Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 6, 2015

CLAIM NO. 200381696

GIPSON FARMS TRUCKING, LLC PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

JOHNEY BALLARD
HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Gipson Farms Trucking, LLC ("Gipson Farms"), seeks review of a decision rendered October 31, 2014 by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), denying its request to reduce the total disability award granted to Johney Ballard ("Ballard"). Ballard had been awarded permanent total disability ("PTD")

benefits in an opinion and award rendered by Hon. Grant S. Roark, Administrative Law Judge ("Judge Roark"), on April 20, 2009. Gipson Farms also appeals from the order denying its petition for reconsideration issued November 10, 2014.

On appeal, Gipson Farms argues the CALJ erred by failing to consider the medical evidence. Gipson Farms also argues the evidence was so overwhelming it compelled a reduction of the award. We disagree, and affirm.

In its motion to reopen, filed February 21, 2014, Gipson Farms argued the award of PTD benefits should be reduced because Ballard had returned to work pursuant to KRS 342.125(3). On March 14, 2014, Gibson Farms filed an amended motion to reopen, "to incorporate certain statements from plaintiff Ballard and Danny Morris which confirm plaintiff's work and receipt of income."

On June 17, 2003, Ballard was unstrapping the shuttle on a trailer when his feet slipped and he fell approximately five feet to the ground. He filed a Form 101 on November 5, 2004 alleging he sustained injuries to his left elbow and arm in the fall, and developed reflex sympathetic dystrophy and a psychological condition. The employment history provided with the claim indicates his previous work experience included driving trucks, mechanic,

supervisor in a factory, operator in a factory and kiln operator.

In an opinion rendered June 14, 2005, the Hon. James L. Kerr, Administrative Law Judge, awarded permanent partial disability benefits based upon an 8% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. The award was enhanced by the three multiplier found in KRS 342.730(1)(c)1. Ballard subsequently filed a motion to reopen alleging a worsening of condition and increased disability on August 25, 2008. On April 20, 2009, Judge Roark found Ballard permanently totally disabled, and increased his benefits effective August 25, 2008.

On February 21, 2014, Gipson Farms filed a motion to reopen requesting a decrease in the award of PTD benefits pursuant to KRS 342.125(3), because Ballard had returned to work. KRS 342.125(3) states as follows:

> Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set for in KRS 342.730(1)(c)(2), or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the

> original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

KRS 342.125 was amended by the legislature effective December 12, 1996. Prior to that time, either party could reopen a claim at any time to increase or decrease benefits. The amended statute capped the reopening time period to either increase or decrease benefits to four years, except when an individual returns to work. In this instance, Gipson Farms had the burden to establish Ballard had returned to work.

KRS 342.0011(34) defines "work" as "providing services to another for remuneration on a regular and sustained basis in a competitive economy."

Ballard testified twice in the reopening proceedings. He first testified by deposition on July 9, 2014. He next testified at the hearing held August 26, 2014. Ballard is a resident of Bardwell, Kentucky. He testified he still treats for the injuries he sustained in the June 2003 accident. He currently treats with medications, including Norco, Valium, Neurontin and Effexor, prescribed by his treating family physician, Dr. Jeff Carrico of Mayfield, Kentucky. He also receives Testosterone injections from Dr. Michael Knox.

Ballard testified he has held a commercial driver's license ("CDL") since 2002. He keeps it current in case he improves to the point he can return to work. He stated he has driven a wrecker for M & M Truck, Tire and Wrecker Service ("M & M") on a few occasions since the beginning of 2012, no more than once per month, but no longer does so. He stated driving aggravated his condition, and he experienced extreme difficulty for several days after each run. He stated he received no pay for driving the wrecker. He stated Danny Morris ("Morris") owns the wrecker service. He leases space on his property to Morris to store a wrecker and vehicles taken from accident sites. He stated he has also sold guns, tools, and a pick-up truck to Morris.

Morris testified by deposition on July 16, 2014. Morris is a resident of Graves County, Kentucky, and owns M & M. He owns six wreckers. He has known Ballard for over twenty years due to serving with him on a volunteer fire department. He stated Ballard had driven a wrecker for him on a few occasions, but had never been paid to do so. He leases space from Ballard in order to store a wrecker so he can be placed on the call list to respond to accidents in the county. He usually responds to the accident, but Ballard has done so occasionally. Ballard no longer does

this. Ballard receives $800.00 per year for the lease, and half of any storage fees for vehicles stored on the property. Ballard advised he did not feel well for a few days after each run.

Lisa Spissinger ("Spissinger"), a private investigator, conducted surveillance of Ballard at Gipson Farm's request. She observed Ballard on September 28, 2013 and again on January 21, 2014, and videoed his activities at the scene of an accident while driving a wrecker for M & M. She observed him arrive, his activities at the accident scene, and removal of a disabled vehicle. She also performed some internet research relating to Ballard.

With its motion to reopen, Gipson Farms attached the November 28, 2011 Department of Transportation report prepared by Dr. Carrico for renewing Ballard's CDL. The report noted Ballard was taking Daypro, Effexor, Lortab, Neurontin and Valium. Also attached was the March 26, 2013 report from Dr. Carrico's office for a re-examination for the CDL. Dr. Carrico's office note from September 28, 2011 was submitted as evidence at the hearing. Dr. Carrico noted Ballard had experienced chronic pain for several years due to his elbow injury. He noted this impairs Ballard's "ability to perform household chores/duties, and work abilities".

Gipson Farms also filed the July 17, 2014 record of Dr. Knox, a urologist from Paducah, Kentucky. Dr. Knox noted Ballard has hypogonadism for which he administered a Testosterone shot. Ballard advised he could not miss time from work as a wrecker operator.

A Benefit Review Conference was held on August 12, 2014. The parties stipulated the only contested issue was, "Whether or not plaintiff's PTD award should be reduced because plaintiff has returned to work, and, if so, the benefits to which plaintiff is entitled pursuant to KRS 342.730."

The CALJ issued an opinion and order on October 13, 2014. He noted Ballard was engaged in driving a wrecker for M & M only sporadically. The CALJ specifically noted, "It is quite doubtful Plaintiff would be able to engage in this activity '***on a regular and sustained basis in a competitive economy.***'"

The CAL further stated the following:

> In this reopening, all that has been proven is that Plaintiff is performing very sporadic work for very minimal remuneration for a close personal friend. Under the circumstances presented by the evidence in this reopening, the CALJ is convinced Plaintiff is NOT "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy". Plaintiff

> remains permanently totally occupationally disabled.

The ALJ further stated the following:

> Defendant Employer failed to sustain its burden of proving to the satisfaction of the trier of fact Plaintiff is now providing services to another in return for remuneration on a regular and sustained basis in a competitive economy and, therefore is no longer permanently totally occupationally disabled. Plaintiff continues to be permanently totally occupationally disabled. In making this finding, the CALJ has relied on Plaintiff's testimony, the testimony of Danny Morris and the evidence presented through Danny Morris.

Gipson Farms filed a petition for reconsideration arguing the CALJ failed to consider the medical evidence, or Ballard's ability to work without restriction. On November 14, 2014, the CALJ entered an order denying the petition for reconsideration, stating as follows:

> The CALJ agrees with Plaintiff's position stated in his response. However, to put Defendant Employer's mind at ease, the CALJ will render a finding concerning Plaintiff's physical/medical condition.
>
> The medical evidence presented by Defendant Employer consists entirely of office notes and printed forms relating to medical examination[sic] for the purpose of commercial driver's licensing. This evidence confirms Plaintiff was recertified multiple times for a commercial driver's license

> (CDL). The records contain forms completed and signed by Plaintiff indicating he was physically capable of operating as a commercial driver as well as statements by two physicians and physician's assistant indicating Plaintiff had pronounced himself, and in fact was, capable of working as a commercial driver. None of the medical evidence presented convinces the CALJ Plaintiff has had an improvement in his medical condition to the extent he is no longer permanently totally occupationally disabled.

Pursuant to KRS 342.125(3), whether Ballard retains the capacity to work is irrelevant. Gipson Farms had the burden of demonstrating Ballard had indeed returned to work, as defined pursuant to KRS 342.0011(34), and failed to introduce any evidence to support its position. While Ballard may have driven a wrecker on a few occasions for Morris, his friend, no evidence was provided which would establish he received any payment for those activities. Leasing space to store a wrecker and disabled vehicles does not constitute work as defined by KRS 342.0011(34).

Gipson Farms had the burden of proving Ballard was no longer entitled to PTD benefits. Since it was unsuccessful in that burden, the question on appeal is whether the evidence compels a finding in Gipson Farms' favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.

App. 1984). Compelling evidence is defined as evidence which is 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). In rendering a decision, KRS 342.285 grants an ALJ as fact finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The 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 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). With that standard in mind, we find no error.

We believe ample substantial evidence exists which supports the outcome selected by the CALJ. Again, no evidence was produced demonstrating Ballard has returned to work as defined by the Act, and therefore the award may not be set aside. Here, Gipson Farms had the burden of demonstrating Ballard had returned to work, not whether he could do so. It failed in its burden, and a contrary result is not compelled.

Accordingly, the decision rendered October 13, 2014, and the order on reconsideration issued November 10, 2014, by the Hon. J. Landon Overfield, Chief Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON R CHRISTION HUTSON
P O BOX 995
PADUCAH, KY 42002

COUNSEL FOR RESPONDENT:

HON JEFFERY A ROBERTS
P O BOX 1023
MURRAY, KY 42071

CHIEF ADMINISTRATIVE LAW JUDGE:

HON J LANDON OVERFIELD
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601