Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 7, 2014

CLAIM NO. 201198832

DANCO TRUCKING CO., LLC PETITIONER

VS. **APPEAL FROM HON. STEVEN BOLTON, ADMINISTRATIVE LAW JUDGE**

JAMES HOWARD;
COMMONWEALTH CHIROPRACTIC;
AYMAN ALBAREE; AND
HON. STEVEN BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
AND REMANDING

* * * * * *

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

RECHTER, Member. Danco Trucking Co., LLC ("Danco") appeals from the May 27, 2014 Opinion, Award and Order and the July 28, 2014 order denying its petition for reconsideration rendered by Hon. Steven G. Bolton, Administrative Law Judge

("ALJ"). The ALJ found James Howard ("Howard") permanently totally disabled as a result of a January 10, 2011 injury. Danco argues the ALJ erred in finding Howard permanently totally disabled and made insufficient findings regarding the award of medical benefits. We affirm the finding of permanent total disability and remand for additional findings regarding the award of medical benefits.

Howard filed his claim on July 27, 2011 alleging he sustained a neck injury, concussion, whiplash, chest contusions and a right shoulder injury on January 10, 2011. The injury occurred when a tire he was inflating blew off the rim. His claim was later amended to include hearing loss and psychological conditions.

Howard testified by deposition on January 21, 2013 and at the hearing held March 24, 2014. He worked as a truck driver from 1977 through 1980, then as an equipment operator running drills, rock trucks and dozers. He returned to truck driving in 1984. Beginning in 1993, he worked as a welder/mechanic. He started with Danco in 2008. The position required heavy lifting, including tires and jacks that could weigh 150 pounds.

Howard continues to have pain in his neck and shoulder on a daily basis. The neck pain causes headaches and he feels light-headed and off-balance. He has trouble

sleeping because of shoulder pain. He has difficulty climbing, stooping and crawling. His pain is increased when leaning over, sitting for long periods, lifting a milk jug or lifting anything above the waist and reaching. He estimated he could sit for approximately thirty minutes to an hour. Howard can no longer bow-hunt and is unable to perform activities with his grandchildren. He developed depression and anxiety following the work injury. He denied any prior treatment or counseling for a psychological condition.

Dr. David Jenkinson performed an independent medical evaluation ("IME") on July 20, 2011 and opined Howard may have had a minor soft tissue sprain or strain of his neck. However, Dr. Jenkinson concluded there is no objective evidence of any significant injury, nor any abnormality to support Howard's subjective complaints. He believed Howard requires no further medical treatment, has no need for restrictions, and no impairment rating related to the work injury.

Dr. Anbu Nadar performed an IME on October 5, 2011 and diagnosed a cervical strain with non-verifiable radiculopathy, right shoulder strain with rotator cuff tendinitis, and chest contusion. Dr. Nadar assigned a 12% impairment rating pursuant to the American Medical

Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") for the cervical spine with 30% attributable to his pre-existing active condition. He also assigned a 4% impairment for the shoulder condition. Dr. Nadar stated Howard would have limitations in work activities that require heavy lifting, pushing, pulling and overhead activity. In his opinion, Howard is unable to return to his former employment.

Dr. Gregory Snider performed an IME on October 6, 2011 and diagnosed soft tissue contusions of the face, chest and neck, neck pain, and right shoulder pain. Dr. Snider assigned a 4% impairment for the shoulder condition pursuant to the AMA Guides but found no specific acute anatomic changes to the cervical spine that would warrant an impairment rating. He felt Howard could return to work without restrictions. Dr. Snider recommended use of an anti-inflammatory medication for arthritic complaints. Dr. Snider's March 12, 2013 deposition testimony is consistent with his report. After reviewing the IME reports of Drs. Nadar and Bilkey, Dr. Snider indicated Howard's impairment for the shoulder is between 4% and 11%.

Dr. Warren Bilkey performed an IME on January 23, 2012 and diagnosed a cervical strain, muscle spasm affecting the neck flexor muscles and right shoulder pain. He was not

sure Howard had reached maximum medical improvement for the shoulder condition, and for this reason assigned no impairment rating. Dr. Bilkey indicated Howard should avoid anything other than sedentary work, as well as overhead or repetitive work with his right upper extremity. Dr. Snider assigned an 8% impairment for the cervical strain injury pursuant to the AMA Guides.

Leah P. Salyers, MS, CRC, LPC, performed a vocational evaluation on February 16, 2012 and opined Howard's symptoms and limitations preclude him from performing his past employment or other work for which he is suited by his experience, training, and existing skills or abilities on a sustained basis. His limitations would preclude a successful vocational adjustment to other work or completion of a retraining program. Likewise, Ms. Salyers opined Howard would not be able to sustain full-time, unskilled work in the regional or national labor market.

Ralph M. Crystal, Ph.D. performed a vocational evaluation on March 30, 2012. He opined Howard could perform a wide range of jobs and would be a good candidate for vocational retraining. Dr. Crystal indicated Howard could return to his usual and customary work and does not have a loss of employability or earning capacity.

Leigh Ann Ford, Ph.D. performed a psychological evaluation on February 24, 2012. She diagnosed a pain disorder related to a medical condition and a depressive disorder. In her opinion, Howard's psychological complaints are a direct result of the work-related physical injury. Dr. Ford assigned a 5% impairment for the psychological condition pursuant to the Fifth and Second editions of the AMA Guides.

Dr. Douglas D. Ruth performed a psychological evaluation on April 19, 2012. He indicated that if Howard did not undergo treatment, he would have a 4% psychiatric impairment with 2% attributable to depression from unemployment and 2% attributable to a pre-existing anxiety condition.

Julie Helfen, Au.D., performed an audiological evaluation on November 12, 2012 and assigned an 8% impairment pursuant to the AMA Guides. She stated Howard's pattern of high frequency hearing loss is consistent with noise exposure.

Daniel R. Schumaier, Ph.D., CCC-A, performed an audiological evaluation on February 6, 2013 and assigned a 4% impairment pursuant to the AMA Guides. He indicated the impairment is the result of long-term noise exposure during

his work career and recreational noise exposure from shooting guns.

Dr. Raleigh Jones and Dr. Persis J. Ormond performed a university evaluation on April 5, 2013 and found a 10% impairment pursuant to the AMA Guides related to Howard's occupational exposure to noise. Dr. Jones recommended Howard avoid further exposure to noise without hearing protection.

The ALJ found Dr. Snider most persuasive regarding Howard's physical injuries and accepted his 4% impairment rating for the shoulder condition. The ALJ accepted the opinion of the university evaluators regarding Howard's hearing loss, noting it is entitled to presumptive weight. Relying on Dr. Ford, the ALJ concluded Howard's psychological condition is directly related to the physical injury. He determined Howard did not have a pre-existing disability/impairment. Finally, with respect to the extent of Howard's disability, the ALJ was persuaded by the opinion of Ms. Salyers that his symptoms and limitations preclude the performance of his past employment or other gainful activity for which he is suited by experience, training, existing skills or abilities on a sustained basis. The ALJ further found these limitations would preclude a successful completion of a retraining program resulting in gainful

employment, including performance of sustained, full-time unskilled work activity in the regional or national labor market. Additionally, the ALJ found as follows:

> Further, given his age, education, lack of diversified training and work experience as well as the general economy in his home region, I find Mr. Howard to have a permanent disability rating of a physical, hearing and psychological nature and resultantly has a complete and permanent inability to perform any type of work as a result of those injuries, and is therefore permanently totally disabled from all work in a competitive economy.

The ALJ awarded medical expenses “incurred for the cure and relief of the effects of the work injuries”. However, he ruled treatments provided by Commonwealth Chiropractic and by Dr. Ayman Albaree had been “totally ineffective” and were not medically reasonable or necessary. Danco’s subsequent petition for reconsideration, raising the same arguments it now raises on appeal, was denied.

On appeal, Danco argues the ALJ abused his discretion and erred in finding Howard permanently totally disabled. It objects to the ALJ’s consideration of the general economy in Howard’s “home region” and of his disability rating from his psychological and hearing loss claims. Danco notes no restrictions on his return to work status were placed on Howard regarding those conditions.

Further, Danco emphasizes that Dr. Snider only assigned a rating for the shoulder condition, which was the impairment rating adopted by the ALJ. However, the ALJ seemingly took into consideration the physical restrictions recommended by Drs. Bilkey and Nadar, who assigned impairment ratings for the cervical condition. According to Danco, the ALJ did not adequately explain how the shoulder injury, alone, renders Howard permanently totally disabled.

The ALJ understood and articulated the definitions of permanent total disability and work. As noted by the ALJ, Howard is an older worker whose employment has been physical labor, primarily as a welder and mechanic in the trucking and mining industries. These positions required the ability to perform heavy physical labor. The ALJ was convinced Howard's condition precluded him from performing his past work. The opinion of Ms. Salyers, a vocational expert, is substantial evidence supporting a finding of permanent total disability. She expressed her opinion based upon Howard's ability to compete for employment in the regional and national labor market. Although the ALJ made reference to the "general economy in his home region", it is clear this was not the sole consideration. Rather, the ALJ properly considered Howard's ability to perform work "in a competitive economy." Additionally, Howard's testimony

regarding his limitations is substantial evidence of a significant impact on his ability to secure and maintain regular employment. Furthermore, the ALJ is entitled to consider the totality of Howard's post-injury condition, including the effects of non-impairment ratable work injuries.

An ALJ has wide discretion in granting or denying an award of permanent total disability. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006). Although the record contains proof supporting a different conclusion, there was substantial evidence presented to the contrary. As such, the ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Danco argues the ALJ erred in rendering his award of medical benefits. It again notes the only impairment for the physical injury was assessed for the shoulder condition. Danco argues the ALJ's findings are not specific enough in addressing the body parts for which it has liability.

We find it necessary to remand this matter for additional findings regarding the award of future medical benefits. The ALJ addressed specific contested medical

treatment from Dr. Albaree and chiropractic treatment. However, that finding does not conclusively resolve the issue of future medical care for physical conditions other than the shoulder. While the ALJ stated he found Dr. Snider persuasive regarding the physical injury, that finding is not sufficient to apprise the parties of the basis for his decision regarding the compensability of the cervical condition to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982).

It is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are authorized. Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001). It is also possible to sustain a permanent injury that does not warrant an impairment rating but requires ongoing treatment. FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007). In Mullins v. Mike Catron Construction/Catron Interior Systems, Inc., 237 S.W.3d 561 (Ky. App. 2007), the Court of Appeals addressed FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), and noted the ALJ is entitled to exercise his or her

discretion in making a determination regarding future medical benefits. Where there is evidence the claimant will not require future medical treatment for any effects of his work-related injury, an award of medical benefits is not required. Mullins v. Mike Catron Construction/Catron Interior Systems, Inc., id.

Dr. Snider diagnosed neck pain, but found no objective anatomic change and did not assign an impairment rating for the cervical condition. He stated no further formal medical treatment was required, but recommended an anti-inflammatory should be taken on a regular basis for the arthritic complaints. The ALJ found no pre-existing impairment. However, if a work injury arouses previously dormant non-disabling degenerative changes necessitating treatment, the degenerative condition is compensable. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). On remand, the ALJ must determine whether Howard sustained an arousal of a dormant arthritic condition or a temporary or permanent cervical injury, as discussed herein, and award appropriate medical benefits, if any, for the cervical condition.

Accordingly, the May 27, 2014 Opinion, Award and Order and the July 28, 2014 order denying its petition for reconsideration rendered by Hon. Steven G. Bolton,

Administrative Law Judge are **AFFIRMED IN PART** and this matter is **REMANDED** for additional findings regarding the award of future medical benefits in conformity with the views expressed herein.

ALL CONCUR.

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