OPINION ENTERED: May 3, 2013

CLAIM NO. 201294841

BLUEGRASS REHABILITATION CENTER PETITIONER

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

EDNA MILES
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. Bluegrass Rehabilitation Center ("Bluegrass") seeks review of the opinion and order rendered December 17, 2012 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Edna Miles ("Miles") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical

benefits. Bluegrass also appeals from the January 9, 2013 order on remand.

On appeal, Bluegrass argues the ALJ's award of PTD benefits is unsupported by the facts, and is arbitrary and capricious. Because the ALJ's determination is supported by substantial evidence, we affirm.

Miles filed a Form 101 on July 22, 2012 alleging injuries to her back, hips and lower abdomen on February 6, 2012 from lifting a patient in the course of her job as a Certified Nursing Assistant ("CNA"). As she was assisting another CNA in repositioning a patient in bed, she experienced a pop in her back and her right leg went numb, causing her to fall to the floor.

Miles testified by deposition on October 26, 2012, and at the hearing held December 14, 2012. Miles was born on September 17, 1974, and is a resident of Lexington, Kentucky. She is a high school graduate, and completed one year of college in order to obtain a higher level CNA certification. Her previous work history consists primarily of various CNA positions and working on an assembly line for General Motors in Michigan. She began working for Bluegrass as a CNA in September 2010. Her job duties required bathing, dressing, transferring and feeding residents. Some residents weighed in excess of five

hundred pounds. Two people were needed in some, but not all lifting situations.

Miles testified she had not previously experienced back pain, except briefly during one of her pregnancies, which resolved shortly after she gave birth. She was not treating for any back pain prior to her accident. On February 6, 2012, she assisted a co-worker in pulling a resident up in bed to keep the resident from choking while eating. As they attempted to lift or scoot the patient, Miles experienced a pop in her back, and her right leg went numb, causing her to fall to the floor. She has continued to experience pain in her back since the accident, which varies daily. Her back pain is worse after engaging in certain activities such as bending, squatting and walking long distances.

Subsequent to the accident, she sought treatment with Baptistworx. She attempted to return to light duty which consisted of passing ice. She had a course of physical therapy which provided some relief. She eventually treated with Dr. Thomas Menke, an orthopedic surgeon in Lexington. Dr. Menke took her off work, and she was subsequently terminated from her job. She has not worked since, and does not believe she can return to work. Dr. Menke advised surgery would not help, and an injection

provided only brief relief. She currently takes Soma and Flexeril. Dr. Menke released her to return to work, and advised her to lift no more than twenty-five pounds occasionally, or over fifteen pounds frequently. She continues to experience back spasm and periodic leg numbness, and falls occasionally. Since Dr. Menke released her, she occasionally seeks hospital treatment in order to renew her prescriptions.

In support of the Form 101, Miles filed the February 6, 2012 note from Baptistworx. The note reflects she was assisting a co-worker with pulling a resident in bed when she experienced a pop in her back, and her right leg went numb, causing her to fall.

Miles filed the September 12, 2012, Form 107-I report completed by Dr. James Owen. Dr. Owen noted the history of injury and initial treatment at Baptistworx. He diagnosed persistent low back pain with slightly positive supine straight leg raising on the right, and definite dysmetria and muscle spasm in the low back with non-verifiable radicular symptomatology, all of which was caused by her work accident. He assessed an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Owen opined Miles does not retain the

physical capacity to return to the type of work performed at the time of the injury. He also recommended restrictions of lifting, handling, and carrying objects weighing less than twenty pounds, and avoidance of activity requiring recurrent bending, squatting or stooping, and avoidance of prolonged standing greater than half an hour, or walking more than an hour.

Miles also submitted the Form 107-I medical report prepared by Dr. Jared Madden, D.O., dated November 9, 2012. Dr. Madden outlined the history of onset of back pain, leg numbness, and the fall. He diagnosed low back pain, lumbar degenerative disk disease, lumbar radiculopathy, and chronic pain syndrome due to trauma. He assessed a 12% impairment rating pursuant to the AMA Guides. He opined Miles had reached maximum medical improvement ("MMI") by August 6, 2012. He further opined Miles does not retain the physical capacity to return to the type of work performed at the time of the injury. He stated she is limited to light duty consisting of minimal bending, twisting, and stooping, with no prolonged sitting or standing. He also advised against repetitive motion with the lower extremity, and no lifting over ten pounds. He also recommended routine position changes.

Bluegrass filed office records from Dr. Menke for treatment provided from April 16, 2012 through July 13, 2012, as well as a December 11, 2012 letter. Dr. Menke treated Miles for low back pain, and numbness in her right leg. He stated she had reached MMI by July 2, 2012. He also noted a steroid injection provided temporary relief which wore off after only a few days. Dr. Menke stated Miles is not a surgical candidate. He noted she is status post a work-related injury, and has disk dessication at L4-5 identified on MRI. He assessed a 5% impairment rating based upon the AMA Guides, and recommended restrictions of no lifting over thirty pounds on a maximum occasional basis, or over fifteen pounds more frequently.

Bluegrass also filed the Functional Capacity Report prepared by Mr. Rick Pounds on November 15, 2012. Mr. Pounds recommended an "aggressive functional restoration program." He stated Miles demonstrated the ability to lift and carry boxes weighing ten, twenty and twenty-five pounds.

A benefit review conference ("BRC") was held on December 4, 2012. In the BRC order and memorandum, the parties agreed the contested issues were benefits per KRS 342.730 and overpayment of TTD benefits.

In an opinion rendered December 17, 2012, the ALJ found, pertinent to this appeal, as follows:

> **A. Benefits per KRS 342.730.**
>
> I saw and heard the plaintiff testify at the hearing and she was a credible and convincing witness. Based upon the totality of the evidence, including the plaintiff's sworn testimony and the very persuasive medical reports from Dr. Owen and Dr. Madden, I make the factual determination that Ms. Miles will sustain a 12% permanent whole person impairment under the AMA Guides, Fifth Edition, as per the very persuasive medical report from Dr. Madden.
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> 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). In this case I find most persuasive the opinion of Dr. Madden and find that the plaintiff will sustain a 12% whole person permanent impairment.
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> "'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 injury, her age, her work history, her education, the testimony of the plaintiff and Dr. Madden's specific opinions regarding her 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 she is permanently and totally disabled.

B. TTD overpayment.

KRS 342.0011(11)(a) defines "temporary total disability" to mean 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.

Based on the totality of the evidence, I make the factual determination that the plaintiff's temporary total disability benefits should have been in

> the amount of $291.26 per week, and that, therefore, there was an overpayment of temporary total disability benefits.

Bluegrass filed a petition for reconsideration asserting the award of PTD benefits was not supported by substantial evidence, and Miles did not request such an award. The ALJ entered an order on January 9, 2013 denying the petition for reconsideration.

The crux of this appeal concerns whether the ALJ's award of PTD benefits is appropriate, and 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). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d (Ky. 1979). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky.1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. 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).

After reviewing the evidence of record, we believe the ALJ applied the appropriate legal standard for

determining whether Miles 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 Miles' age, education and past work experience, in conjunction with her post-injury physical status, the ALJ was persuaded due to the effects of the work-related injury, she is totally disabled. We cannot say the outcome arrived at by the ALJ finding her entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed.

There is no question Miles sustained a work-related injury. This was assessed by Drs. Owen, Madden and Menke. Likewise, all of these physicians assessed impairment ratings and recommended restrictions resulting from her work injury. Miles testified she cannot return to work. She also testified she has constant low back pain (sometimes increased with activity), takes medication, and her right leg occasionally goes numb, causing her to fall.

The ALJ determined Miles sustained a work-related injury while employed by Bluegrass rendering her permanently totally disabled. This was based upon not only the medical evidence, but Miles' testimony. Therefore, the

ALJ's determination is supported by substantial evidence and will not be disturbed on appeal.

Accordingly, the decision rendered December 17, 2012, and the order on reconsideration issued January 9, 2013, by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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