TTD Benefits in Kentucky: No Longer what the Legislature Intended

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We are at a crossroads in Kentucky on the issue of temporary total disability (TTD) benefits and when it is appropriate to pay them versus getting an employee back to work. In one direction we have an interpretation of our statute that may forever alter the meaning of TTD and defeat the purpose of return-to-work programs (and with it, one of the primary purposes of workers' compensation). There are two cases pending before the Kentucky Supreme Court that stand at this intersection: they can either turn down this path, or restore the clear meaning of "temporarily totally disabled" and, with it, the equilibrium of our system.

The Natural Order

Let's start with the definition of TTD benefits and then work through the case law to ensure that we are on the same page. In Kentucky, "temporary total disability" means the condition of an employee who has not reached maximum medical improvement <u>and has not reached a level of improvement that would permit a **return to employment.**</u>" KRS 342.0011(11)(a). It is this final phrase of the definition that has been utterly wrecked by case law.

In <u>Central Kentucky Steel v. Wise</u>, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court interpreted the phrase "and has not reached a level of improvement that would permit a return to employment" as follows:

> "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, the rule of law created by the Kentucky Supreme Court is that the employer has a reasonable basis to terminate TTD benefits when the claimant reaches a level of improvement that would allow him to return to his pre-injury job, or to perform other work that is "customary" for him and which is not "minimal work". These terms are the key ones from this case. The question of what other work is "customary" for a particular worker is unique for each claimant, and likely turns upon the claimant's prior work history.

The use of the term "minimal work" by the Supreme Court in *Wise* appears to be a recognition that Kentucky has adopted the "odd lot doctrine" for the analysis of total disability, whether temporary or permanent. The odd lot doctrine considers whether the work the claimant is able to do is at a similar hourly rate, involves a similar number of hours per week, is not in an onerous location or on an onerous shift, and whether the job is bona fide or manufactured for the purpose of avoiding liability for TTD benefits. It looks primarily at the quality and quantity of work the claimant is able to perform after the injury. If the claimant can return to his usual job without accommodation, rather than to modified duty with accommodation, that tends toward normal work activity, not odd lot work. The number of hours worked is probably the single most important factor. If the claimant was a 40 hour worker prior to the injury, but is temporarily limited to 30-35 hours per week, he may not be temporarily totally disabled. But recently the courts have been finding that even this is a gray area.

<u>**Making Matters Worse**</u>

Last summer, the Kentucky Court of Appeals issued two decisions that have Kentucky employers very much up in arms over the future of TTD. First came *Mull v. Zappo's*,[1] rendered 7/11/14. Ms. Mull worked weekends at the Zappo's warehouse (she also held another full-time job elsewhere). She developed a finger injury due to her Zappo's job. She was placed on "light duty", working the same

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[1] *Mull v. Zappos.com, Inc.*, No. 2013-CA-001320-WC, 2014 WL 3406684 (Ky. Ct. App. July 11, 2014) (unpub.).

hours as before the injury, with no reduction in her wages. She continued this light work every weekend, without difficulty, until she quit more than two months later for unrelated reasons. In her claim, Mull demanded TTD from 5/15/11 (the date she quit) until 12/29/11(the date she reached MMI). The ALJ found she lacked the ability to "return to employment" during that time frame and awarded TTD. The Worker's Compensation Board [Kentucky's first body of appeal in comp cases] reversed, finding nothing in the record established that the light work was "minimal" under *Wise*. Mull worked regular shifts while on restrictions. She was also capable of other work for which she had training and experience (i.e. her full-time job), and voluntarily ceased her employment for reasons unrelated to her injury. This did not entitle her to TTD.

Mull's pre-injury job was in the shipping department, scanning and handling boxes. Her post-injury light duty involved scanning items and keeping account of scanner guns used by other workers. On appeal, Mull argued she was "totally disabled" because she was capable of performing some, *but not all*, of her customary pre-injury duties within her restrictions. Zappo's argued that "return to employment" should be interpreted broadly to include a worker's demonstrated ability to perform a job at approximately the same wage and for the same hours, primarily consisting of duties (but not necessarily *every* duty) the worker had the training and experience to perform pre-injury and which constituted a normal part of the pre-injury employment.

<u>The Court of Appeals sided with Mull and the ALJ</u>. Oddly, the Court noted that a dispositive factor is "always" the worker's ability to perform the pre-injury job. This is a mischaracterization of *Wise*. The Kentucky Supreme Court found that a worker should receive TTD if he is released to "minimal work", but not if he is released to perform work that is customary for him ***or*** that he was performing at the time of his injury. Thus, "customary" is not the same as "the job the worker did pre-injury." It is an either/or proposition. Regardless, the *Mull* Court ruled that an employee has achieved a "return to employment" if, and only if, they can perform the *entirety* of their pre-injury duties within the confines of their post-injury medical restrictions. In so doing, the Court compressed the two-part rule of *Wise* into one, and allowed Ms. Mull to receive 7 ½ months of TTD *after* she quit the job at Zappo's where she was earning wages equal to her pre-injury earnings.

The following month, the Court of Appeals dropped bomb #2, also known as *Tipton v. Trane Commercial Systems*, [2] rendered 8/22/14. Tipton was testing commercial AC units (her usual job) when she was injured. She was paid TTD and returned to light duty work (building circuit boards). Building circuit boards was much less physically demanding but still permitted Tipton to work within her restrictions. This job was of the same pay grade as her pre-injury assignment, so there were no lost wages. Several months later Tipton was released to her regular job, but requested to continue the circuit board assignment permanently because she enjoyed it. Trane allowed this.

After filing her claim, Tipton sought TTD from 3/23/11 (when she started on light duty) through 7/7/11 (when she was released back to her prior job). Because she returned to work at a job that the ALJ felt was <u>very similar</u> to the job she performed at the time of injury, and she was earning the same hourly pay, the ALJ did <u>not</u> award TTD. The Board affirmed the ALJ. On appeal, though, Tipton argued she was entitled to TTD since she was not able to return to her "customary work" or the work she was performing at the time of her injury. The Court agreed, citing *Bowerman v. Black Equipment Co*. In that case, the claimant's pre-injury job was as a forklift operator. After a back injury his doctor assigned restrictions that allowed him to return to light work in the parts room. Bowerman had problems performing this work because there was a lot of reaching, and some parts were heavy. The Court determined that even though Bowerman resumed working, his ability to perform the light duties demonstrated that he was capable of only "some form of work," (under *Wise*: "minimal work") as

[2] *Tipton v. Trane Commercial Sys.*, No. 2014-CA-000626-WC, 2014 WL 4197504 (Ky. Ct. App. Aug. 22, 2014), *as modified* (Sept. 12, 2014) (unpub.).

opposed to his pre-injury work or "other customary work". Therefore this was not a "return to employment" for purposes of TTD.

The *Tipton* Court concluded that *Bowerman* stands for the proposition that light-duty assignments consisting of duties entirely different from pre-injury work duties cannot be a "return to employment" for the purpose of determining TTD. The Court concluded that, since Ms. Tipton never worked on circuit boards before her injury, it was not "customary" work for her. Therefore it was not a "return to employment". Consequently, though Tipton continued to work full time, earning equal or greater wages, she *also* received an award of TTD *on top of her regular pay*. **In other words, she received 167% of her wages for this 3 ½ month period, plus 12% interest per year**. This did far more than compensate her for lost wages; it punished the employer for accommodating its employee even after its obligation to do so ended.

BOOM. The cloud of dust is still settling.

Both *Mull* and *Tipton* are currently on appeal to the Kentucky Supreme Court.[3]

The Fallout…And a Ray of Hope

Decisions in *Mull* and *Tipton* should be issued later in 2015 or early 2016. In the meantime, employers are left wondering how the definition of "return to employment" could have strayed so far from the simple language of the Act and what, if anything, can be done to pull it back on course. The phrase "return to employment" has become so diluted that its plain meaning is no longer read at face value.

It seems very clear that the words "return to employment" do NOT mean "precisely the same job the worker was doing at the time of injury." The Act made this distinction in KRS 342.730(c)(1), when it authorized triple benefits to the worker who cannot "return to the type of work that the employee performed at the time of injury…" If the legislature meant for this standard to apply to TTD as well as PPD, it could have drafted the statute that way. But it didn't.

Clearly, if the Supreme Court affirms these decisions then it will be time to seek legislative action. We can only hope that they move back towards a more reasonable test for TTD (or simply reaffirm the one that is already written in the statute), and a recent published decision is giving us reason to think this hope is not in vain.

In the case of *Livingood v. Transfreight, LLC*,[4] the Supreme Court ruled on the issues of TTD.[5] Livingood suffered an injury to his left shoulder in September 2009. He underwent two surgeries and received TTD

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[3] While Plaintiff was victorious in the *Mull* case, perhaps the Supreme Court will listen to the Court of Appeals suggestion that the definition of TTD has been turned on its head.

> We are cognizant that this interpretation flies in the face of the plain meaning of the words "totally disabled"; it narrowly defines otherwise broad language such as "return to employment"; and, when applied in the context of a worker who is capable of performing most pre-injury duties or pursuing some other employment for equal wages and for an equal amount of hours each week, it would seem to contradict the very purpose of awarding TTD, that 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." *Mitchell,* 182 S.W.3d at 514. Be that as it may, this interpretation is consistent with binding precedent and, whether we agree with it or not, we are bound to follow it. It is the purview of the Kentucky Supreme Court or the General Assembly to say otherwise.

Mull v. Zappos.com, Inc., No. 2013-CA-001320-WC, 2014 WL 3406684, at *10 (Ky. Ct. App. July 11, 2014) (unpub.).

from November 2009 until March 2010, when he returned to work on modified duty, earning the same wages. He continued working until he underwent a third surgery in October 2010. He received TTD again from October 2010 through December 2010, returning to work without restrictions on December 13, 2010. On that date, he backed a forklift into a pole. He was terminated 10 days later due to that incident.

The ALJ found Livingood was not entitled to additional TTD from March 2010 through October 2010 (before his third surgery) because he did not satisfy the second prong of the test for TTD (i.e. he had returned to customary employment). The ALJ concluded that, with the exception of one task, most of the activities Livingood did on light duty were ones he had performed before the injury; they were not "make-work." (75% was work he "customarily and regularly" performed pre-injury) Livingood appealed, but the Board and the Court of Appeals affirmed. Fortunately, the Supreme Court also agreed. Though Livingood argued that *Wise* supported his argument, the Supreme Court distinguished it. In rejecting the notion that the work he was doing was not "customary", the Court stated

> "[W]e 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.' Livingood had the burden of proof on the issue. Where the ALJ finds against the party with the burden of proof, the standard of review on appeal is whether the evidence compelled a contrary finding….The Board and the Court of Appeals were not convinced that it did. Nor are we."

We think this case demonstrates that our Supreme Court is not particularly receptive to nitpicking over the pre- and post-injury duties of a worker, and if they do not align exactly, TTD should be awarded. Instead, if a worker cannot perform his customary work he *may* be entitled to TTD, but is not *always* so entitled. Livingood's light duty work was mostly comprised of tasks he performed before he was hurt; this was enough to consider his light duty work "customary". While this will still require case-by-case analysis, it is a good start, and provides some relief from the draconian standard toward which we have been marching over the last year.

However, a word of caution. In April, 2015, in an *un*published decision, the Supreme Court warned us that there is no credit for light duty wages.[6] The Court made the troubling statement that a credit/offset is only allowed in two instances: (a) unemployment and (b) an employer funded disability plan, both directly from the statute.[7] This should be a reminder that, while they may eventually come down on the reasonable side with regard to TTD, they are not going to go all the way down the path with employers.

What should employers do while they wait to see how the Supreme Court rules on the other cases discussed above? General Eisenhower said that "[n]either a wise man nor a brave man lies down on the tracks of history to wait for the train of the future to run over him." Neither should employers simply do nothing.

<u>What Happens Now? The Options.</u>

As case law stands right now, TTD benefits are owed until the worker either (a) reaches MMI or (b) regains the ability to return to customary employment However, the push in the appellate cases still pending is for the standard to change: TTD benefit are owed until the worker regains the .

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[4] 2014-SC-000100-WC (To Be Published), issued 8/20/15.

[5] In the same case, the Court also ruled that the application of the 2X multiplier, as altered by *Chrysalis House*, is no longer valid, but that is a subject for another time

[6] <u>Quad/Graphics, Inc. v. Holguin</u> No. 2014-SC-000391-WC, 2015 WL 1544253, at *3 (Ky. Apr. 2, 2015) (unpublished) ("While Quad makes a good public policy argument in favor of receiving an offset, the workers' compensation statutes do not allow for a credit like the one requested in this situation.")

[7] *Id.* at *2.

Despite the current test for TTD, there are things that can be done to guard against results like those discussed above. First, what other work has the injured worker done for this employer? As long as one of those positions is within the worker's restrictions, return them to one of those jobs, paying the same average weekly wage ("AWW"). This may avoid an award under *Wise* or *Bowerman*. If there is no such job, look at the injured worker's job application, or talk with the worker, to see what work he or she has done in the past. If the current employer has that type of job, and if it is within the worker's restrictions, then return them to that job (again earning the same AWW).

When accommodation at the usual work site cannot be done, employers have been turning to off-site return-to-work programs as a solution. Some of these off-site programs are non-profits, which accept help from volunteers to do simple tasks such as answer phones, stuff envelopes, etc. The employer then pays the employee a wage for that work performed for the non-profit. However, a big problem with this kind of program is that it tends to involve "minimal work" as described in *Wise*. Though the goal of keeping the employee working at something useful is fulfilled to the extent that the program is intended to avoid liability for TTD. But ultimately, unless the work being done is something the injured work has done in the past, i.e, customary employment, it most likely fails. The only way this type of program will work is if all the injured workers agree to participate. If a worker declines, there is no mechanism to enforce his participation. If the worker is entitled to TTD benefits, then you would have to pay those benefits.

Another, as yet largely unexplored, alternative is an employer funded disability plan. Under KRS 342.730(6): "All income benefits otherwise payable…shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter…" This offset is permitted against all worker's compensation income benefits. Normally this section is thought to address only a Short-Term and Long-Term Disability plans from third party insurance providers ("STD/LTD"), but the wording of the statute does not limit it to that type of plan.

How would this look? What we envision is a written employer-funded disability plan applicable to all employees that pays an injured worker their average weekly wage until they reach MMI. As part of this, the worker would continue to work within his/her restrictions, either for the employer (if possible) or, if not, then work for a non-profit for the same number of hours they worked before the injury.

We are suggesting payment of the injured worker's AWW, not the TTD rate, which would be 2/3's of the AWW. Why? The worker needs enticement to get back to work; offering someone 2/3's of their AWW to either (a) sit at home or (b) work is not much of a choice. Most workers would choose to take the money and sit at home.

The credit for an employer-funded disability plan has been applied, with some success, to a loss of license benefit,[8] employer-funded disability retirement benefits,[9] and a company-funded disability plan.[10] We acknowledge that this is untested before our appellate courts, which have been creative in

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[8] *UPS Airlines v. West*, 366 S.W.3d 472 (Ky. 2012) (The Supreme Court held that the airline was entitled to receive credit against its liability for payment of loss of license benefits only to extent that benefits overlapped with workers' compensation benefits).

[9] *Alcan Aluminum Corp. v. Stone*, 276 S.W.3d 817 (Ky. 2009) (The Supreme Court held that the offset to which employer was statutorily entitled was limited to the amount claimant received in excess of early retirement benefits.)

[10] *Conkwright v. Rockwell Int'l*, 920 S.W.2d 90, 92 (Ky. Ct. App. 1996) *overruled by Williams v. E. Coal Corp.,* 952 S.W.2d 696 (Ky. 1997) ("The Rockwell plans were unilaterally funded, provide coverage of the same nature as workers' compensation, and contain an internal offset provision. All these factors support a finding that such payments fulfill the same purpose as workers' compensation. In such instance, a credit is proper to avoid a duplication of benefits.")

their interpretation of unambiguous statutory language. There are also some unresolved issues. For example, does an employer benefit by making these payments? In other words, does this proactive step keep their worker's compensation premiums down even after a reported injury with TTD and medicals paid? We do not yet have answers to these questions.

Given the holdings to date by our Supreme Court, we can't simply hope that they will reverse course. Despite *Livingood*, it's possible they may still affirm their prior rulings, leaving TTD owed for extended periods and neutralizing any return to work/light duty programs as they have existed in the past. Short of legislative intervention, which hasn't happened in nearly twenty years, employers, carriers and attorneys need to be creative and aggressive in returning employees to work and being credited for payments made to injured workers during the same. The goal is to return injured workers to work, and employers should not be penalized for striving to make that goal a reality.

4816-1801-9110, v. 1