Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 6, 2013

CLAIM NO. 200901496

ELMO GREER & SONS, LLC PETITIONER/CROSS-RESPONDENT

VS. **APPEAL FROM HON. JONATHAN WEATHERBY, ADMINISTRATIVE LAW JUDGE**

DAVID STAFFORD RESPONDENT/CROSS-PETITIONER

UNINSURED EMPLOYERS FUND, RESPONDENTS
GREER MINING, INC.
dba GREER MINING & ENERGY SERVICES,
WEST VIRGINIA MINE POWER fka QUALITY MASONRY,
HON. JONATHAN WEATHERBY, ALJ and
HON. JAMES L. KERR, FORMER ALJ

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Elmo Greer & Sons, LLC ("Elmo") appeals and David Stafford ("Stafford") cross-appeals from the November 26, 2012 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), and the January 4, 2013 order denying petitions for

reconsideration. Elmo also appeals from the December 14, 2010 order rendered by Hon. James L. Kerr, ALJ. Elmo argues the ALJ erred in finding Stafford was an employee of Elmo, finding jurisdiction, finding Stafford was within the course and scope of his employment when involved in the accident, limiting testimony and refusing to revisit issues addressed in the prior interlocutory order. Stafford argues the evidence compels a finding he is permanently totally disabled. We affirm.

Stafford testified by deposition on July 13, 2010 and June 26, 2012, and at the hearing held September 26, 2012. He provided the following details regarding the circumstances of his employment. From 1985 to 2000, was self-employed, operating an auto body repair shop. In 2000, he began his employment with Elmo in East Bernstadt, Kentucky. Stafford worked as a heavy equipment operator running a 992 loader. His work routinely involved travel to jobs throughout Kentucky, Tennessee, Alabama and West Virginia.

Stafford was sent by Elmo to Beckley, West Virginia to begin work on October 19, 2008. The West Virginia job involved strip mining coal, for which Stafford was required to complete a one-week strip mining class. His supervisor was Felix Baker, also an Elmo employee. Elmo

furnished and paid for an apartment which Stafford shared with another worker.

Initially, Elmo issued Stafford a monthly check for $600 to cover expenses. After approximately six weeks, he was called to the office of West Virginia Mine Power ("Mine Power") to complete paperwork. Stafford then began receiving checks bearing the name "Greer Mining and Energy Services". He assumed Greer Mining and Energy Services was handling payroll for Elmo. At no point did he receive a check from Mine Power, though he did receive a W-2 in 2009 from that company. Stafford also underwent a physical for life insurance and began receiving health insurance through Greer Mining and Energy Services.

Stafford recognized many of the workers on the West Virginia site as Elmo employees, including mechanics with whom he had worked in other states. The bosses on the West Virginia job were also Elmo employees, who previously issued orders to Stafford on other job sites. The equipment used on the site belonged to Elmo, in addition to vehicles Stafford operated while in West Virginia. In fact, Stafford operated the same loader he had used at Elmo job sites in Alabama and Harlan County, Kentucky. He never saw signage in any state for Greer Mining, Inc. Stafford also noticed

the checks from Greer Mining and Energy Services came from the same bank as those from Elmo.

Stafford was injured on July 29, 2009 while driving his personal truck. He was on his way from the apartment, furnished by Elmo, to the job site when his vehicle was struck by another vehicle. He was taken to Greenbrier Valley Medical Center where he was treated and released. However, he returned to the emergency room later that day and underwent foot surgery.

In the June 26, 2012 deposition, Stafford stated he continued to have stinging, numbness, and burning as well as swelling and pain in his foot. He is unable to perform the work he had done at Elmo because he is unable to walk on uneven ground, cannot climb on the loader, and cannot operate the clutch on the loader. Stafford stated he was required to climb in and out of the loader several times each day.

At the hearing held in September 2012, Stafford rated the pain in his foot as a seven or eight on a scale of one to ten. He experienced stinging and burning pain on the left side and top of his foot. Walking or standing for more than ten to fifteen minutes resulted in swelling and increased pain. Stafford’s left leg is shorter because of the injury, which affects his back. Additionally, the

injury to his left foot prevents Stafford from operating heavy equipment. His inability to bend and lift also prevents a return to Stafford's prior career performing auto body repair work.

Don Wilson, Safety Director for Elmo, testified by deposition on August 3, 2010 and provided insight into the relationship between Elmo; Greer Mining, Inc.; Greer Mining and Energy Services; and Mine Power. Elmo is primarily a highway contractor, building and repaving roads, bridges, and airports. Elmo and Greer Mining have the same owners and officers, and use the same Controller. In fact, Elmo and Greer Mining share a common office.

Wilson explained there is no contractual relationship between Elmo and Mine Power, and Greer Mining had no ownership interest in Mine Power. However, Mine Power also does business as "Greer Mining and Energy Services". Mine Power supplies the workers for the strip mining site in West Virginia, and Elmo has no employees at the site. (Wilson contradicted Stafford's testimony that Felix Baker, Stafford's immediate supervisor, is an Elmo employee. According to Wilson, Baker has been an employee of Greer Mining since 2008 and, in fact, is its only employee.) Yet, Wilson confirmed Greer Mining pays Mine Power for the workers at the West Virginia mining site.

Wilson also acknowledged the equipment used at the mine site belonged to Elmo.

With respect to Stafford's employment, Wilson stated Stafford was last employed by Elmo in November, 2008 at which point he became an employee of Mine Power. Wilson indicated Stafford received his last check from Elmo on December 5, 2008. Thus, according to Wilson, Stafford went to West Virginia as an Elmo employee, but shortly thereafter became an employee of Mine Power.

Expert testimony regarding Stafford's foot injury came from Dr. George Quill, who found the surgery performed after the accident had essentially failed, resulting in nerve damage. Dr. Quill diagnosed a left calcaneus fracture malunion, possible subtalar arthrodesis nonunion, painful retained hardware and a prominent bony buildup and neuropraxia if not neurotmesis of at least two distal branches of the superficial peroneal nerve and possibly the medial calcaneal nerve. He removed the hardware on July 18, 2011. On October 5, 2011, Dr. Quill further diagnosed dysesthesia, low back pain, mechanical foot and ankle problems after an open calcaneus fracture and arthrodesis, and calcaneus fracture malunion. On December 27, 2011, Dr. Quill assessed a 12% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent

Impairment, 5th Edition ("AMA Guides"). He stated Stafford's injury resulted in a lack of mobility and predicted Stafford would always have difficulty walking on uneven ground, ramps and construction sites. Dr. Quill restricted Stafford to carrying no more than 40 pounds, recommended a high top shoe, and limited Stafford's time on ladders and equipment to less than thirty minutes in an eight hour work shift.

Stafford underwent two independent medical evaluations ("IME"). Dr. Steven J. Lawrence examined Stafford on March 17, 2011, before Dr. Quill performed the hardware removal procedure. Dr. Lawrence diagnosed neuropathic pain status post subtalar fusion, compartment syndrome of left hind foot, and status post left intra-articular calcaneus fracture. Dr. Lawrence noted Stafford had significant dysfunction and an anterior impingement due to hardware placed anteriorly to his ankle joint preventing dorsiflexion of the ankle. Stafford had neuropathic pain over the medial aspect of his hind foot and over the antereolateral surgical incision. Dr. Lawrence indicated Stafford was not at maximum medical improvement ("MMI") for his left foot, and opined he did not retain the physical capacity to return to the type of work performed at the time of his injury. Dr. Lawrence stated Stafford would have

difficulty walking on uneven surfaces as a result of the subtalar fusion.

The second IME was conducted by Dr. John Gilbert on February 12, 2012. Dr. Gilbert diagnosed gait abnormality; pain disorders related to psychological factors; muscular wasting and disuse atrophy; other chronic pain; open fractures of the lower limb; and a closed fracture of an unspecified bone.

Elmo submitted the report of Dr. Gregory Snider who performed an IME on March 29, 2012. Dr. Snider diagnosed comminuted a left calcaneus fracture, status post left subtalar arthrodesis, status post partial orthopedic hardware removal, chronic left foot and ankle pain, chronic low back pain and chronic narcotic use. Dr. Snider determined Stafford reached MMI on November 1, 2011. Dr. Snider opined no further treatment was reasonable or necessary, but recommended an anti-inflammatory medication and an orthotic. Dr. Snider noted Stafford had been restricted from lifting due to a prior back injury. Dr. Snider indicated he would add restrictions of no prolonged walking or standing, no work on ladders, no work above stepladder height and no repetitive use of foot controls. Dr. Snider assessed a 5% impairment pursuant to the AMA Guides.

The back injury which Dr. Snider referenced had occurred on September 19, 2005 while Stafford was an Elmo employee. The injury resulted in a claim (number 2005-70406) and Elmo introduced records of that claim. The claim was settled based upon a 5% impairment with medical benefits remaining open.

Stafford submitted medical records of Drs. Brett Scott and William Ackerman documenting the treatment he received for his back injury. Dr. Scott diagnosed mechanical low back pain syndrome, L5 spondylolysis with minimal L5-S1 spondylolisthesis and degenerative lumbar spondylosis at L3-4, L4-5, and L5-S1. On October 28, 2006, Dr. Scott assigned a 5% impairment pursuant to the AMA Guides. He restricted Stafford to lifting no more than 25 pounds on an occasional basis and 10 pounds on a regular basis, with no repetitive bending, twisting, or flexion of the waist.

At the Benefit Review Conference ("BRC") held June 28, 2010, the claim was bifurcated on the issues of jurisdiction, employment relationship, course and scope of employment, and interlocutory relief. In a December 14, 2010 order, ALJ Kerr found as follows:

> 8. A determination must be made in respect to employment relationship. After consideration of the issues of

employment and whether an injury has occurred within the course and scope of his employment, the undersigned finds pursuant to Volume 1, Section 48 of Larson's Workers Compensation Desk Edition, page 8–104, Elmo Greer & Sons was a general employer and lent the plaintiff to West Virginia Mine Power as a special employer. As pointed out in Section 48, when a general employer lends an employee to a special employer, the special employer becomes liable for workers compensation only if: (a) the employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has a right to control the details of the work. It further provides that when all three of the above conditions are satisfied in relation to both employers, both employers are jointly liable for workers compensation benefits. See also Volume 1, Section 48.40 of Larson's where it is pointed out that joint employment occurs when a single employee, under contract with two employers, and under simultaneous control of both, performs services for both employers. When the service for each employer is the same as or closely related to that of the other, both employers are liable for workers compensation. Herein, the plaintiff has regular employment with Elmo Greer & Sons and also has a contract of hire with West Virginia Mine Power. It may be inferred that the work being done is essentially that of both the special employer, West Virginia Mine Power, as well as Elmo Greer & Sons through its shadow corporation, Greer Mining, Inc. Further, the details of plaintiff's work were controlled by Felix Barker, who was essentially an Elmo Greer & Sons employee although he may have been paid

by Greer Mining, Inc. As the three conditions set forth above in Larson's are met by both employers, the Administrative Law Judge finds that both employers are liable for plaintiff's workers compensation benefits.

9. As plaintiff was working outside the territorial limits of the Commonwealth at the time of his injury, the undersigned only has jurisdiction over West Virginia Mine Power to the extent the jurisdiction may be found in KRS 342.670. Herein, the plaintiff was working under contract of hire with West Virginia Mine Power made outside the Commonwealth of Kentucky and his employment was not principally localized anywhere other than West Virginia. Thus, plaintiff may not pursue a claim under Kentucky Worker's Compensation Act against West Virginia Mine Power and it shall be dismissed.

10. It is incumbent upon the Administrative Law Judge to determine whether plaintiff's injury occurred in the course and scope of his employment. It is noted that plaintiff was traveling from an employer–furnished apartment to the job site at the time of his motor vehicle accident and he was not technically on the clock. Under normal circumstances, the "going and coming rule" would prevent recovery. However, the Administrative Law Judge notes that plaintiff was on a short term assignment for the benefit of the employer, Elmo Greer & Sons, and this matter may be viewed as a "special mission" for the benefit of the employer as plaintiff's work for the employer placed him under the circumstances which led to the motor vehicle accident. The Administrative Law Judge considers plaintiff's daily travel to and from an apartment furnished by the employer to the job

> site part of the special mission as assigned by Elmo Greer & Sons. Wherefore, the Administrative Law Judge finds that the plaintiff's motor vehicle accident occurred in the course and scope of his employment with the defendant-employer.

Elmo filed a petition for reconsideration raising essentially the same arguments it now raises on appeal. ALJ Kerr issued an order denying the petition on February 23, 2011, which provided:

> Addressing the employment relationship first, the petitioner puts stake in what West Virginia Mine Power has acknowledged in terms of an employment relationship as well as plaintiff's own affidavit in his motion for interlocutory relief. An employment relationship calls for a legal conclusion and, to the Administrative Law Judge, plaintiff remained in the employment of Elmo Greer & Sons at all times relevant. As to jurisdiction, the Administrative Law Judge believes that plaintiff's claim fits under KRS 342.670(1) in that his employment is principally localized in this state, although the injury occurred while on assignment in West Virginia.
>
> Wherefore, the Administrative Law Judge denies the petition in respect to jurisdiction. Finally, as to course and scope of employment, the Administrative Law Judge believes Elmo Greer & Sons was receiving a benefit in plaintiff travelling to and from work as it had the advantage of a long term employee away on an assignment in company-provided housing going to a company job site. The Administrative Law Judge continues to believe that

> plaintiff was acting within the course and scope of his employment at the time of the injury.

On December 9, 2011, the claim was reassigned to ALJ Weatherby, who issued an Opinion and Award on November 26, 2012. At the BRC, the ALJ had ruled the prior orders of ALJ Kerr would stand regarding the bifurcated issues of employment relationship, jurisdiction and course and scope of employment. He further disallowed any additional evidence regarding those issues.

Turning to the remaining issues, the ALJ found Dr. Quill most credible concerning Stafford's impairment rating and noted the medical consensus was Stafford does not retain the physical capacity to return to the same type of work. Accordingly, the ALJ awarded permanent partial disability benefits based upon a 12% impairment rating enhanced by the three multiplier.

Elmo and Stafford filed petitions for reconsideration raising the same arguments now raised on appeal. The ALJ issued a January 4, 2013 Order denying the petitions for reconsideration. The ALJ reiterated he found Stafford permanently partially disabled, but not permanently totally disabled. The ALJ further indicated he denied

Elmo's petition in accordance with the prior interlocutory order.

We now turn to the issues raised on appeal. At the outset, we reiterate Stafford, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of his cause of action before the ALJ, including the extent and duration of any disability generated by the work injury alleged. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Stafford was unsuccessful in his burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge 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). The ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, *supra*.

Employment Relationship

Elmo raises several arguments challenging the conclusion Stafford was its employee on July 29, 2009. Elmo first argues there is no substantial evidence to support this conclusion. Nor is there evidence, according to Elmo, to support the finding Stafford was under the simultaneous control of Elmo and Mine Power at the time of the injury. Additionally, Elmo contends ALJ Kerr misapplied the law concerning employment relationship in the interlocutory opinion.

To support these claims, Elmo points to circumstances indicating Stafford was a Mine Power employee. Indeed, Mine Power acknowledged Stafford was its employee on

the date of the injury. Stafford himself acknowledged that by November, 2008 he was being paid by Greer Mining & Energy Services, a separate entity unrelated to Elmo. Elmo further notes Stafford was laid off by Mine Power between March 23, 2009 and April 27, 2009. When he was reinstated, prior to the injury, it was clearly with Mine Power and not Elmo.

Notwithstanding these circumstances, we conclude the ALJ conducted a proper analysis and based his decision on substantial evidence. ALJ Kerr found Stafford was jointly employed by Elmo and Mine Power at the time of his injury and cited the "joint employment" doctrine as legal authority for this conclusion. As referenced by the ALJ, Professor Larson offers the following definition of "joint employment":

> Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.
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> * * * *
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> Joint employment is possible, and indeed fairly common, because there is nothing unusual about the coinciding of both control by two employers and the

> advancement of the interests of two employers in a single piece of work.

Larson, Larson's Workers' Compensation Law, §68.01, Desk Ed. (1998).

Professor Larson discusses joint business arrangements creating joint employment situations in the following excerpt from his treatise:

> The joint employment may come about simply because of the joint character of the business arrangement between the two employers. The most obvious illustration is that of a classic joint venture. For example, the owner of a Ferris wheel furnished it to the operator of a carnival, while the latter furnished and paid for all help necessary for its operation, the net proceeds being equally shared. They were held to be joint adventurers. Joint employment may also be found when work is performed for affiliated or closely related corporations or businesses. *Again, the coincidence of interest and control may occur because one employer is the proprietor of a business that the other is involved in liquidating.*

Larson, Larson's Workers' Compensation Law, §68.03, Desk Ed. (1998). (Emphasis added).

Here, the evidence established Stafford initially was paid for his work at the West Virginia site by Elmo, stayed in an apartment paid for by Elmo, and received

travel expenses from Elmo. Stafford continued to operate the same loader he used in his employment with Elmo. The evidence was uncontradicted the heavy equipment used at the West Virginia site belonged to Elmo. Although Stafford later received checks from Greer Mining, Professor Larson in §48.30 notes "[t]he element of who pays the employee shrinks into comparative insignificance in lent-employee problems, because the net result is almost invariably that the special employer ultimately pays for services received and the employee ultimately gets his wages." In that section, Larson further explains:

> The factor that seems to play the largest part in lent-employee cases is that of furnishing heavy equipment. Many cases have found continuing liability in the general employer when he furnishes operators together with road equipment, excavating equipment, steam and truck shovels, cranes and trucks. … the majority of the decisions have been influenced by arguments both that the general employer would naturally reserve the control necessary to ensure that his or her equipment is properly used, and that a substantial part of any such operator's duties consist of the continuing duty of maintenance of the equipment. Id.

Stafford testified he took orders from "bosses" who were Elmo employees. The evidence and reasonable inferences drawn therefrom support a conclusion Stafford remained an

employee of Elmo, and Elmo retained some control over Stafford. The ALJ's decision in this regard is based on substantial evidence and, therefore, will not be disturbed.

In a related argument, Elmo also asserts it was improperly denied the opportunity to present further evidence of Stafford's relationship with Mine Power. As stated above, ALJ Weatherby refused to revisit the issues already decided in ALJ Kerr's interlocutory order, including the issue of employment relationship. Specifically, Elmo sought to introduce wage information from Mine Power and the deposition of Kassandra Lycans, an employee of Mine Power. Lycans verified Stafford was an employee of Mine Power and noted Greer Mining and Energy Services was a d/b/a of Mine Power. Further, she stated wage records confirm Stafford was an employee of Mine Power. Elmo also sought to introduce Stafford's personnel file, which would support the assertion Stafford was an employee of Mine Power and not Elmo. Elmo asserts the ALJ's failure to consider this additional evidence is contrary to precedent, which allows the ALJ to reverse a prior interlocutory finding when new evidence on the issue has been presented or there has been a misapplication of the law.

We disagree and find no error in the ALJ's refusal to allow additional evidence regarding issues

previously determined in the interlocutory order. It has been long been accepted the ALJ, as fact-finder, has the authority to control the taking and presentation of proof, and it is not unreasonable for an ALJ to either permit additional proof or prohibit evidence in order to maintain a reasonable amount of administrative due process. Dravo Lime Company, Inc. v. Akins, 156 S.W.3d 283 (Ky. 2005); Yocum v. Butcher, 551 S.W.2d 841 (Ky. App. 1977); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991); and Searcy vs. Three Point Coal Company, 134 S.W.2d 228 (Ky. 1939). The ALJ's power to control the parties' presentation of proof lies within the sound discretion of the ALJ and will not be disturbed absent an abuse of that discretion. Yocum v. Butcher, 551 S.W.2d at 844.

In this instance, ALJ Kerr bifurcated the claim on the issues of jurisdiction, employment relationship, course and scope of employment and interlocutory relief. Though the order was interlocutory, it was intended to be the final ruling regarding those issues. Elmo had ample opportunity to develop its proof and present its arguments regarding jurisdiction, employment relationship and course and scope of employment prior to ALJ Kerr's December 14, 2010 order. Elmo offers no reason why the evidence it sought to introduce following that order could not have

been developed or produced prior to ALJ Kerr's decision. We find no abuse of discretion on the part of ALJ Weatherby in declining to revisit the bifurcated issues or allow further evidence.

Jurisdiction

Next, Elmo argues ALJ Kerr erred in finding Kentucky has jurisdiction. Elmo contends there was no evidence that would allow Stafford to proceed against it. Elmo further asserts the ALJ failed to perform the analysis required to determine whether KRS 342.670 (1)(a), (b) or (c) were applicable.

Essentially, this argument is another challenge to the ALJ's determination Stafford was Elmo's employee at the time of his injury. As set forth above, there was substantial evidence on the record to support the finding regarding an employment relationship with Elmo. Moreover, there is no dispute Elmo's principal place of business is in Kentucky, and Stafford was hired and worked out of its East Bernstadt, Kentucky location. KRS 342.670(5)(d)1. These factual findings support the conclusion that jurisdiction pursuant to KRS 342.670(1)(a) is proper.

Injury Within Course and Scope of Employment

Elmo next argues ALJ Kerr erred in finding Stafford was within the course and scope of the employment at the time of his injury. Elmo contends the ALJ's finding Stafford was on a "special mission" is not supported by substantial evidence. Stafford was driving his own vehicle on a public road and was on his way to work at the time of the accident. Elmo contends Stafford was merely on his way to work and was not providing any benefit to Elmo. Elmo argues ALJ Weatherby erred in not addressing the issue of course and scope of employment.

We find no error in the ALJ's determination Stafford was injured within the course and scope of his employment. Generally, injuries occurring while a worker is off duty and away from an employer's work site are held not to be in the course of his or her employment. *See* KRS 342.0011(1); Kaycee Coal Co. v. Short, 450 S.W.2d 262 (Ky. 1970). There are, however, several exceptions to this rule, one of which is the "travelling employee" doctrine. This rule has been summarized in Larson's Workers' Compensation, § 25.00, Desk Edition, as follows:

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during

> the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

Kentucky specifically adopted the above rule in Black v. Tichenor, 396 S.W.2d 794 (Ky. 1965). *See also* Haney v. Butler, 990 S.W.2d 611 (Ky. 1999); Olster-Kimberly Quality Care v. Parr, 965 S.W.2d 155 (Ky. 1998). The evidence establishes Stafford was injured travelling from the employer's apartment to the work site. There was no evidence Stafford was engaged in any personal errand at the time of the accident. *See* Haney, 990 S.W.2d at 615 ("[W]here work involves travel away from the employer's premises, the worker is considered to be within the course of the employment during the entire trip unless a distinct departure on a personal errand is shown."). The ALJ correctly determined Stafford remained in the course and scope of his employment while working away from home at the direction of Elmo.

Permanent Total Disability

On cross-appeal, Stafford argues the ALJ failed to make findings of fact regarding his claim of permanent total disability. Stafford contends the medical evidence established he could not return to any of the types of work

for which he has training or experience. Stafford argues the evidence compels a finding of permanent total disability.

KRS 342.0011(11)(c) defines "permanent total disability" in pertinent part as:

> 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.

A total disability award, as articulated by the Supreme Court in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), requires a weighing of the evidence as to whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy. "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The determination of whether an individual is permanently totally disabled is an individualized determination of what the worker is and is not able to do after recovering from the work injury.

Here, the ALJ found Dr. Quill persuasive regarding the effects of Stafford's work injury. Dr. Quill restricted Stafford from carrying more than forty pounds and limited

his time on ladders to less than thirty minutes during an eight hour day. While the physicians opined Stafford could not perform work as a heavy equipment operator, the ALJ was not persuaded Stafford's restrictions rendered him permanently totally disabled. It is readily apparent the ALJ properly understood the evidence before him. It can rarely be said the evidence will compel a finding of a greater or lesser degree of occupational disability. Millers Lane Concrete Co., Inc. v. Dennis, 599 S.W.2d 464, 465 (Ky. App. 1980). The ALJ determined Quill's restrictions warranted application of the three multiplier set forth in KRS 342.730(1)(c)(1). Dr. Quill's opinion does not compel a finding of total occupational disability.

Accordingly, the November 26, 2012 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, the January 4, 2013 order denying petitions for reconsideration and the December 14, 2010 order rendered by Hon. James L. Kerr incorporated by ALJ Weatherby are **AFFIRMED**.

ALL CONCUR.

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