OPINION ENTERED: February 8, 2013

CLAIM NO. 201001346

GSI COMMERCE, INC. PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

MS. ROSHAUNNA THACKER
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. GSI Commerce, Inc. ("GSI") seeks review of a decision rendered August 6, 2012, by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), awarding Roshaunna Thacker ("Thacker") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits. GSI also appeals from the

August 27, 2012 order denying its petition for reconsideration.

The ALJ found Thacker sustained a right knee injury, and a psychological condition stemming from a September 21, 2009 accident. Thacker alleged her right knee popped when she was pulling a cart while filling orders. She subsequently underwent surgery on the right knee, and has not returned to work since the injury.

On appeal, GSI argues the award of PTD benefits is unsupported by the evidence, and is therefore erroneous. GSI also argues the ALJ erred in failing to apportion any of her disability to a pre-existing active condition. GSI next argues Thacker was a seasonal employee, and the ALJ erred in his determination of the appropriate average weekly wage ("AWW"). Finally, GSI argues the ALJ erred in relying upon the opinion of Dr. Kenneth Manges, and his assessment of Thacker's condition because he was provided an inaccurate history, and his opinion was flawed pursuant to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). We disagree and affirm.

The ALJ performed an exhaustive summary of the evidence which will not be extensively reviewed again. Thacker testified by deposition on January 5, 2011, and

again on April 20, 2012. She then testified at the hearing held June 5, 2012.

GSI is a warehouse facility engaged in shipping sports memorabilia to consumers. Thacker began working for GSI as an order picker on November 2009, earning $9.75 per hour. Her job involved selecting items to complete orders, and placing them in totes to be boxed and shipped. Her job required her to stand, walk, bend, stoop and squat. She explained her job was fast-paced, requiring her to pick 115 items per hour.

On December 21, 2009, Thacker was pulling a cart containing totes of product. As she turned while pulling the cart, she experienced a pop and immediate onset of pain in her right knee. She reported the incident, and was sent for medical treatment by GSI. She was eventually referred to Dr. John Larkin, an orthopedic surgeon who performed right knee surgery.

Thacker denied any previous problems with her right knee. She admitted treating previously for anxiety; however, she denied previous issues with depression or treatment for that condition. Thacker testified she continues to experience pain in the right knee and suffers from depression.

Thacker supported her claim with records and reports of Dr. Mitchell Simons, a pain management physician she saw upon referral of Dr. Michelle Andrews, an orthopedic surgeon seen at GSI's direction for a second opinion. Dr. Simons treated Thacker for ongoing pain stemming from her right knee and low back. Dr. Simons referred her to Kenneth Manges, Ph.D., a psychologist, for evaluation of whether she was a candidate for a spinal cord stimulator trial.

Dr. Manges first saw Thacker on December 22, 2010, regarding the spinal cord stimulator implant. He next saw her on February 18, 2012, when he diagnosed major depressive disorder, recurrent, moderate, and a pain disorder. Dr. Manges outlined Thacker's previous history of a psychological condition and treatment for anxiety stemming from factors unrelated to her employment. Specifically, Dr. Manges noted she had a pain disorder associated with both psychological factors and a general medical condition consistent with her injury and objective medical findings. He opined she is prohibited from working due to her psychological condition. He noted her pre-existing psychological conditions did not prevent her from working. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 2nd

Edition (AMA Guides, 2nd), Dr. Manges assessed a 35% impairment rating.

Both Thacker and GSI submitted reports and records of Dr. Larkin who assessed a 1% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides). Dr. Larkin opined the injury to Thacker's right lateral meniscus was caused by the work accident. Dr. Larkin stated Thacker reached maximum medical improvement ("MMI") on July 19, 2010 due to failure to attend a functional capacity evaluation or to complete work-hardening.

Thacker was evaluated by Dr. Joseph Zerga, a neurologist, and Dr. Douglas Ruth, a psychiatrist, at GSI's request. Their reports were submitted, and both testified by deposition.

Dr. Zerga noted Thacker's complaints of burning pain in her right knee and leg with movement, weight bearing, lifting and sitting. He noted the history of popping at work. Dr. Zerga found no evidence of complex regional pain syndrome ("CRPS"), or reflex sympathetic dystrophy ("RSD"), and determined she had no evidence of lumbar pathology. He also stated he found no evidence supporting treatment for neuropathic pain.

Dr. Ruth opined Thacker has an undifferentiated somatoform disorder; post-traumatic stress disorder; and attention deficit/hyperactive disorder, primarily inattentive type, none of which were caused by her work injury. He noted these conditions all stemmed from her previous unrelated emotional trauma and abuse. He made that determination despite admitting he reviewed no records indicating Thacker had a somatoform condition preceding her work injury. He found she has not reached MMI for the non-work-related conditions, but opined she would qualify for a 3% impairment rating pursuant to the AMA Guides, 2nd. Dr. Ruth disagreed with the opinion rendered by Dr. Manges, which he stated was “flawed”.

In his August 6, 2012 opinion, the ALJ determined Thacker was permanently totally disabled based upon a combination of the injury to her right knee and depression. The ALJ specifically found as follows:

> KRS 342.0011 (11) (c) defines permanent total disability as meaning, "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."
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> In addition, the Supreme Court, in the case of *Ira Watson Department Stores vs. Hamilton*, 34 SW 3d 48 (KY 2000), stated the[sic] some of the principles set forth in the case of

Osborne vs. Johnson, 432 SW 2d 800 (KY 1968) must be considered when determining whether or not an individual is permanently and totally occupationally disabled. The Court stated that when determining whether or not an individual is incapable of performing any work, medical assessments remains only one of the many elements to be considered, along with such things as the individuals own testimony, vocational testimony, and physiological testimony.

An individualized determination must be made of what a worker is and is not able to do after recovering from a work injury; such a determination necessarily includes consideration of factors such as the workers post-injury physical, emotional, intellectual, and vocational status and how those factors interact and also includes consideration of the likelihood that the particular worker will be able to find work consistently under normal employment conditions. . *McNutt Construction vs. Scott*, KY 40 SW 3d 854 (KY 2001). In this specific instance, the Plaintiff is relatively young being only 37 years of age. However, she only has a 10th. grade education, and has no specialized or vocational training. Her prior work history has consisted of retail work in a rental center business, jobs as a waitress, temporary jobs, some factory work, and work in a pet store.

While the Plaintiff suffered what could be deemed a minor knee injury, consisting of a meniscus tear, that was surgically repaired, and Dr. Larkin is of the opinion she could return to work without restrictions solely on a physical basis, it is readily apparent to the undersigned Administrative Law

Judge that Plaintiff suffers from a severe psychiatric condition that causes her to suffer from chronic pain in her right leg. The psychiatric condition causes the Plaintiff to be incapable of performing basic activities of daily living such as cleaning herself after a bowel movement without the assistance of her partner. The Plaintiff is incapable of standing on her feet for any period of time and describes the pain in her right leg as "horrible".

The Administrative Law Judge had the opportunity of observing the Plaintiff that[sic] Final Hearing herein and does not believe that she is malingering or otherwise embellishing her symptoms. She seemed to be a credible individual who is clearly suffering from psychological problems that have manifested themselves into physical pain. In addition, Dr. Manges opined that Ms. Thacker, as a consequence of her impairment from her industrial claim, her mental disorder indicates she would have difficulty relating to others and her condition precludes work. If she was to find work it would have to be at a low stress job, consistent with her education, training and experience and could not involve supervision of others or contact with the public.

Therefore, when you compare the Plaintiff's present situation to the principles announced by the Supreme Court in *Osborne vs. Johnson*, *supra*., the Administrative Law Judge finds that Plaintiff has met her burden of proving that she is permanently and totally occupationally disabled. While additional psychiatric treatment may be beneficial to the Plaintiff in allowing her to handle her present psychological

> situation and hopefully allow her to return to work in the future, at the present time, in the undersigned Administrative Law Judge's opinion, she is permanently and totally occupationally disabled primarily as a result of her psychological condition that was caused by the December 21, 2009, right knee injury.

Regarding Thacker's psychiatric injury and whether her condition was pre-existing and active, the ALJ found as follows:

> While there is no question that Plaintiff had pre-existing psychiatric problems as a result of a difficult childhood wherein she suffered abuse as well as two marital relationships from which she suffered both physical and psychological abuse, the Administrative Law Judge finds persuasive the opinion of Dr. Manges and believes that this December 21, 2009, work-related incident is what caused her current psychological state. While the Plaintiff may have been a fragile individual going into her employment at this GSI commerce, the Defendant Employer, "takes their Plaintiff as they find them". Therefore, the Administrative Law Judge finds that Plaintiff has met her burden of proving that she suffered a psychological injury as a direct result of her December 21, 2009, right knee injury.

Finally, the parties disagreed regarding the correct calculation of Thacker's AWW. Thacker argued she had worked less than thirteen weeks, and her AWW should be calculated pursuant to KRS 342.140(1)(e). GSI argued

Thacker was a seasonal employee, and therefore the AWW should be calculated pursuant to KRS 342.140(2). The ALJ found as follows:

> It is undisputed that the Plaintiff began working for GSI commerce [sic] November 2009 and was injured on December 21, 2009. Therefore her wages are to be calculated pursuant to KRS 342.140(1)(e) which states in pertinent part, "if the employee had been in the employee[sic] of the Employer less than 13 calendar weeks immediately preceding the injury, his (her) average weekly wage shall be computed under paragraph (d) taking the wages for that purpose to be the amount he (she) would have earned had he (she) been so employed by the Employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation."
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> In this instance, review of the wage records of a similarly situated employees submitted by the Defendant Employer indicate[sic] that the appropriate average weekly wage would be $491.31.
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> The Defendant Employer argues that the Plaintiff was a "seasonal" employee and admitted such. They argue that because she was hired to work during the holiday seasons that she was clearly not a full-time employee and that her wages should be calculated pursuant to KRS 342.140 (2) which states, "in occupations which are exclusively seasonal and therefore cannot be carried out throughout the year, the average weekly wage shall be taken to be one `1/50th of the total

> wages which the employee has earned from all occupations during the 12 calendar months immediately preceding the injury."
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> The Plaintiff argues that she was not a seasonal employee and therefore her average weekly wage should be $491.31. As a general rule, seasonal employment consists of an occupation which is exclusively seasonal and therefore cannot be carried on throughout the year. *Barlow v Dessa International Inc*., 59 SW3d 872 (Ky. 2001). In addition, the test for determining whether an occupation is seasonal is not what the Plaintiff intended but what the job itself was, seasonal or permanent. *May vs. James H Drew Shows, Inc.,* 576 SW 2d 524 (KY App. 1978).
>
> In this instance, the fact that the Plaintiff may have testified, which she actually did not, that she was hired as a seasonal worker, is of no import. The true question is whether or not the work performed by the Defendant Employer, GSI Commerce Solutions is exclusively seasonal employment. GSI Commerce Solutions is in the business of selling sports paraphernalia and in fact sells this merchandise on a year-round basis. While they may be busier during the Christmas holidays and hire "seasonal" help to help with their busy season this does not translate to the employees being considered seasonal workers. Therefore, the Administrative Law Judge finds that Ms. Thacker was not a seasonal employee pursuant to KRS 342.140 (2).

Both Thacker and GSI filed petitions for reconsideration. Thacker argued the ALJ determined her AWW

was $491.31 per week; however, in the award he incorrectly stated $431.31 per week, and erroneously calculated benefits accordingly. GSI argued the ALJ erred in finding Thacker's psychiatric condition work-related and in finding her permanently totally disabled. The ALJ granted Thacker's petition for reconsideration and revised his decision. The ALJ denied GSI's petition for reconsideration as being a re-argument of the claim.

On appeal, the first consideration is whether the ALJ's assessment of permanent total disability is supported by the evidence. Authority has long acknowledged an ALJ has wide ranging discretion when awarding or granting total disability. 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). Likewise, 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).

Although evidence existed which could have produced a contrary result, 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).

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, supra. Substantial evidence of record exists to support that conclusion. For that reason, we cannot say the ALJ's determination that Thacker is entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed as a matter of law.

Regarding the ALJ's finding of a work-related psychiatric condition, we again find no error. GSI argues Thacker's condition was pre-existing and active, and therefore should have been found non-compensable. However,

although Dr. Ruth opined the 3% impairment he would assign was due to active, unrelated conditions, Dr. Manges specifically found all of the 35% impairment was due to the work injury. While Thacker may have suffered from and been treated for anxiety prior to the work injury, there is no evidence she had previously suffered from or been treated for depression. In rejecting Dr. Ruth's opinion, the ALJ determined Dr. Manges provided a more accurate analysis of Thacker's condition.

In Finley v. DBM Technology, 217 S.W. 3d 261 (Ky. App. 2007), the Court of Appeals held the burden to prove the existence of a pre-existing condition falls upon the employer who must prove that immediately prior to the injury: 1) the pre-existing condition is symptomatic; and 2) that condition is impairment ratable. In the case *sub judice*, while GSI introduced evidence of previous bouts of anxiety and treatment resulting from abuse when she was young, it failed to establish Thacker suffered from symptomatic depression immediately prior to her work-related knee injury. Therefore, the ALJ did not err in finding Thacker's impairment was not due to a pre-existing active condition.

GSI next argues the ALJ erred in calculating Thacker's AWW in accordance with KRS 342.140(1)(e) rather

than utilizing KRS 342.140(2). Thacker testified other GSI employees performed the same job on a permanent basis, but additional employees were hired to assist around Christmas. She testified she had hoped to be retained on a permanent basis after the Christmas rush had ended.

KRS 342.140 states, in relevant part, as follows:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
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> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
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> . . .
>
> (d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;
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> (e) The employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so

> employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation; and
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> . . .
>
> (2) In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the injury.
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> . . .

The ALJ determined although she was hired on a temporary basis, the job itself was not exclusively seasonal. Therefore, he did not err in determining Thacker's AWW pursuant to KRS 342.140(1)(e).

Because he found KRS 342.140(1)(e) applicable, the ALJ was required to compute the employee's AWW pursuant to paragraph (d) by taking the wages, excluding overtime and premium pay, to be the amount Thacker would have earned had she been so employed by the employer for the full thirteen consecutive calendar weeks immediately preceding the injury, and had worked when work was available to other employees in a similar occupation.

Here the ALJ had for his consideration the earnings submitted by GSI for a similarly situated employee. The purpose of the various methods for calculating AWW under KRS 342.140 is to obtain a realistic reflection of the claimant's earning capacity at the time of his injury. C & D Bulldozing v. Brock, 820 S.W.2d 482 (Ky. 1991). The computation must take into consideration the unique facts and circumstances of each individual case. *Id*. The ultimate objective is to ensure the claimant's benefit rate is based upon "a realistic estimation of what the worker would have expected to earn had the injury not occurred." Desa International, Inc. v. Barlow, 59 S.W.3d 872, 875 (Ky. 2001).

The goal of KRS 342.140(1)(e) is to determine the amount Thacker would have earned had she been employed by GSI for the full thirteen calendar weeks immediately preceding the injury, and had worked when the work was available to other employees in a similar occupation. In this case, the ALJ's determination of $491.31 to be the correct AWW is supported by the record and complies with the mandates of KRS 342.140(1)(e). Therefore, his determination is affirmed.

Finally, we find no merit in GSI's argument regarding the applicability of Cepero, supra. GSI argues

Dr. Manges' opinion is erroneous because he was not provided an accurate history of Thacker's previous mental treatment, and therefore it should be disregarded.

Cepero, supra, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related, but instead, was attributable to the non-work-related injury two and a half years previous. We find nothing akin to Cepero in the case *sub judice*.

We cannot say the history provided to Dr. Manges, or his interpretation of the work-relatedness or causation of her complaints was so flawed as to render his opinions so lacking in probative value as to require rejection pursuant to Cepero, supra. In fact, Dr. Manges clearly outlines and references Thacker's past history in his

report. Therefore, the ALJ's decision shall not be disturbed.

Accordingly, the decision rendered August 6, 2012, and the order on reconsideration rendered on August 27, 2012, by Hon. R. Scott Borders, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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