Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 5, 2014

CLAIM NO. 201198603

FLAV-O-RICH DAIRIES PETITIONER

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

GLENN HAMPTON,
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

RECHTER, Member. Flav-O-Rich Dairies ("Flav-O-Rich") appeals from the September 3, 2013 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), and from the October 1, 2013 Opinion and Order on Reconsideration. The ALJ found Glenn Hampton permanently totally disabled as a result of an injury to

his arm and shoulder. Because the ALJ's opinion fails to set forth an adequate basis for the award, we vacate and remand.

Hampton testified by deposition on February 20, 2012 and at the hearing held August 29, 2013. Born February 20, 1978, Hampton earned a high school degree and attended Somerset Community College for one year. He has no specialized or vocational training. Hampton's employment history includes work as a stocker for Kmart and as a general laborer for American Greetings. At American Greetings, he cleaned the outside of jar candles as they came off the line, put on lids and stickers, placed the candles in boxes, and stacked the boxes. Hampton also worked as an off-bearer for R.T. Lumber, where he and another worker would drag and stack railroad cross ties.

Hampton was injured on December 30, 2011 while operating a Fogg machine that fills bottles. Noticing a bottle had fallen off the line, Hampton reached into the machine, which caught and pulled his right arm. His body was wedged against the machine while his arm was being pulled. He pulled the emergency safety cable, but the machine did not stop immediately. A sharp pain in the shoulder joint was felt instantly, followed by a loss of strength and range of motion.

When conservative measures failed to resolve the pain, Hampton sought treatment with Dr. Ronald Belhasen, who performed rotator cuff surgery. The surgery did not relieve Hampton's pain, so he sought a second opinion from Dr. Benjamin Kibler. Dr. Kibler obtained an MRI and MR arthrogram, which revealed a previously undetected labrum tear. On August 17, 2011, he performed a surgical repair. A year later, after Hampton had been in physical therapy, Dr. Kibler performed a partial debridement, repair and removal of post-operative scarring. Eight months after the third surgery, Dr. Kibler ordered a functional capacity evaluation, which indicated Hampton could perform medium duty work with his right arm. In an April 1, 2013 note, Dr. Kibler opined Hampton could lift fifty pounds to the waist, twenty pounds to the shoulder, and ten pounds overhead. Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Kibler assigned a 14% impairment rating, noting Hampton should avoid excessive rotation and repetitive activities.

Hampton was also evaluated by Dr. J. Martin Favetto, who performed an independent medical evaluation ("IME") on May 9, 2013. Dr. Favetto diagnosed a stretch injury to the right shoulder and elbow. He noted the elbow

“has gotten better”, but Hampton continues to have signs and symptoms of cubital tunnel and T1 and C8 nerve root irritation. Furthermore, although the rotator cuff and labral tears had been repaired, Hampton continues to have pain and discomfort. Noting Hampton’s point tenderness along the posterior aspect of the shoulder, Dr. Favetto suspected either a labral problem or an injury to the brachial plexus. He recommended pain management using electrical stimulation, such as a TENS unit, or an implantable stimulator. He assigned a 14% impairment pursuant to the AMA Guides, consisting of a 4% impairment for limitation of motion and a 10% impairment for loss of strength.

Hampton was also evaluated by Dr. Arthur Hughes. In a June 25, 2013 report, Dr. Hughes noted the injury caused pain in the shoulder and elbow and restricted range of motion in the shoulder, limiting Hampton’s ability to use the right arm for work, house maintenance and recreational activities with his children. He assigned a 10% impairment rating for Hampton’s elbow and shoulder, and opined he did not retain the physical capacity to return to the type of work performed at the time of the injury. Further, he restricted lifting with the right arm to twenty pounds and stated Hampton should avoid tasks involving

repetitive use of the right arm, use of the right arm above shoulder level, or climbing ladders. Dr. Hughes opined Hampton would find it difficult to get on and off large pieces of equipment and large machines.

Dr. Daniel D. Primm performed an orthopedic examination on July 26, 2013 at Flav-O-Rich's request. Dr. Primm diagnosed work-related right shoulder injury with posterior and superior labral tears showing no signs of residual instability. He found no evidence of decreased strength in the right upper extremity compared to the left. Dr. Primm assigned a 4% impairment rating for the shoulder condition. He assigned restrictions of no lifting more than twenty pounds on a repetitive basis above shoulder level, with occasional lifting up to a maximum of forty pounds. No restrictions for work below shoulder level were recommended. Finally, he encouraged continued strengthening and range of motion exercises.

At his deposition, Hampton explained his present physical condition. He believed he was starting to have problems with his left shoulder as a result of increased use to compensate for his right shoulder condition. Moreover, his right shoulder strength has not fully returned.

Hampton indicated he continues to experience pain. At his last visit to Dr. Kibler, in April 2013, he received injections which only provided relief for a "couple of days." His right shoulder joint and elbow cause constant pain, which prevents him from performing "any" activities because he is right hand dominant. A decreased range of motion also impedes his ability to function. For example, Hampton testified he is unable to hold his arm straight out, and cannot reach behind his back. Due to his present physical condition, Hampton has not attempted to find work and does not believe he is physically capable of returning to work. He stated he is unable to perform his past work with American Greetings or Flav-O-Rich due to the lifting, pushing and pulling involved. However, Hampton also acknowledged he is able to perform numerous physical tasks such as caring for his infant daughter and driving his vehicle.

Allen Blessit, plant manager at Flav-O-Rich, testified concerning the physical demands of Hampton's position. Blessit stated most of Hampton's time was spent watching the line to make sure the labels were aligned, bottles were standing up, and were being capped, filled, and dated correctly. Hampton had to stand most of the time, though he frequently would have to climb a stepladder

to put caps in a hopper over his head and handle bottles coming off the line. The caps were in bags weighing five pounds.

In the September 3, 2013, Opinion and Order, the ALJ made the following findings regarding permanent total disability:

> In the present case, I considered the severity of the plaintiff's work injuries, his age, his work history, his education, and the testimony of the plaintiff and the medical opinions of both Dr. Favetto and Dr. Hughes, which I found to be very persuasive and which covered the plaintiff's permanent impairment and his occupational disability. All of the above testimony is covered in detail hereinabove. Based upon 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 Mr. Hampton is permanently and totally disabled.

Flav-O-Rich filed a petition for reconsideration requesting numerous findings of fact including the specific job duties and physical requirements involved in Hampton's work at the time of the injury and his prior employment. It also requested specific findings regarding his age, education and the precise injuries sustained in the accident; the evidence, basis and reasoning behind the finding Hampton could not find work consistently or

dependably and is permanently totally disabled, cannot perform any type of work, and cannot perform other prior work; Hampton's ability to perform medium duty, one handed duty, operate machinery or perform computer work; and regarding the availability of work in the London area. Flav-O-Rich contends the evidence compels a finding Hampton retains the physical capacity to return to the type of work performed at the time of the injury and has failed to meet his burden of proving permanent total disability.

The ALJ issued his Opinion and Order on Reconsideration on October 1, 2013 denying Flav-O-Rich's petition for reconsideration. The ALJ stated the September 3, 2013 Opinion and Order thoroughly discussed the contested issues raised by the parties.

Flav-O-Rich raises four arguments on appeal, each challenging the conclusion Hampton is permanently totally disabled. It first argues the ALJ failed to make crucial findings of fact, thus preventing meaningful review of the decision. In a related argument, Flav-O-Rich contends this failure deprived it of due process. Next, Flav-O-Rich claims the ALJ did not consider all of the evidence in making his decision. Finally, it challenges the sufficiency of the evidence supporting the award.

We agree the ALJ's findings are insufficient to permit meaningful appellate review. Through citation to Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the ALJ identified the applicable law and appropriate standards to declare a claimant is permanently totally disabled. He then stated his reliance on the medical opinions of Drs. Favetto and Hughes, as well as Hampton's testimony. Instead of identifying the particular portions of Hampton's testimony which he found persuasive, the ALJ referenced his summary of Hampton's testimony. The ALJ's summary of Hampton's testimony is as follows:

> The plaintiff, Glenn Hampton, testified that his work injuries occurred on December 30, 2010. He worked for the defendant for eight years. He last worked for the defendant on March 24, 2011. As a result of his work injuries he has had three surgeries. He is now being treated by Dr. Kibler, who has given him injections and pain patches. The plaintiff testified that he continues to have pain in his shoulder and elbow. He stated that he cannot return to work for the defendant due to his right shoulder injuries.

Even reading the summary of evidence together with the ALJ's findings of fact, we are unable to discern the basis of the ALJ's decision. KRS 342.0011(b), (11)(c) and (34) require the ALJ to make an *individualized* determination of what the worker is and is not able to do.

The required analysis "necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact." Ira A. Watson, 34 S.W.3d at 51.

While reference to the medical opinions of Drs. Favetto and Hughes arguably establishes Hampton's post-injury physical status, the ALJ's opinion is devoid of any discussion whatsoever of his emotional, intellectual or vocational status, and how these factors and Hampton's relatively young age contribute to a state of permanent total disability. While the doctors' opinions contain certain physical restrictions, the ALJ did not discuss how these restrictions prevent Hampton from performing his pre-injury duties at Flav-O-Rich or other work for which he has prior training and experience. Furthermore, though Hampton declared he could not perform any work whatsoever, his own testimony on cross-examination and the medical opinions challenge this assertion. Under such circumstances, it is incumbent upon the ALJ to identify the portions of the claimant's testimony upon which he bases his opinion, and to explain his reasoning.

This Board is mindful of the cost of remanding a case for further fact-finding. Litigants must wait for a final resolution to the case, and judicial resources are

expended. Nonetheless, all parties are entitled to findings of fact which inform them of the basis for the ALJ's decision and permit meaningful appellate review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). In this case, the ALJ has not fulfilled this duty and the matter must be remanded for further fact-finding. Furthermore, because this case must be remanded for the reasons stated, it would be premature to address Flav-O-Rich's additional arguments.

Accordingly, the September 3, 2013 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge, and the October 1, 2013 Opinion and Order on Reconsideration are **VACATED** and this matter is **REMANDED** for additional proceedings as herein described.

ALL CONCUR.

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