OPINION ENTERED: December 14, 2012

CLAIM NO. 201070469

FOOD FAIR OF ASHLAND, INC. PETITIONER

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

KAREN SUE HOLLOWAY
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Food Fair of Ashland, Inc. ("Food Fair") seeks review of the opinion, order and award rendered May 31, 2011 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Karen Sue Holloway ("Holloway") permanent total disability ("PTD") benefits and medical benefits. Food Fair also appeals from the order entered

August 27, 2012 denying in part its petition for reconsideration.

On appeal, Food Fair argues the ALJ's award of PTD benefits is not supported by substantial evidence. Food Fair also argues the ALJ failed to make sufficient findings of fact and conclusions of law to sufficiently apprise the basis of the finding. We disagree and affirm.

Holloway testified by deposition on May 22, 2012, and at the hearing held August 2, 2012. She was born on April 15, 1961, and completed the eleventh grade. She took some vocational training in horticulture, but did not complete a course of study.

Holloway, the produce manager for Food Fair, a grocery located in Greenup, Kentucky, experienced a popping sensation in her right shoulder and neck on July 8, 2010 as she was moving a pallet of groceries in order to access a cardboard compressor. She filed a Form 101 on January 12, 2012 alleging injuries to her neck, right shoulder, left shoulder and back as a result of the accident. She continued to work for Food Fair until December 1, 2010, at the same job, and at the same pay rate.

Subsequent to the accident, Holloway immediately reported the incident to the store bookkeeper and completed her shift. She did not obtain medical treatment until July

23, 2010. Holloway's initial treatment consisted of physical therapy which provided no relief.

After the physical therapy proved ineffective, she was referred to Dr. James Powell, a neurosurgeon, who performed a two-level anterior cervical fusion and discectomy at the C-5/6 and C-6/7 levels on April 11, 2011. In the operative report of that date, Dr. Powell noted Holloway was asymptomatic prior to the lifting incident at work. Dr. Powell ordered additional physical therapy which provided no relief. Holloway indicated the surgery provided some relief, but she continues to experience pain in her neck, both shoulders, her left arm to the elbow and in the middle of her back.

Holloway began working for Food Fair in 2004. Her job as produce manager required unloading trucks, unloading pallets, unloading items from the cooler, and disposing of spoiled produce. The job required lifting up to fifty to a hundred pounds. Holloway's entire work history consists of working in groceries, primarily in produce departments. She previously sustained an injury to her right knee in 1989 or 1990 while working in Florida, which required two surgeries. She was paid while she was off work, and her medical bills were paid. Prior to the July 8, 2010 incident, she continued to take Lorcet for her

knee pain. She testified at the hearing she is taking no different medications now than she was taking prior to the work accident. Except for the ongoing knee problems, Holloway was asymptomatic prior to the work accident. She testified she has difficulty with lifting, and also has problems standing, sitting or walking for prolonged periods of time.

In addition to Dr. Powell's operative note, Holloway attached a copy of the November 29, 2011 MRI report from the Bon Secours Health System. The report stated "consider labral tear. No axillary adenopathy seen."

Holloway submitted the report of Dr. Bruce Guberman, who evaluated her on April 4, 2012. Dr. Guberman diagnosed acute and chronic cervical spine strain; post-traumatic status post anterior cervical discectomy and fusion at C5-C6 and C6-C7 on April 1, 2011; acute and chronic thoracic spine strain, post-traumatic; disc extrusion at T7-8 as seen on MRI; chronic post-traumatic strain of the left shoulder; rule out labral tear; and persistent range of motion abnormalities. He attributed all of these conditions to her work-related accident. Dr. Guberman assessed a 35% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to

the Evaluation of Permanent Impairment ("AMA Guides") with no prior active impairment. Dr. Guberman noted she had reached maximum medical improvement ("MMI") as of April 4, 2012. He assessed restrictions of no lifting, carrying or pushing over ten pounds maximum or over five pounds frequently, and opined she does not retain the capacity to perform her prior work.

Holloway also submitted the report of Dr. Warren Bilkey, who evaluated her on June 27, 2012. Dr. Bilkey diagnosed cervical strain, cervical radiculopathy, and aggravation of degenerative disc disease of the cervical spine. Dr. Bilkey noted she had undergone anterior cervical discectomy and fusion surgery at C5 and C6, and has residual chronic neck pain and impairment. He noted she sustained a left shoulder strain and labral tear according to the MRI. He also noted she has myofascial pain affecting the scapular muscles which has not been treated. He opined all of these conditions were caused by the work-related accident of July 8, 2010. Dr. Bilkey found she had reached MMI for the cervical condition, but not for her shoulder complaints. He assessed a 29% impairment rating pursuant to the AMA Guides.

Holloway was examined by Dr. David Jenkinson, an orthopedic surgeon, on October 25, 2011. Food Fair

submitted the report prepared as a result of that examination, and subsequently deposed Dr. Jenkinson. He noted the history of a pop in the back of her neck and right shoulder while pulling a pallet of groceries. Dr. Jenkinson noted physical therapy did not help, and surgery was eventually performed by Dr. Powell which provided no relief. Holloway complained primarily of burning pain across the back of her neck, and also of tingling and numbness radiating to her left upper arm. He stated she exhibited no signs of ataxia, and could satisfactorily execute a tandem gait. He further noted the MRI demonstrated multilevel degenerative changes which were most pronounced at C5-6 and C6-7. He noted no significant spinal cord compression. On examination, he found no objective abnormality of the head or neck other than the surgical scar. She complained of tenderness when he touched the back of her left shoulder, and when she turned her head to the right.

Dr. Jenkinson's diagnosis consisted of a history of possible minor soft tissue sprain or strain of the right shoulder and/or neck. Dr. Jenkinson opined she had no significant injury to her neck on July 8, 2010. He found no objective findings to support her complaints. He further opined Holloway's subsequent complaints

demonstrated manipulation or self-limiting behavior. He recommended no clinical tests, and stated she had reached MMI on October 25, 2011. He found no need for additional physical therapy and stated her complaints are not consistent with her alleged injury. He found no basis for imposing restrictions, and indicated she could return to work to her previous job. He stated she would qualify for a 28% impairment rating pursuant to the AMA Guides due to a two-level fusion surgery.

Dr. Gregory Snider evaluated Holloway at Food Fair's request on June 29, 2012. He diagnosed a cervical and thoracic sprain/strain. He further noted she was status post a discectomy and fusion at the C6 and C7 levels. He also noted she has a disc herniation at T8-9. Dr. Snider stated he was unclear why the two-level fusion was performed. He also found no evidence of intra-articular shoulder pathology. He stated no further treatment is necessary. Dr. Snider assessed a 7% impairment rating pursuant to the AMA Guides due to the thoracic findings, and indicated restrictions of no lifting, pushing or pulling over thirty pounds, no overhead work and no repetitive use of the upper extremities. Finally, Dr. Snider stated the fusion surgery was not

performed for relief of the effects of the work-related injury.

Food Fair also submitted the vocational report of Dr. Ralph Crystal who evaluated Holloway on May 10, 2012. Dr. Crystal stated Holloway was not disabled from all employment, and has access to a wide range of jobs. He recommended she obtain a GED.

In the opinion, award and order rendered August 6, 2012, the ALJ found as follows:

> **SECTION VI – FINDINGS OF FACT AND CONCLUSIONS OF LAW**
>
> **1. Did the plaintiff sustain an injury caused by her work for the defendant?**
>
> The plaintiff argues that she sustained a permanent injury as a result of the work accident. The defendant argues that the plaintiff sustained only a strain.
>
> 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. *Id*.
>
> In the present case the ALJ finds more persuasive the opinion[sic] of Dr. Bilkey and Dr. Guberman, as supported by treatment records. I therefore find that on July 8, 2010 the plaintiff did

sustain injuries to her thoracic spine, her cervical spine and both shoulders caused by her work for the defendant.

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

The plaintiff argues that she has sustained a 35% whole person impairment and lacks the capacity to return to work. The defendant argues that the plaintiff sustained only transient injuries and nothing about that incident hinders her return to work. 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 most persuasive the opinions of Dr. Bilkey and Dr. Guberman. I therefore find that the plaintiff sustained a 29% whole person impairment, including the cervical spine and left shoulder. Based on the records of Dr. Snider I find that she has sustained a work-related thoracic spine injury as well.

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

In the present case, the ALJ considers the severity of the sequelae of the plaintiff's injuries; her age; her lack of education; her steady work history; her testimony; and her physical limitations. In spite of having no high school diploma, this 51 year-old plaintiff has held a steady job since the age of 15. The ALJ finds that if she could be working, she would be. Based on these factors the ALJ finds that the plaintiff cannot find work consistently under regular circumstances and work dependably. I therefore find her permanently and totally disabled.

3. **Is the defendant responsible for disputed and unpaid medical expenses?**

The defendant argues that based on causation, it should not be responsible for the plaintiff's medical expenses with regard to her thoracic spine and left shoulder.

KRS 342.020 requires the employer to pay for the cure and relief from the effects of an injury or occupational

disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.

I have found that the plaintiff sustained work-related injuries to her thoracic spine and left shoulder, evidenced by radiographic scans and supported by the opinions of Dr. Bilkey and Dr. Guberman. I note that even the defendant's physician, Dr. Snider, connected the thoracic injury to the work incident. I therefore further find that the defendant is responsible for the plaintiff's medical care for the work injuries to her left shoulder and thoracic spine in accordance with KRS 342.020.

4. **What was the plaintiff's average weekly wage?**

The plaintiff testified that she earned $9.50 per hour, an AWW of $371.55. The defendant's wage records indicate an AWW of $396.24. The ALJ finds more persuasive the defendant's written records. I therefore find that the plaintiff's AWW was $396.24.

5. **Has there been an overpayment of TTD?**

The defendant argues that it overpaid TTD. The ALJ has found an average weekly wage of $396.24. The parties stipulated that the defendant paid TTD at the rate of $264.16 per week from December 3, 2010 through November 8, 2011. Dr. Guberman, however, found the plaintiff at MMI on April 4, 2012. I

> therefore find an underpayment as to duration.

Food Fair subsequently filed a petition for reconsideration arguing since Holloway continued to work until December 1, 2010, it should not be responsible for payment of PTD benefits until December 3, 2010. Food Fair also argued the ALJ's analysis failed to support the award of PTD benefits.

In the order on reconsideration, the ALJ specifically stated:

> 2. The parties agree that the plaintiff's permanent total disability benefits should begin on December 3, 2010 instead of July 8, 2010. Therefore, the Opinion and Order dated August 6, 2012 is amended so as to state that the plaintiff's permanent total disability award of $264.16 per week shall begin on December 3, 2010.
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> 3. In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. It is clear that the defendant is attempting to reargue the case regarding the plaintiff's award of permanent and total disability benefits.
>
> 4. 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). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky.1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky.1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky.1974). The board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky.1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky.2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky.1976).

I saw and heard Ms. Holloway testify at the hearing on August 2, 2012. She was a credible and convincing witness. Based upon her testimony and the credible and convincing evidence from Drs. Bilkey and Guberman and the holding of the Kentucky Supreme Court in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky.2000), I made the factual determination that Ms. Holloway is permanently and totally disabled and is entitled to appropriate workers' compensation benefits. The Opinion and

> Order dated August 6, 2012 was based upon a careful consideration of the record.
>
> In light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration challenging the permanent and total disability award dated August 6, 2012, as amended, is hereby overruled and denied.

The crux of this appeal is whether the ALJ's assessment of permanent total disability is supported by the evidence. Authority has long acknowledged in making a determination granting or denying an award of permanent total disability, 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. *See* 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).

It was within the ALJ's discretion as fact-finder to pick and choose from the evidence whom and what to believe. Caudill v. Maloney's Discount Stores, supra. 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).

Food Fair argues the ALJ failed to provide a sufficient basis to support his decision. We disagree. Although the ALJ provided a *de minimus* basis to support his determination in the opinion, he further explained his reasoning in the order on reconsideration. Those findings are sufficient to support his determination. The ALJ chose to rely upon the opinions of Drs. Bilkey and Guberman, rather than those of Drs. Jenkinson and Snider. Drs. Bilkey and Guberman both determined Holloway sustained significant injuries resulting from her work injury which prevented her from returning to her previous work and resulted in significant impairment. After reviewing the evidence of record, the ALJ applied the appropriate legal standard for determining permanent total disability in accordance with the Supreme Court's holding in Ira A.

Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Taking into account Holloway's age, education and past work experience, in conjunction with her post-injury physical status, the ALJ was persuaded due to the effects of the work-related injury, she no longer retains the ability to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy. *See* KRS 342.0011(11)(c) and (34). Substantial evidence of record exists to support that conclusion. For that reason, we cannot say the outcome arrived at by the ALJ finding Holloway entitled to an award of permanent total disability benefits is so unreasonable under the evidence the decision must be reversed.

Accordingly, the decision rendered August 6, 2012, by Hon. William J. Rudloff, Administrative Law Judge, as well as the order ruling on the petition for reconsideration entered August 27, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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