OPINION ENTERED: March 29, 2013

CLAIM NO. 201177232

BLUEGRASS CENTRAL CONSTRUCTION, INC. PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

ERIC B. ROBERTS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Bluegrass Central Construction, Inc. ("Bluegrass") seeks review of the opinion, order and award rendered December 10, 2012 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Eric B. Roberts ("Roberts") permanent total disability ("PTD") benefits and medical benefits. No petition for reconsideration was

filed. On appeal, Bluegrass argues the ALJ's award of PTD benefits is not supported by substantial evidence. We disagree and affirm.

Roberts testified by deposition on July 3, 2012, and at the hearing held December 7, 2012. Roberts was born on April 10, 1973, and is a high school graduate with some vocational training in carpentry. He is a resident of London, Kentucky. He filed a Form 101 on April 20, 2012, alleging injuries to his right leg, hip, foot, knee and ankle due to a work-related accident occurring on August 23, 2011. He subsequently amended the claim to include the allegation of a psychological condition stemming from his injuries.

Roberts began working for Bluegrass in 1994 in building houses. He then worked with power line construction on the ground crew, and eventually became a lineman. He described his duties included climbing poles, stringing cable, framing poles, digging holes, setting poles, and operating a jackhammer which weighed ninety pounds.

On August 23, 2011, he was working at a jobsite in Lawrenceburg, Kentucky, where he was assisting in loading utility poles. One of the poles rolled onto his right leg and ankle. He was taken to the emergency room at

the Frankfort Regional Medical Center, and subsequently treated in Corbin with Dr. Ronald Dubin, an orthopedic surgeon. He has had no surgery, but at least one physician recommended a fusion of the right ankle.

Roberts attempted to return to work for Bluegrass but was unable to work more than a few days due to excessive swelling, numbness, and pain in his right foot. He was laid off, and continued to draw unemployment benefits through the date of the hearing. He stated he is unable to stand for long periods of time, and is unable to climb. He also reported complete numbness in the right foot after driving for thirty minutes. He testified he is physically unable to perform any laboring activities, and due to his depression, he avoids people, including family. He wears an ankle brace.

In support of the Form 101, Roberts filed the records from the Frankfort Regional Medical Center. Those records outline the initial treatment he received subsequent to the accident.

Roberts filed records documenting his treatment with Dr. Dubin. In an office note dated April 25, 2012, Dr. Dubin indicated he first saw Roberts on August 26, 2011 for the work injury. He diagnosed Roberts with a fracture of the calcaneus interarticular to the calcanoucuboide

ligament and mild reflex sympathetic dystrophy ("RSD"). He assessed a 15% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Dubin further noted Roberts did not retain the ability to perform his previous work, could perform sedentary or semi-sedentary work only, and he must be allowed to sit for long periods of time. Dr. Dubin further opined Roberts is not a surgical candidate. In his note dated May 24, 2012, Dr. Dubin stated Roberts had returned to work, but complained of pain and swelling in the right foot and ankle. He noted Roberts could not return to his previous work, and exhibited some findings consistent with RSD.

Dr. Dubin later testified by deposition on August 28, 2012. He initially expected Roberts to miss only four to six weeks of work. He noted Roberts initially complained of knee pain which eventually resolved. He referred Roberts to Dr. Lawrence in Lexington for a second opinion regarding possible RSD who found no evidence of that condition. Dr. Dubin reiterated his assessment of a 15% impairment rating pursuant to the AMA Guides due to gait derangement, with an objective finding of swelling. He stated Roberts had reached maximum medical improvement

("MMI") from the physical effects of his injury approximately three to four months after the accident.

Roberts filed the July 31, 2012 report of Dr. Dennie Sprague, a psychologist. Dr. Sprague diagnosed a depressive disorder, not otherwise specified; pain disorder with psychological factors and general medical condition; a generalized anxiety disorder; and mild mental retardation. He recommended medical monitoring, psychiatric or psychological treatment, and pain management. Dr. Spraque opined Roberts is emotionally unable to work. He assessed a 10% impairment rating pursuant to the AMA Guides, 2nd Edition, of which he found 2% due to pre-existing mental retardation.

Bluegrass filed the March 1, 2012 report prepared by Dr. David Muffly, an orthopedic surgeon. Dr. Muffly noted the August 23, 2011 accident and complaints of pain in the right medial ankle and lateral mid-foot. He noted stiffness of movement and swelling with discoloration. Roberts complained of increased symptoms with walking on irregular ground. He also complained of right knee pain with extension. He has had no surgery. Dr. Muffly diagnosed a healed right calcaneus fracture at the calcaneal cuboid joint with slight displacement and right ankle sprain, all due to the work accident. He stated

Roberts had reached MMI, and assigned a 3% impairment rating pursuant to the AMA Guides. He would restrict Roberts from climbing poles.

In a subsequent report dated August 15, 2012, Dr. Muffly reiterated his assessment of 3% impairment and restrictions. He also stated he disagreed with Dr. Dubin's assessment of RSD.

Bluegrass also filed the October 19, 2012 report prepared by Dr. Tim Allen, a psychiatrist. Dr. Allen noted the history of injury, and complaints of constant tingling in the foot, numbness upon extended driving, irritability, anger, loss of concentration and weight gain. Roberts reported he attempted a temporary return to work, but had to leave due to swelling in his foot. Dr. Allen diagnosed adjustment order, unspecified, and mild mental retardation; personality disorder, not otherwise specified, with paranoid traits. He opined Roberts had reached MMI, and stated the adjustment disorder developed subsequent to the work-related injury. He assessed a 10% impairment rating pursuant to the AMA Guides, 2nd Edition, which he assessed 1/3 to the work injury.

A Benefit Review Conference ("BRC") was held on September 7, 2012. In the BRC order and memorandum, the parties stipulated to the occurrence of a work-related

injury, an average weekly wage of $1,232.64, Roberts last worked in September 2011, and temporary total disability ("TTD") benefits were paid from August 24, 2011 through March 2, 2012. The issues preserved included extent and duration of disability; compensability of the psych claim; exclusion of prior active non-work-related condition; credit for unemployment benefits; and vocational rehabilitation.

In a decision rendered December 10, 2012, the ALJ found, pertinent to this appeal, as follows:

> I saw and heard the plaintiff testify at the hearing. He was a credible and convincing witness. Based upon the totality of the evidence in the record, including the plaintiff's testimony, and the expert evidence from Dr. Dubin and Dr. Sprague, which I found persuasive, I make the factual determination that Mr. Roberts will sustain a significant permanent physical whole person impairment and also a significant permanent psychological impairment as a result of his work injuries on August 23, 2011 while employed by the defendant. As indicated above, Dr. Dubin stated that Mr. Roberts will sustain a 15% permanent whole person impairment as a result of his physical injuries and Dr. Sprague stated that Mr. Roberts will sustain a 10% permanent whole body impairment for his psychological injuries resulting from his work accident.
>
> In rendering a decision, KRS 342.285 grants the Administrative Law Judge as

fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008).

"'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 . . . ." Kentucky Revised Statutes (KRS) 342.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee's post-injury physical, emotional, and intellectual state has on the employee's ability "to find work consistently under normal employment conditions . . . . [and] to work dependably[.]" *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

> "the ALJ must necessarily consider the worker's medical condition . . . [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."

Id. at 52. (Internal citations omitted.) *See also, Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

In the present case, I considered the severity of the plaintiff's work injuries, his age, his work history and the specific medical evidence regarding his permanent impairments and occupational disability. Based on all

> of those factors, I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that Mr. Roberts is permanently and totally disabled.

No petition for reconsideration was filed.

The crux of this appeal concerns whether the ALJ's determination of PTD is supported by substantial evidence. Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). Because the outcome selected by the ALJ is supported by

substantial evidence, we are without authority to disturb his decision on appeal. *See* KRS 342.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In support of its assertion the ALJ erred by awarding PTD benefits, Bluegrass merely points to evidence which could have produced a contrary result. This is an insufficient basis for setting aside the ALJ's determination. After reviewing the evidence of record, we believe the ALJ applied the appropriate legal standard for determining whether Roberts is permanently totally disabled in accordance with the Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Taking into account Roberts' age, education and past work experience, in conjunction with his post-injury physical status, the ALJ was persuaded due to the effects of the work-related injury, he is totally disabled. For that reason, we cannot say the outcome arrived at by the ALJ finding Roberts entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed.

It is noted Roberts filed a motion for continuation of benefits pending appeal on February 28, 2013, to which Bluegrass responded on March 8, 2013.

Although this argument would be moot absent further appeal, we determine Roberts has satisfied the requirements of the statute and the applicable administrative regulation. Accordingly, the motion is hereby **GRANTED**.

We also acknowledge Roberts' request sanctions be levied against Bluegrass pursuant to KRS 342.310 and 803 KAR 25:010 §24 for filing a frivolous appeal. Such request is not taken lightly. Finding Bluegrass did not file a frivolous appeal, Roberts' request for sanctions is **DENIED**. However, Bluegrass is cautioned that appeals without the likelihood of success are frowned upon, and such appeals in the future may result in sanctions.

Accordingly, the decision rendered December 10, 2012, by Hon. William J. Rudloff, Administrative Law Judge, is hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

_____

MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON GUILLERMO A CARLOS
444 WEST SECOND STREET
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON TIMOTHY WILSON
309 NORTH BROADWAY
LEXINGTON, KY 40508

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM J RUDLOFF
400 EAST MAIN ST, STE 300
BOWLING GREEN, KY 42101