Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 26, 2015

CLAIM NO. 201398278

BOBBY LEE IRWIN PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, CHIEF ADMINISTRATIVE LAW JUDGE**

HURST OFFICE SUPPLIERS
HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Bobby Lee Irwin ("Irwin") appeals from the January 23, 2015 Opinion, Award and Order of Hon. Robert L. Swisher, Chief Administrative Law Judge (the "CALJ"). He argues the CALJ erred in determining he is not permanently totally disabled as a result of a motor vehicle accident which occurred during the course and scope of his

employment with Hurst Office Suppliers ("Hurst"). For the reasons set forth herein, we affirm.

Irwin alleged he sustained injuries to his neck and low back as a result of a motor vehicle accident ("MVA") on January 8, 2013. The parties stipulated the MVA was work-related, and Irwin sustained a compensable lumbar spine injury resulting in a 5% permanent impairment rating. Hurst further concedes Irvin suffered a mild cervical injury as a result of the January 8, 2013 MVA, which has subsequently resolved. The primary contested issue in the claim is the cause of Irwin's current, ongoing cervical complaints. Hurst argued Irwin's current symptoms are a result of a second, non-work-related MVA which occurred on May 7, 2014. On that date, Hurst was driving his wife to an appointment when their vehicle was rear-ended while stopped at a traffic light. Irwin contended his current cervical pain is a result of the January 8, 2013 MVA. The CALJ ultimately determined Irwin did not suffer a permanent cervical injury as a result of the January 8, 2013 MVA, and that finding has not been appealed. Therefore, we will not extensively discuss the medical evidence relating to that injury.

Irwin began working for Hurst as a delivery truck driver in 2008. He was making deliveries on January 8,

2013 when the brakes failed, and he ran into another vehicle. He was sore that evening, and his low back pain worsened overnight. He visited Concentra Urgent Treatment Center the following days with complaints of neck and low back pain. He was given pain medication and restricted from lifting over fifty pounds. Irwin returned to work on January 10, 2013 but his pain worsened when he drove the delivery truck. He did not thereafter return to work.

Thereafter, Irwin came under the care of Dr. Stephen Royse and attended physical therapy. By February 11, 2013, Irwin reported to Dr. Royse he was still in pain but improving. An MRI scan revealed degenerative changes with a disc protrusion and stenosis, but no herniation or impingement. By July 12, 2013, Irwin reported his neck was better but his low back pain continued. A rhizotomy was planned and was later approved in an Interlocutory Order.

Irwin was no longer treating with Dr. Royse for his neck when the May 7, 2014 MVA occurred. Following the accident, he visited Dr. David Dome upon referral by Dr. Royse. Dr. Dome received a history of upper back, neck and left shoulder pain. An MRI of the left shoulder revealed severe tendinosis and a low-grade instrasubstance tear. Irwin’s complaints of low back pain continued at a June 12, 2014 visit with Dr. Dome’s colleague, Dr. Robert Owen. He

also reported left arm pain and tingling into the left thumb. Dr. Owen opined Irwin's neck pain is due partly to whiplash suffered during the May 7, 2014 MVA, and partly to degenerative spondylosis. He recommended injections and physical therapy.

Dr. Owen placed Irwin at maximum medical improvement on June 28, 2013 and diagnosed persistent neck and low back pain. Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assigned a 6% impairment rating for the back and a 5% impairment rating for the neck. He opined Irwin could not return to the same job he had been performing at the time of the injury, and restricted him from lifting over 20 pounds or recurrent bending, squatting, stooping and neck turning.

Dr. Arthur Hughes conducted an independent medical evaluation ("IME") on July 24, 2014. He assigned a 5% whole person impairment for Irwin's low back condition and opined he does not have the physical capacity to return to his pre-injury work. He indicated Irwin should avoid tasks involving repetitive bending and twisting of the neck or lower back. He also recommended Irwin should lift no more than 20 pounds regularly and 40 pounds occasionally.

Dr. Joseph Zerga conducted IMEs on February 27, 2013 and May 8, 2014. Dr. Zerga diagnosed low back pain secondary to osteoarthritis and assigned a 5% whole person impairment rating pursuant to the AMA Guides. He assigned lifting restrictions of no more than 30 pounds repetitively and 40 pounds at any one time. Dr. Zerga also recommended a weaning program for Irwin's prescription narcotic medications.

Irwin testified at a deposition on July 17, 2014 and at the December 5, 2014 final hearing. He continues to suffer significant neck and low back pain which interferes with his daily activities. He does not believe he is physically capable of returning to work due to his pain and stiffness. He testified he suffers back pain every day, to varying degrees.

The CALJ determined Irwin suffered a lumbar spine injury as a result of the January 8, 2013 MVA, but suffered no permanent injury to his cervical spine. He assigned a 5% whole person impairment rating for the lumbar spine injury. He awarded medical benefits for both injuries, with the benefits for Irwin's temporary cervical spine injury ceasing on May 7, 2014. The CALJ was also persuaded by Dr. Zerga's opinion that Irwin's narcotic pain medications are not reasonable and necessary. He set a

weaning schedule and determined Hurst will no longer be liable for the cost of the narcotic pain medication after the weaning schedule is complete. Finally, considering whether Irwin is totally disabled, the CALJ explained:

> Having carefully and thoroughly considered the evidence in the record, and having applied thereto the analysis required by [*Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000)], the CALJ is not persuaded that plaintiff is permanently and totally occupationally disabled as a result of the lumbar spine injury of January 8, 2013. In so finding, the CALJ acknowledges that plaintiff is 60 years of age and has not worked since January 8, 2013, factors which would tend to support plaintiff's claim for permanent total occupational disability. On the other hand, plaintiff has not offered any evidence that he is significantly precluded from a return to the labor force as a result of his post-injury educational or emotional/psychological status. The CALJ notes specifically that plaintiff obtained a GED on his own after completing only 11 years of formal education. Having had the opportunity to observe plaintiff testify during the course of two Formal Hearings, the CALJ found him to be a pleasant gentleman who was able to communicate with counsel and the undersigned with ease. Further, there is no evidence in the record that plaintiff suffers from any emotional sequelae or consequence as a result of the motor vehicle accident which would impair or impede his ability to return to work should he choose to do so.
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> The most significant aspect of the *Hamilton* analysis in the context of the

present claim, however, involves a determination of plaintiff's post-injury physical status. In this regard, the CALJ notes that the physicians who have seen him most recently, and after the rhizotomy procedures authorized in the Interlocutory Opinion, Award and Order, i.e., Drs. Hughes and Zerga, offered different opinions with respect to plaintiff's residual restrictions. Dr. Zerga felt that plaintiff could not return to the type of work that he was performing when he was injured including the lifting required therein, but he attributed that to plaintiff's underlying degenerative spine changes. Dr. Hughes indicated in his report that plaintiff does not retain the physical capacity to return to the type of work performed at the time of injury and he assigned restrictions including avoiding tasks which involved repetitive bending and twisting of the neck and lower back or lifting more than 20 pounds regularly and 40 pounds on occasion but felt that plaintiff could do tasks which allow him to stand or sit as needed. In other words, even the restrictions assigned by Dr. Hughes would allow plaintiff to continue to lift significant weights on occasion although not on a frequent or routine basis. Sitting and standing is left to plaintiff's discretion, but Dr. Hughes does not impose any specific limitations or restrictions with respect to either. No physician has restricted plaintiff against driving, and he testified that he is still able to do that. In reviewing plaintiff's prior work history, the CALJ notes that in the past he has worked as a stock clerk, worked in a warehouse, operated a forklift, detailed automobiles, has been a restaurant cook and a delivery driver. Most recently, his work with Hurst Office Supply has required him to

> load and drive a delivery vehicle and deliver office supplies throughout his assigned territory. Plaintiff testified that he does not believe he could return to that type of work because of the bending and lifting involved, and the CALJ finds his testimony in that regard persuasive. *Hush v. Abrams,* 584 S.W.2d 48 (Ky. 1979). The CALJ is not persuaded, however, that as a result of plaintiff's simple non-surgical lumbar strain that he is completely precluded from performing work in the light, sedentary and even some medium categories. Plaintiff's present restrictions would not prohibit him from being either a forklift operator, delivery driver, automobile detailer or stock clerk, occupations for which he has prior training and experience. While the CALJ finds that plaintiff still experiences lumbar-related symptoms for which ongoing treatment is being provided, and that while those symptoms are sufficiently severe to preclude him from returning to the type of work performed at the time of injury, (i.e., as a delivery driver for Hurst Office Supply), the CALJ is ultimately not persuaded that plaintiff's ongoing lumbar symptoms and complaints are sufficiently impairing to preclude his return to the labor market should he choose to do so. Accordingly, the CALJ finds that plaintiff is not permanently and totally occupationally disabled.

No petition for reconsideration was filed. As such, the CALJ's findings of fact are binding. KRS 342.285(1). On appeal, Irwin argues the CALJ erred in determining he is not permanently and totally disabled. He cites his significant, ongoing pain, which impedes his

ability to perform even household chores. He claims his pain would prevent working on a regular and sustained basis in a competitive economy, as work is defined at KRS 342.0011(34). Moreover, Irwin notes the CALJ's weaning order would further complicate his ability to work consistently without pain medication.

Permanent total disability is "the condition of an employee who, due to an injury, has a permanent disability rating and a has a complete and permanent inability to perform any type of work as a result of the injury." KRS 342.0011(11)(c). In considering whether a person is permanently totally disabled, the fact-finder must conduct an individualized analysis of what the worker is and is not able to do following the injury. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). This analysis includes a consideration of the worker's post-injury physical, emotional, intellectual and vocational status, and how those factors interact. Id.

Though Irwin provided substantial testimony regarding the pain he suffers daily, this appeal is essentially a request for this Board to reweigh the evidence in his favor, which we have no authority to do. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). Because Irwin did not successfully establish he is

permanently totally disabled, the only question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The CALJ fully considered the factors enunciated in Hamilton, and thoughtfully articulated his reasoning and analysis of those factors. He acknowledged Irwin's ongoing symptoms and pain, but considered those complaints within the context of the physical restrictions recommended by Dr. Hughes and Irwin's prior work history. The CALJ conducted the appropriate analysis required by Hamilton, and reached a result that is supported by the evidence. As such, we cannot conclude the weight of the evidence compels a contrary result.

For these reasons, the January 23, 2015 Opinion, Award and Order of Hon. Robert L. Swisher is hereby **AFFIRMED**.

ALL CONCUR.

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