and remand.

Williams is 56 years of age,[2] with two years of higher education and seven years of service in the Air National Guard.[3] He is a trained millwright and a member of Local Union 1031 in Louisville, Kentucky. Williams was employed by FEI as a foreman in June 2003. On August 24, 2003, while working for FEI at the Ford plant in Louisville, Williams was standing on a bucket in order to check the bolts on an overhead conveyor, when the ratchet he was using slipped. Williams fell striking his right elbow on a steel beam. Williams experienced numbness on his right side and pain in his elbow and in the outer three fingers of his right hand. Prior to this accident, Williams had suffered no previous injuries or symptoms to his right arm.

Williams's injury was reported to his superintendent, Scott Brown, and he was taken to Prompt Care in Louisville, where x-rays were taken. He was then referred to Dr. Navin Kilambi, an orthopedist, who first treated Williams a few days

[2] Williams was born on November 7, 1949.

[3] He also has training in crash fire rescue.

after the accident with physical therapy and placed his arm in a sling. This treatment continued for five to six weeks. In October 2003 Dr. Kilambi ordered electrodiagnostic testing to investigate the persistent numbness in the outer three fingers of Williams's right hand. Thereafter, Dr. Kilambi recommended Williams undergo surgery, and on November 17, 2003, he performed a submuscular ulnar nerve transposition, which was followed by additional physical therapy. Feeling returned to his fingers and the soreness in his elbow eased, but it was still tender to the touch.

From August 24, 2003, to November 17, 2003, Williams's doctor restricted him to light-duty work and to using his left hand. He notified FEI of his doctor's restrictions, and he testified that Brown sent him home because there was no light-duty work available and that FEI refused to make accommodations for his restrictions. This was disputed by Brown.[4] Williams also testified that he applied for unemployment benefits during the time of light-duty restriction, but his claim was denied. From November 17, 2003, to March 1, 2004,[5] Williams was placed on

[4] Brown testified that during the period Williams was on light-duty restrictions, FEI was working at the Ford plant only on weekends, the primary hours that the plant was off-line. Brown testified that he never knew how many employees he would need on the weekend until the Thursday before FEI was scheduled to work. Brown stated that Williams's work absences were not due to his injury or lack of accommodation by FEI because Brown had attempted several times during this period to call Williams in to work, but Williams either could not be contacted or refused to report to work.

[5] Dr. Kilambi released Williams to return to regular-duty work on this date.

no-work status by Dr. Kilambi and off-duty slips were placed into evidence. FEI made voluntary TTD payments during this time. FEI's contract ended in January 2004, before Williams was released to return to regular duty work in March 2004, and, thus, Williams did not return to work for FEI.[6]

Williams filed his Form 101, Application for Resolution of Injury Claim, on October 9, 2003. The parties stipulated the work injury of August 24, 2003, and did not litigate whether Williams had an injury as defined by the Act. In support of his claim, Williams filed the report of Dr. S. Pearson Auerbach, who had conducted an independent medical examination of Williams on March 2, 2004. Dr. Auerbach received a history of the injury, and physically examined Williams. However, on this date, he had no medical records to review. He observed that Williams retained active reflexes and found normal sensation in both upper extremities. Dr. Auerbach also observed significant weakness in Williams's right hand and concluded that Williams sustained a contusion of the ulnar nerve and post-op anterior transplant of the ulnar nerve. On this date, Dr. Auerbach stated that he did not know whether Williams could return to construction work, but that he could try.

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[6] Following his release, Williams attempted to work for a few weeks setting up commercial tents, but the work aggravated his elbow pain. At the time of the final hearing, Williams had been unable to find any employment.

In May 2004 Dr. Auerbach had an opportunity to review Williams's medical records. He then opined in his report filed on May 17, 2004, that Williams did not retain the physical capacity to return to the type of work he was performing at the time of the injury. Dr. Auerbach assessed Williams at a 7% permanent impairment rating under the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, combining 4% attributed to the body as a whole for the upper extremity and 3% for pain. He recommended restrictions pertaining to crawling, bending, twisting, turning, sitting, standing, walking, kneeling, pinching, grasping, carrying, and lifting.

Dr. Michael Moskal of the Shoulder and Elbow Center in New Albany, Indiana, evaluated Williams on behalf of FEI on March 25, 2004. Upon reviewing the medical history of Williams's injury and performing a physical exam, Dr. Moskal diagnosed Williams with ulnar nerve contusion, history of anterior transportation with sub muscular positioning, resolved ulnar nerve contusion and no late effect surgery, sub maximal effort with strength testing, and shoulder pain. Dr. Moskal noted that Williams should minimize his use of vibratory tools, but did not give any other work restrictions. He assigned Williams a 0% impairment rating to the body as a whole based on the AMA Guides, 5th Edition.

The issues presented to the ALJ included the extent and duration of Williams's disability, his average weekly wage,[7] and his entitlement to additional TTD benefits. After reviewing the lay[8] and medical evidence, the ALJ entered an opinion on September 3, 2004, and determined that Williams did not have any permanent functional impairment resulting from the elbow injury. He awarded Williams the TTD benefits Williams had already been paid by FEI[9] and all medical expenses previously paid.[10] However, he denied Williams additional TTD, PPD, or future medical benefits. Williams filed a petition for reconsideration, which the ALJ summarily denied on October 1, 2004. On February 25, 2005, the Board entered its opinion affirming the ALJ. This petition for review followed.

The function of the Court of Appeals in reviewing a decision of the Board is "to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross

[7] This is not disputed on appeal.

[8] Williams testified that he continued to experience pain in his elbow and shoulder, but the surgery had helped the numbness in his fingers and that taking Vioxx had helped "quite a bit." Brown testified that the company had light-duty work available following Williams's work injury until the date of his surgery in November 2003.

[9] TTD benefits were paid from November 17, 2003, to March 1, 2004, at the rate of $571.42 per week.

[10] The parties did not litigate Williams's entitlement to the related medicals and there was no medical fee dispute.

injustice."[11] Furthermore, our workers' compensation laws should be interpreted liberally "[i]n light of the munificent, beneficent and remedial purposes of the Workers' Compensation Act."[12]

Williams claims that the ALJ erred by not awarding him PPD benefits. Williams argues that the ALJ was required to determine his permanent impairment based on a valid impairment rating given by the independent medical examiners.[13] Williams argues that Dr. Auerbach's rating was substantiated and met valid criteria, but Dr. Moskal's was not, and, thus, the ALJ, and ultimately the Board, failed to rely upon valid impairment ratings based on the AMA Guides. We are mindful that an ALJ may not disregard uncontradicted medical evidence, "when the question is one properly within the province of medical experts[.]"[14] However, the medical evidence in this case is not uncontradicted. We conclude that the ALJ properly exercised his discretion in giving more weight to the evidence presented by Dr. Moskal as to Williams's impairment rating.

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[11] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

[12] Coal-Mac, Inc. v. Blankenship, 863 S.W.2d 333, 335 (Ky.App. 1993).

[13] Williams also argues that in making this decision the ALJ improperly considered his testimony that he would accept work as a millwright "in a heartbeat" and that his last return work slip from Dr. Kilambi had no restrictions.

[14] Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184, 187 (Ky.App. 1981).

Dr. Auerbach assigned Williams a 7% permanent partial impairment rating based on the AMA Guides, while Dr. Moskal assigned a 0% rating based on the AMA Guides. Relying on the report of Dr. Moskal, the ALJ determined that Williams had sustained a work-related injury, however there was no permanent impairment, and a 0% impairment rating was assigned based on the AMA Guides. The ALJ found that there was insufficient evidence to award PPD benefits under KRS 342.730(1)(b).

Since the 1996 amendments, KRS 342.730 has required a recipient of permanent income benefits to have an AMA impairment rating.[15] Although the 2000 amendments to KRS 342.730(1)(b) changed the methods by which a partial disability award is calculated, the statute retained the use of an AMA impairment as the basis for calculating a partial disability award. Dr. Auerbach set forth the calculations he used in arriving at the 7% impairment rating; however, during his deposition, Dr. Auerbach admitted that he did not follow "the directives of the AMA Guides" in assessing the rating.[16] On the other hand, Dr.

[15] See KRS 342.0011(35)(stating "'[p]ermanent impairment rating' means percentage of whole body impairment caused by the injury or occupational disease as determined by 'Guides to the Evaluation of Permanent Impairment,' American Medical Association, latest available edition"). Pursuant to KRS 342.730(1)(b), impairment ratings must be determined in accordance with the latest available edition of the AMA Guides. Thus, the establishment of permanent partial disability necessarily requires reference to the AMA Guides. See Adkins v. R & S Body Co., 58 S.W.3d 428, 431-32 (Ky. 2001).

[16] The Board's opinion reveals the following regarding Dr. Auerbach's assessment of Williams's permanent impairment:

Moskal referenced the AMA Guides, but did not expressly state how he reached the 0% impairment rating.

A physician's AMA rating can be challenged by taking his deposition; however, there is no evidence that Williams deposed Dr. Moskal. In Dr. Auerbach's deposition, he opined that his rating was "more reliable because it has a normal bell curve," but testified that he respects Dr. Moskal's opinions. The ALJ could have used Dr. Auerbach's contradictory opinion to discount Dr. Moskal's credibility, but chose not to. When the evidence is in conflict, the ALJ is at liberty "to believe part of the evidence and disbelieve other parts even if it comes from

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On deposition, Dr. Auerbach explained that he utilized Table 16-15 of the AMA Guides to assess a 7% upper extremity impairment due to sensory deficit or pain, which converts to a whole-body rating of 4%. He conceded on cross-examination that the proper use of Table 16-15 requires the evaluator to grade the percentage of sensory deficit according to Table 16-10 and then multiply that percentage by 7%, which is the maximum rating provided under Table 16-15 for sensory loss. Dr. Auerbach confirmed that he did not follow that protocol. Though he acknowledged that Williams does not have a total sensory loss, Dr. Auerbach assessed the maximum rating allowed under Table 16-15, anyway, because he felt anything less failed to take into account the seriousness of the injury and surgery. Dr. Auerbach explained that this was the same rationale for his assessment of the maximum 3% allowed under the Pain Chapter. Here, too, Dr. Auerbach conceded that he did not follow the protocol set out in the AMA Guides. He testified, "It has a – a formula which is very complicated, and the – and I tried using the – the scoring system and using – I just used my own judgement [sic]." When asked whether he was "kinda just throwing the 3 percent impairment rating for pain in to get to where you think you should be," Dr. Auerbach responded "Probably."

the same witness or the same adversary party's total proof[,]"[17] and matters of credibility and the weight to be assigned to, and inferences drawn from, various testimony are solely for the ALJ.[18] A party challenging the ALJ's factual findings must do more than present evidence supporting a contrary conclusion to justify reversal.[19]

Williams had the burden of proof on the issue, and the ALJ resolved the issue against him.[20] Where the party with the burden of proof was unsuccessful before the ALJ, the issue on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor. . . . [T]o be compelling, the evidence produced in [his] favor [ ] must be so overwhelming that no reasonable person could reach the conclusion of the [ALJ]."[21] The determinative question to be answered is whether the ALJ's finding is "so unreasonable under the evidence that it must be

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[17] Brockway v. Rockwell International, 907 S.W.2d 166, 169 (Ky.App. 1995). See also Pruitt v. Bugg Brothers, 547 S.W.2d 123, 124 (Ky. 1977).

[18] Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985).

[19] Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 52 (Ky. 2000).

[20] Magic Coal Co., 19 S.W.3d at 96 (holding that the burden is on the claimant to prove every element of his claim [citations omitted]). See also Snawder v. Stice, 576 S.W.2d 276, 279 (Ky.App. 1979).

[21] REO Mechanical v. Barnes, 691 S.W.2d 224, 226 (Ky.App. 1985)(overruled on other grounds, Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001)). See also Paramount Foods, 695 S.W.2d at 419.

viewed as erroneous as a matter of law" [citations omitted].[22] The Board found that the ALJ relied on the substantial evidence of Dr. Moskal's opinion and provided a sufficient explanation for rejecting the impairment rating assessed by Dr. Auerbach,[23] and we conclude that in doing so, the Board did not "overlook[ ] or misconstrue[ ] controlling statutes or precedent, or commit[ ] an error in assessing the evidence so flagrant as to cause gross injustice."[24] Thus, we affirm the denial of permanent partial disability benefits.

The issue of the denial of future medical expenses turns on the interpretation of KRS 342.020(1).[25] We review issues involving statutory interpretation de novo, and without deference to the construction given by the Board.[26] The first

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[22] Ira A. Watson, 34 S.W.3d at 52. See also KRS 342.285.

[23] See Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540, 541 (Ky.App. 1985).

[24] Western Baptist Hospital, 827 S.W.2d at 687-88.

[25] KRS 342.020(1) provides in pertinent part as follows:

> In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability . . . . The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits [emphases added].

[26] Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky.App. 1998).

sentence of KRS 342.020(1) confines an award of medical expenses to those expenses which "may reasonably be required at the time of the injury and thereafter during disability." Moreover, KRS 342.020(1) reiterates "[t]he employer's obligation to pay the benefits specified in this section shall continue for as long as the employee is disabled regardless of the duration of the employee's income benefits." An ALJ may award medical expenses even in the absence of permanent disability because it is possible for a non-disabling injury to require medical care.[27]

Because Williams had reached maximum medical improvement and had no permanent disability rating, the Board affirmed the ALJ's finding that FEI would not be liable for payment of any future medical expenses which Williams may incur as a result of his work-related injury. Williams claims that the ALJ erred by ruling his entitlement to future medical benefits under the Act was barred because he had successful surgery, had reached maximum medical improvement, and retained the ability to return to work without restrictions. We agree.

In Cavin, the claimant received multiple injuries, including injuries to his neck and back, when he tripped and fell into a ditch while carrying an 80-pound jackhammer on his shoulder. The "old" Board rejected Cavin's claim for income

[27] See Cavin v. Lake Construction Co., 451 S.W.2d 159, 161-62 (Ky. 1970); and Mountain Clay, Inc. v. Frazier, 988 S.W.2d 503 (Ky.App. 1999).

benefits, finding the injury produced no occupational disability arising out of the accident, but nevertheless awarded medical benefits pursuant to KRS 342.020. In affirming the Board's ruling, the Court stated as follows:

> We do not believe it is necessarily inconsistent for the board to award payment of medical expenses without finding some extent of disability. It is not impossible for a non-disabling injury to require medical attention.[28]

Since the Court rendered its decision in Cavin, KRS Chapter 342 has undergone several transformations, most recently in 1996 and 2000. However, the 1996 amendment to KRS 342.020(1) does not expressly link a claimant's right to receive reasonable medical care to his entitlement to an award of temporary or permanent disability income benefits. Following the changes, the Court, to a limited degree, revisited the issue of entitlement to future medical benefits in Robertson v. United Parcel Service.[29]

The claimant in Robertson failed to prove to the satisfaction of the ALJ anything more than a temporary work-related exacerbation of a pre-existing, nonwork-related condition. Because the injury produced no permanent effects, the claimant in Robertson was found to be entitled only to the medical expenses previously paid by his employer during the

[28] Cavin, 451 S.W.2d at 161-62.

[29] 64 S.W.3d 284 (Ky. 2002).

temporary flare-up of symptoms. While the claimant in Cavin had a pre-existing condition, it was dormant at the time of the work-related injury, unlike the pre-existing condition of the claimant in Robertson. Cavin is factually distinguishable from Robertson and for that reason is still good law.

KRS 342.020(1) limits the duration of an award of medical benefits according to the period of the injured worker's "disability." The issue turns on whether the effects of the injury are enduring to the degree that there is a resulting need for medical treatment beyond the point in time when the claimant reaches maximum medical improvement. Since the effective date of the 1996 amendments, the Act has not contained a definition of "disability." Instead, the Act now provides only definitions of temporary total disability, permanent partial disability, permanent total disability, and permanent disability rating.[30]

[30] KRS 342.0011(11)(a)(b) and (c), and (36) state as follows:

> (11) (a) "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 permit a return to employment;
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> (b) "Permanent partial disability" means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work; and
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> (c) "Permanent total disability" means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury, except that total

Because the award of permanent medical benefits is not contingent on an award of income benefits or a permanent disability rating, “disability” as utilized in KRS 342.020 is not necessarily synonymous with the phrases “temporary total disability”, “permanent partial disability”, or “permanent total disability” as those terms are intended for purposes of calculating awards of income benefits pursuant to KRS 342.730. Rather, “disability” as used in KRS 342.020, is dependent on the duration of a claimant’s need for medical care, depending on the evidence of record and the particular findings of fact made by the ALJ.

In this case, Williams was found to have sustained a work-related injury. The evidence of record supports that

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> disability shall be irrebuttably presumed to exist for an injury that results in:
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> 1. Total and permanent loss of sight in both eyes;
> 2. Loss of both feet at or above the ankle;
> 3. Loss of both hands at or above the wrist;
> 4. Loss of one (1) foot at or above the ankle and the loss of one (1) hand at or above the wrist;
> 5. Permanent and complete paralysis of both arms, both legs, or one (1) arm and one (1) leg;
> 6. Incurable insanity or imbecility; or
> 7. Total loss of hearing
>
> . . .
>
> (36) “Permanent disability rating” means the permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730(1)(b).

finding. Although Dr. Moskal felt that Williams was at maximum medical improvement and assessed a 0% impairment rating, he never stated that Williams would not have any need for medical treatment in the future as a result of his work-related injury. Dr. Auerbach stated that the "transfer of the ulnar nerve is not usually successful," and that it is a "pretty serious procedure" because the nerve is moved from its normal position and transferred anteriorly. From those statements, we conclude that the medical evidence is undisputed that Williams may reasonably require subsequent medical treatment and some future medical benefits relative to Williams's work-related injury may be appropriate.[31] FEI will remain free to challenge the reasonableness and necessity of any proposed medical treatment.[32]

In making its ruling, the Board relied on unpublished opinions which referenced the 1996 reforms. However, there were no changes to KRS 342.020 by the 1996 reforms. We agree with Williams that the Board misconstrued KRS 342.020 and controlling

[31] See Ira A. Watson, 34 S.W.3d at 51 (stating that "[a]n analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. . . . [I]t necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities").

[32] See 803 KAR 25:012; and National Pizza Co. v. Curry, 802 S.W.2d 949, 951 (Ky.App. 1991).

case law. Therefore, we vacate this portion of the Board's opinion and remand for the ALJ to enter an appropriate award for future medical treatment pursuant to KRS 342.020.

Finally, we address Williams's claim that the ALJ committed reversible error by failing to award TTD benefits from August 24, 2003 through November 17, 2003. It is uncontested that Williams was placed on light-duty work from the date of his injury until his surgery on November 17, 2003, at which time he was placed on no-work status until he reached maximum medical improvement and was released to return to regular-duty work on March 1, 2004. FEI voluntarily paid TTD from November 17, 2003, the date Williams had surgery, until March 1, 2004. However, Williams received no benefits of any kind from the date of his injury until the date of his surgery. At the time of the injury, Williams was a millwright foreman. Brown testified that Williams could have returned to work as a foreman to supervise the other millwrights. However, Williams testified that he had to perform the work similar to the other millwrights he was supervising because he was a foreman of a small crew, and was thus a "working foreman".[33] Williams also testified that he had limitations from the medication he was taking, and FEI did not

[33] As a working foreman, Williams testified that he would change out bolts, lift and carry angles weighing up to 120 pounds, push and pull, grasp and grip, climb, and perform over-the-shoulder work activities.

want him to work under the influence of medications. Brown disputed this testimony.

It was also uncontested that Williams was only offered weekend work during the period between his injury and surgery. Brown testified that Williams was only offered three or four weekends during the contested period, including Labor Day weekend, which was only two weekends after the injury. He further testified that there was no work available during November 2003. Brown also admitted that he instructed Williams to apply for unemployment benefits, but stated it was because Williams was not reliable and Brown only needed a few workers at a time.

First, Williams argues that the fact that he was instructed to apply for unemployment benefits negates the ALJ's finding that he was offered work and accommodations by FEI but refused such work. Second, he argues the ALJ erroneously denied him TTD for the whole period between his injury and surgery based upon three to four weekends that he was offered work and that "at all other times, he had either not reached MMI and was not able to physically resume the physical activities of a millwright or work for another project." The ALJ found that "the employer did in fact make every reasonable effort to return [Williams] to work during the time period of August 25, 2003

[sic] through November 17, 2003, and for whatever reason [Williams] failed to show up for work."

KRS 342.0011(11)(a) defines TTD as follows:

> "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 permit a return to employment.

Our Supreme Court has held that a claimant is not required to be homebound in order to be awarded permanent total disability benefits.[34] That same logic dictates that an injured employee should not be deemed ineligible for TTD merely because he can perform minimal activities within the range of his medical restrictions while those same restrictions would prevent his return to his primary, pre-injury employment.

In Central Kentucky Steel v. Wise,[35] the employer argued that the claimant was not entitled to TTD after his physician released him to work with a restriction that he not lift more than five pounds. Nonetheless, the ALJ determined that the claimant was entitled to TTD until he reached maximum medical improvement and was released to perform the job that he had been performing at the time of the injury. The Supreme Court analyzed the argument of the employer as follows:

[34] Ira A. Watson, 34 S.W.3d at 51.

[35] 19 S.W.3d 657 (Ky. 2000).

> [The employer] would interpret the statute so as to require a termination of TTD benefits as soon as the worker is released to perform any type of work. We cannot agree with that interpretation. 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.[36]

Thus, Wise holds that a release "to perform minimal work" does not constitute a "return to employment" for the purposes of KRS 342.0011(11)(a).[37]

In the case before us, the ALJ's opinion, as upheld by the Board, resulted in an outcome that was grossly unjust to Williams and that refused to recognize the Legislature's intent to protect workers who have not reached maximum medical improvement and who are unable to return to their normal and customary employment because of a work-related injury. Because we conclude that Williams met the definition of TTD and he is entitled to TTD benefits pursuant to KRS 342.730(1), we vacate that portion of the Board's opinion and remand this matter with instruction that the ALJ enter an award for additional TTD benefits from August 24, 2003, to November 17, 2003.

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[36] Wise, 19 S.W.3d at 659.

[37] See also Double L Construction, Inc. v. Mitchell, ____ S.W.3d ____ (Ky. 2005) (holding that an employee who could only return to a second job as a janitor was still entitled to TTD because he could not return to the work of a construction carpenter, the job at which he suffered the injury).

For the foregoing reasons, we affirm the Board's opinion regarding the ALJ's denial of PPD benefits. However, we reverse the Board's opinion as to Williams's entitlement to future medical expenses and TTD benefits and remand this matter to the Board for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Ched Jennings Louisville, Kentucky	Kimberly D. Newman Lexington, Kentucky