OPINION ENTERED: April 12, 2013

CLAIM NO. 201101566

ENTERPRISE MINING PETITIONER

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

JOHNNY WILDER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFIRMING
* * * * * *

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

ALVEY, Chairman. Enterprise Mining ("Enterprise") seeks review of the amended opinion and order on remand rendered January 14, 2013 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Johnny Wilder ("Wilder") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits and medical benefits. No

petition for reconsideration was filed regarding the opinion on remand.

On appeal, Enterprise argues the ALJ's award of PTD benefits is not supported by substantial evidence, and the ALJ erred by relying upon conditions unrelated to the work injury in arriving at his determination. Because the ALJ's determination is supported by substantial evidence, we affirm.

Enterprise previously appealed from the June 26, 2012 opinion and order rendered by the ALJ finding Wilder permanently totally disabled due to repetitive cumulative trauma manifesting on April 27, 2011, and from the July 16, 2012 Opinion and Order on Reconsideration. In that appeal, Enterprise argued the ALJ erred by rendering his decision without considering the deposition transcript of Dr. Richard Sheridan; the ALJ erred in relying on a non-work-related disability in finding Wilder permanently totally disabled; and, the finding of total disability was not based upon substantial evidence.

In an opinion dated November 30, 2012, this Board vacated and remanded the ALJ's decision because Enterprise was entitled to a determination based upon all the evidence filed in the record. We stated Dr. Sheridan's opinions expressed in his deposition testimony could impact the ALJ's

findings regarding the extent of Wilder's disability. Therefore, on remand, the ALJ was requested to review the deposition in making his final determination. Enterprise did not appeal from that opinion.

In the Amended Opinion and Order on Remand rendered January 14, 2013, the ALJ acknowledged Dr. Sheridan's deposition testimony. He additionally outlined all evidence relied upon and set forth his determination. Regarding Dr. Sheridan's deposition testimony, the ALJ stated the following:

> The defendant took the deposition of Dr. Sheridan on June 18, 2012. For some reason, Dr. Sheridan's deposition was not filed until July 23, 2012. Dr. Sheridan stated in his deposition that he examined Mr. Wilder on May 30, 2012. Dr. Sheridan confirmed that Mr. Wilder did not give him any specific history of injury suffered at work. Dr. Sheridan testified that he prepared a five-page written report dated May 30, 2012 and his report was filed as an exhibit and part of his deposition. Dr. Sheridan recounted his findings on physical examination, including the fact that the plaintiff Mr. Wilder attended the examination in a wheelchair. Dr. Sheridan noted that Mr. Wilder has decreased ranges of motion. Dr. Sheridan recounted what he considered to be his pertinent findings as reiterated in his medical report. Dr. Sheridan's diagnosis was ankylosing spondylitis, which he described as a kind of arthritis. Dr. Sheridan stated that his diagnosis of Marie-Strumpell disease is unknown as to causation and

> that there are no studies that he is aware of which link the causation of that condition to work activity. Dr. Sheridan recounted the treatment which would be appropriate for Mr. Wilder's condition. Dr. Sheridan stated that he had reviewed the medical report of Dr. Robert Johnson. Dr. Sheridan stated that he did not find evidence of cumulative trauma regarding Mr. Wilder and that he did not find any work-related physical condition or impairment regarding Mr. Wilder.

In his January 14, 2013 opinion on remand concerning this appeal, the ALJ found as follows:

> **1. Did the plaintiff sustain a work-related injury?**
>
> The plaintiff argues that repetitive trauma caused permanent injury to his cervical and lumbar spine. He further argues that he had developed a hearing loss as a result of long term occupational exposure to noise. The defendant argues that the plaintiff sustained no new injury and had an active pre-existing cervical condition. The defendant argues that the plaintiff has a 0% hearing injury.
>
> KRS 342.0011(1) defines "injury" as any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process. Injury includes the effects of cumulative trauma.

I saw and heard the plaintiff testify at the final hearing, at which time he appeared in a wheelchair. I found Mr. Wilder to be a credible and convincing witness. I also found persuasive the medical report from Dr. Johnson. I make the factual determination that Mr. Wilder sustained cumulative trauma work injuries while employed by the defendant, which became occupationally disabling on April 27, 2011. In addition to the sworn testimony from the plaintiff and the medical evidence from Dr. Johnson, I relied on the decision of the Supreme Court of Kentucky in *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky. 2001) and the decision of the Court of Appeals of Kentucky in *Southern Kentucky Concrete Contractors, Inc. v. Campbell*, 662 S.W.2d 221 (Ky. App. 1983).

2. Did the plaintiff have an active pre-existing condition?

The defendant argues, based on the opinion of Dr. Sheridan, that the plaintiff had no work injury but a non-work-related medical condition. The plaintiff argues to the contrary.

The phrase "active disability" does not appear in statutes but is a term developed by case law. In *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1976), the Supreme Court stated that a pre-existing condition or disease was "active" if it had become "disabling" prior to the subsequent accident. On the other hand, in *Yocom v. Spaulding*, 547 S.W.2d 442, 445 (Ky. 1977), the Courts defined a "dormant" condition or disease as one which had not created any occupational disability prior to the subsequent accident.

The ALJ finds more persuasive the opinion of Dr. Johnson. The ALJ notes that prior to being informed of the work-relatedness of his symptoms, the plaintiff had no history of treatment or symptoms.

. . .

4. What is the extent and duration of the plaintiff's permanent impairment?

The plaintiff argues that he has sustained a 9% whole person physical impairment and as a result of the work injury. He further argues that he is permanently and totally disabled from work. The defendant argues that the plaintiff sustained no new injury from the work incident.

In rendering a decision, KRS 342.285 grants the ALJ 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 the present case the ALJ finds more convincing the opinions of Dr. Johnson. His opinion comports with the treatment records and with the ALJ's perception of the plaintiff. I, therefore, find that the plaintiff has sustained a 9% physical whole person impairment.

With regard to hearing loss the ALJ finds that the plaintiff has sustained a 0% impairment. The ALJ is persuaded, however, that the plaintiff did sustain a hearing injury. The defendant is, therefore, responsible for medical care relating to the plaintiff's hearing.

"'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.) Also, 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; see also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

In the present case the ALJ considers the plaintiff's debilitating physical injuries, his limited education and lack of transferrable skills, alongside his work history. The plaintiff's injuries necessitate that he cease

> working and use a walker or wheelchair just to get around. In spite of his occupational youth, the plaintiff has a steady work history. Thus the ALJ finds most persuasive the opinions of Dr. Johnson and Mr. Ellis. The ALJ is persuaded that if this plaintiff could work, he would be working. I, therefore, find that the plaintiff is permanently and totally disabled.

The crux of this appeal concerns whether the ALJ's award of PTD benefits 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).

Enterprise argues the ALJ erred in finding Wilder totally disabled due to his work injuries. The ALJ based his determination primarily upon Dr. Robert Johnson's March 14, 2012 report, generated after an evaluation performed on that date. In the diagnosis section of the Form 107-I he completed, Dr. Johnson stated as follows:

> For the convenience of the reader, I am going to summarize my opinion as briefly as I can. I will then come back and describe the physical findings.
>
> In my opinion, Mr. Wilder developed neck and, in particular, back symptoms due to cumulative trauma occurring over a long career of operating heavy equipment. This is verified by examination and diagnostic studies. Mr. Wilder continued working for quite some time when these initial symptoms occurred. Reports from examining physicians, in my opinion, validate my opinion also.
>
> Subsequently, while Mr. Wilder was still working and was affected by these changes, which, in my opinion, are genuine cumulative trauma, two other situations occurred.
>
> The predominant one is an ankylosing spondylitis type arthritis involving numerous joints primarily affecting the sacroiliac joints on the bone scan.
>
> The second one is a significant behavioral pattern.
>
> I have recommended a functional capacity evaluation with validation

criteria because of the behavioral pattern.

I do not engage in psychological, psychiatric or rheumatologic expertise. Findings suggestive of behavioral abnormalities were noted if one reads between the lines. In my opinion, this requires a more direct approach.

The physical findings that I am rating in Section J are, in my opinion, definitely not all related to the problems at the onset. The onset problems were neck and back cumulative trauma and the current situation is a crippling, disabling, generalized arthritis.

Requirement for a cane in the left hand with an antalgic gait.

Currently, Mr. Wilder’s back pain is extremely enlarged, approximately 8 inches in maximum dimension, which is not physiologic and is coupled with pain on light touch and pain on trunk rotation, also not physiologic.

Through the records, Mr. Wilder has complained of peculiar neurological findings including dizziness, giddiness, behavioral changes, etc. This is reported in the IME. I found no record that explained it. This is a different topic entirely and I am not pursuing it except to say that I did not see a diagnosis for it.

Mr. Wilder exhibited anatomical and what I consider genuine findings of lumbar stiffness, paraspinal muscle spasm, and weakness in the low back.

He also lost his balance easily, which possibly is related to this neurologic situation.

On the other hand, the paraspinal muscles do reciprocate with walking. The deep tendon reflexes and great toe extensor power are normal as is manual motor testing despite the symptoms of left-sided subjective weakness.

Straight leg raising in the sitting position was inconsistent with the recumbent position. In the recumbent position, Mr. Wilder exhibited significant exaggerated pain behavior.

Mr. Wilder has definite cavus foot deformities bilaterally. His calves are thin and atrophic appearing with a 29 cm circumference bilaterally. No one has suggested Charcot-Marie-Tooth syndrome but the calf atrophy and cavus feet are consistent with it. Further, diagnostic studies might be informative.

The secondary loss over the lateral and medial portions of the feet, left greater than right, would suggest L3-4 and L5-S1 neuropathy. The examination was otherwise difficult to interpret as the reader will note later.

I found no evidence of vascular disease.

Mr. Wilder’s hips, on passive rotation, caused him to groan and grimace and resist. The pain was greater on the left side than the right.

Tension testing revealed a 90 degree passive lumbar flexion on the right and straight leg raising 60 degrees on the right. Mr. Wilder grimaced and groaned loudly. He states that the pain was on the posterior thigh with Lasegue testing. Reverse Lasegue testing was normal.

On the left side, passive lumbar flexion was 80 degrees. Straight leg raising was 45 degrees. Mr. Wilder cried out in pain complaining of his ankle and low back. Lasegue and reserve Lasegue testing were noncontributory.

Mr. Wilder assumed a prone position with difficulty and was crying out and complaining of pain during this examination. The paraspinal muscles were firmly contracted. Percussion produced a positive involuntary paraspinal reflex muscle contraction. It is my strong opinion that this is a finding that is organic in nature.

Light touch over the large painful area in the back again produced pain.

Mr. Wilder required a lot of assistance from his wife to get up.

In the sitting position, I retested the straight leg raising, which was 90 degrees at the hip and the knees fully extended in front of him, without complaints or leaning backwards.

Examination of the neck: Mr. Wilder has an extreme head forward posture. He can flex 70 degrees but he lacks 15 degrees of reaching neutral when he tries to extend.

Lateral bending on the left was 15 degrees and part of that was trunk motion. On the right, it was 20 degrees causing him to grimace and breathe deeply.

Rotation on the left was 45 degrees, on the right 50 degrees.

Spurling testing caused posterior neck pain of a severe nature. The paraspinal muscles were soft. There was tenderness at C3-4 on the left side. This was increased by trunk rotation. Scalp compression simulating downward pressure did not provoke a response.

There was definite increased muscle tone in the posterior paraspinal muscles.

Jamar testing was 90 degrees on the right, 30 degrees on the left.

Pain and tingling in a glove like pattern starting above the wrist and including everything distal to it on the left side was reported. On the right side, pain and touch sensation was normal.

Deep tendon reflexes at the biceps were 2+ bilaterally. Radial jerk was 1+ bilaterally. Triceps jerk was 1+ bilaterally.

Peripheral circulation in the upper extremities, in my opinion, is normal.

Manual motor testing was performed. With some encouragement, I did not identify significant weakness.

The left sided intrinsic muscles at first appeared to be weak but with repetition, I could not identify a significant difference from the right.

During these portions of the examination, the intension tremor of the right upper extremity was never observed.

The digits exhibited no redness, swelling, stiffness or particular tenderness.

Examination of the shoulder showed flexion of 170 on the right, 130 on the left. There was pain in the left shoulder if I added passive pressure to it. The pain also included extension up into the trapezius muscles.

Extension was 90/70. Abduction 165/120. Adduction 30/30. At the extreme, Mr. Wilder would groan and grimace in his neck.

Extension rotation lacked 25 degrees of reaching the vertical bilaterally.

Internal rotation lacked 20 degrees of the vertical on the right and 15 degrees on the left with groaning and pain.

Inspection and palpation revealed tenderness in the subcromial area of the left side only. There was no visible atrophy. The right shoulder was normal. The acromioclavicular joints were normal.

Liftoff testing was 8 inches on the right, 4 inches on the left.

Passive motion caused neck pain on the left but no crepitation.

Jobe testing revealed no weakness and no pain.

Hawkins test was normal on the right. On the left, he was able to achieve 90 degrees of external rotation but he complained of severe pain in his neck and subacromial area.

Stability was normal. He did have some subjective complaints of apprehension on the left side but no involuntary guarding.

The elbows exhibited no pain, swelling, warmth, redness or tenderness. Elbows both showed normal mobility, normal sensation, reflexes and strength. The bony prominences of the olecranon bilaterally were noted. In my opinion, this is not abnormal for him. The overlying skin was normal.

Both knees were examined.

There was no external deformity. Palpation produced pain in the popliteal space on the left much greater than the right. Extension was full. Stability was normal in all four planes bilaterally. McMurray testing was normal bilaterally. Patellofemoral articulation was normal. There was no heat, redness or swelling. With flexion, Mr. Wilder grimaced and groaned.

Extension was full. Flexion 130 on the right, 125 on the left. The left one had substantially more pain than the right one. He had an expression of pain as well as groaning.

Both ankles exhibited no external deformities except for the calf atrophy and the cavus foot. There was no redness or warmth. The entire left heel was extremely tender and painful as was the ankle when generally palpated.

The extension of the right ankle is 20 degrees. On the left side, it lacked 5 degrees of neutral.

Flexion was 60 degrees on the right, 20 degrees on the left.

Eversion in the subtalar joint was too normal on the right and lacking 15 degrees of neutral on the left.

Inversion was 20 degrees on the right and, in my opinion, ankylosed on the left. There was barely any observable mobility.

When I tried to get Mr. Wilder up to examine both hands, he again required a great deal of assistance by his wife and he groaned and complained.

There was no callus, grime or evidence of autonomic abnormalities.

I have already described the glove like pain and tingling on the left side. In my opinion, this is a somatoform response.

Phalen testing caused pain in the volar part of the wrist and entire hand but mostly the thenar eminence. He did complain of generalized tingling.

Examination of the ulnar nerves in the cubital tunnel revealed normal size, texture, mobility and no response to compression.

The fingers exhibited no swelling, redness, tenderness, stiffness, deformity or loss of motion.

Flexion of the wrist was 78 degrees on the right, 65 degrees on the left. Extension was 85 degrees on the right, 75 on the left. Pronation and supination were entirely normal.

The left wrist was reexamined specifically. Inspection was normal.

> The glove like sensory loss with tingling has been described. Phalen testing negative for carpal tunnel syndrome. Palpation, again, there was tenderness in the volar part of the left wrist.
>
> At this point, I asked Mr. and Mrs. Wilder if there was anything else that effected[sic] him and they both agreed that all of the affected areas had been examination.
>
> Mr. Wilder states, "I'm just worn out from 25 years of working and jarring, doing strenuous work with my arms".
>
> All of the ratable abnormalities will be listed in Section J.
>
> In summary, in my opinion, Mr. Wilder started off with cumulative trauma to his back primarily. Later on, this polyarthritis occurred. Somewhere along the way, a significant somatoform behavior pattern also occurred.
>
> I am not a rheumatologist. I am agreeing with Dr. Pompati's findings and recommendations in terms of Mr. Wilder's complete inability to engage in gainful employment.

Regarding causation of Wilder's complaints, Dr. Johnson stated, "Over a period of many years, operating heavy equipment, Mr. Wilder was subjected to significant jarring as well as stressful physical activities." Dr. Johnson assessed a 42% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), of which

he stated 9% was due to the work injury. Dr. Johnson opined, “Wilder first suffered from cumulative trauma due to repetitive use of his back and neck. At a later date, a severe, crippling and disabling condition of arthritis occurred.” Dr. Johnson further stated, “Mr. Wilder is totally incapable of gainful employment. He is supposed to be in a wheelchair or using a walker. He has extreme degrees of pain and numbness.”

In support of its assertion the ALJ erred by awarding PTD benefits, Enterprise 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, the ALJ’s determination Wilder is permanently totally disabled was in accordance with the Kentucky Supreme Court’s holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Taking into account Wilder’s age, education and past work experience, in conjunction with his post-injury physical status, along with Dr. Johnson’s report, the ALJ was persuaded due to the effects of the work-related injury, Wilder is totally disabled. While Enterprise points to conflicting evidence, the ALJ’s determination is minimally, but sufficiently supported by the record.

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). For that reason, we cannot say the outcome arrived at by the ALJ finding Wilder entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed.

Accordingly, the Amended Opinion and Order on Remand rendered January 14, 2013 by Hon. William J. Rudloff, Administrative Law Judge, is hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

COUNSEL FOR PETITIONER:

HON JEFFREY D DAMRON
P O BOX 351
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT:

HON MCKINNLEY MORGAN
921 SOUTH MAIN STREET
LONDON, KY 40741

ADMINISTRATIVE LAW JUDGE:

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