

OPINION ENTERED: JUNE 18, 2012

CLAIM NO. 200884391

HARDY CORPORATION

PETITIONER

VS.

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

TIMOTHY BERCIK
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

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

SMITH, Member. Hardy Corporation ("Hardy") appeals from the December 19, 2011 Opinion, Order and Award of Hon. R. Scott Borders, Administrative Law Judge ("ALJ") finding Timothy Bercik ("Bercik") permanently totally disabled and from the February 17, 2012 order ruling on Hardy's petition for reconsideration. Hardy argues the ALJ's award of a permanent total disability is not supported by substantial evidence, was arbitrary or capricious and characterized by

an abuse of discretion or clearly unwarranted exercise of discretion.

Bercik, a resident of Carlisle, Tennessee, testified by depositions taken April 21, 2009 and January 7, 2011 and at the hearing held October 19, 2011. Bercik is a high school graduate with a certificate as an EMT in Tennessee. Bercik stated he could not perform emergency work as a result of his knee injury. Bercik had a journeyman's license for HVAC in Kentucky which has expired. Bercik's employment history has consisted of general construction work building houses and HVAC work with air conditioners. For the past 25 years, he has worked installing commercial air conditioning systems in large stores and office complexes. Bercik stated his job required him to climb ladders, carry ductwork, fit it together and hang it. The job required a lot of lifting. Bercik worked for several companies in this capacity. He is a member of a union in Nashville, Tennessee. Bercik also worked occasionally as an EMT when the construction business was slow.

Bercik began working for Hardy in August 2005 as a journeyman sheet metal mechanic installing commercial air conditioning units. In November 2006, he began working on the new Post Exchange at Fort Campbell. He stated he was injured on November 17, 2006 when he stepped across a puddle

and twisted his left knee in loose gravel and fell to the ground. Bercik stated he reported the incident to his supervisor the next day. He continued working with pain. Bercik indicated he continued to perform his normal job duties, but his left knee pain progressively worsened and would occasionally buckle. Bercik stated Hardy did not allow him to obtain medical treatment based upon his failure to present to a doctor within 72 hours of the accident. He continued to work until the project was completed in February 2007.

Bercik saw his family physician, Dr. Robert H. Lee, the day after the injury and he also went to the emergency room at Gateway Medical Center. In December 2006, he was referred to Dr. Cooper Beazley, an orthopedic surgeon in Tennessee. Bercik paid for this treatment because the workers' compensation insurer refused to pay for it. He began receiving workers' compensation benefits after surgery on his knee in November 2007. However, following the surgery, his knee continued to buckle.

Bercik saw Dr. John Stanton in October 2007 and was released to return to work in May 2008.

Bercik also received treatment with Dr. Beauchamp, an orthopedist in Tennessee, who ordered an MRI and referred him for additional physical therapy. Dr. Beauchamp believed

additional surgery may be needed as there were still tears in the knee.

In his second deposition, Bercik stated he was receiving treatment with Dr. Moore, who performed surgery in July 2010. Bercik stated the surgery was successful and his knee no longer buckles. Bercik did not believe he was capable of returning to work. Bercik had applied for Social Security disability benefits.

At the hearing, Bercik testified he initially injured his left knee on November 17, 2006 and re-injured it at work approximately three additional times before completing the job on February 27, 2007. Bercik did not feel he was physically capable of returning to his job at Hardy. He stated he was not able to climb ladders, work with his arms, carry heavy loads, or balance. He stated he could only perform a "half squat" and, after doing so, he could not walk the next day. Bercik indicated he was still undergoing physical therapy in an attempt to strengthen his leg. He was currently taking over-the-counter medication and no longer used narcotic pain medication. Bercik testified he had not worked since February 27, 2009, and despite looking for work, he had been unable to find any work he could perform. Bercik stated he could only stand for 15 minutes

before he needed to sit down. He stated he had looked for medium, light and sedentary work.

Bercik indicated he had applied to the Tennessee Department of Vocational Rehabilitation in an attempt to find work but had been unsuccessful. He also was having no success finding work that would utilize his emergency medical skills. His Social Security disability claim was still pending.

Bercik submitted medical reports from Dr. Lee who first saw him on December 5, 2006, regarding a left knee injury reported to have occurred three weeks earlier. Bercik was not examined at that time but returned on May 4, 2007. Dr. Lee noted Bercik had undergone an MRI with a finding of a torn anterior cruciate ligament. Bercik returned on January 17, 2008, reporting back and neck pain as a result of a motor vehicle accident. Dr. Lee noted Bercik had undergone a left anterior cruciate ligament and meniscus repair by Dr. Stanton on December 26, 2007.

The parties submitted Dr. Lee's December 14, 2010 treatment note. Bercik reported that, for the last two nights, he had to crawl under his house with a clearance of about 18 inches to wrap the pipes to keep them from freezing in the cold weather. Bercik reported having severe back

pain since that time. Bercik reported his knee was doing better since surgery and it did not buckle anymore.

Bercik submitted records reflecting he underwent an MRI scan on March 15, 2007, that revealed a torn anterior cruciate ligament, a tear of the posterior horn of the medial meniscus, and small joint effusion. Dr. Stanton saw Bercik on August 17, 2007 for disruption of the anterior cruciate ligament and calcaneus spur. Bercik gave a history of twisting his knee nine to ten months earlier. He also presented with bilateral foot pain with no precipitating event or injury identified. Bercik returned on September 18, 2007 and at that time agreed to reconstruction of the left knee. Surgery was performed on November 26, 2007.

Bercik was seen for follow-up on November 28, 2007, December 10, 2007 and January 8, 2008. He continued to complain of pain and was undergoing physical therapy. On May 29, 2008, Dr. Stanton assessed a 12% impairment rating for the lower extremity. On March 24, 2008, Dr. Stanton instructed Bercik to wear a brace for strenuous activity and when on uneven ground. Dr. Stanton stated Bercik could return to work with restrictions of no heavy lifting, no squatting, and avoiding uneven ground. Bercik continued to complain of his knee giving way and quad weakness.

Bercik submitted records from Gateway Medical Center ("Gateway") and Clarksville Surgery Center ("Clarksville"). He presented at Gateway on December 6, 2006 with complaints of injury to his left knee occurring at work. On February 10, 2007, Bercik was seen in the emergency room for left knee pain and right foot pain. He gave a history of a work injury occurring two months earlier. On March 15, 2007, Bercik underwent a left knee MRI scan. He subsequently underwent arthroscopic chondroplasty and anterior cruciate ligament reconstruction at Clarksville on November 26, 2007.

Bercik submitted medical records from Dr. Beazley who saw him on December 11, 2006. Bercik reported a history of jumping across a puddle, landing the wrong way and having significant pain in his left knee. Dr. Beazley performed an examination, ordered an MRI and prescribed pain medication.

Bercik submitted records from the Tennessee Department of Human Services Division of Rehabilitation Services consisting of an individualized plan for employment. The form listed Bercik's specific employment outcome as "office worker" with a projected August 2011 achievement of the employment outcome.

Bercik submitted the medical report of Dr. Frederic Huffnagel who performed an evaluation on May 22, 2009. Bercik gave a history of the November 17, 2006 work injury

when he was stepping over a puddle and twisted his left knee. Bercik reported he was treated at Gateway Medical Center, saw Dr. Beazley, and came under the care of Dr. Stanton who performed an ACL repair. Dr. Huffnagel opined Bercik had a significant injury to the left knee leaving him with atrophy involving the quadriceps and loss of motion of the knee. The condition was directly due to a twisting injury occurring in the course of Bercik's employment. Dr. Huffnagel concluded Bercik was at maximum medical improvement and would be limited in his ability to stand walk, twist or crouch and could only perform sedentary work.

In a supplemental report dated July 1, 2009, Dr. Huffnagel opined Bercik had an 8% functional impairment rating to the body as a whole pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") 5th edition.

Bercik submitted medical reports of Dr. William Beauchamp. On February 4, 2009, Dr. Beauchamp diagnosed chronic mechanical low back pain with degenerative disc disease, radiculopathy and left leg gross atrophy of musculature. Dr. Beauchamp noted Bercik reported his knee continued to give him pain and the ACL appeared to be grossly intact. However, there was some involvement of the

meniscal structures which Dr. Beauchamp felt may represent a recurrent tear versus a remnant from the previous surgery.

Hardy submitted medical records from Centerstone Community Health Care Centers beginning September 17, 2008, reflecting Bercik was seen for psychiatric counseling as a result of difficulty completing daily routines due to current depressive symptoms. He gave a history of the 2006 work injury and having anxiety over financial issues. He reported his depression began two years earlier after his father became ill. Bercik left his job and family to care for his father. He also noted chronic knee problems and an inability to work. Bercik was diagnosed with major depressive disorder, recurrent, moderate. His most current stressor appeared to be economic problems. He was unwilling to try medications. On December 3, 2008, Bercik's case manager noted "client is not very realistic because he is waiting for a \$35 an hour job. He refuses to take anything less."

Hardy submitted the report of Dr. Gregory Gleis who evaluated Bercik on June 3, 2009. Dr. Gleis received a history of the November 17, 2006 work injury to the left knee. Dr. Gleis diagnosed a left knee injury occurring at work on November 17, 2006, bilateral plantar fasciitis, and a January 16, 2008 motor vehicle accident which caused

injury to Bercik's back and neck. Dr. Gleis stated Bercik suffered a torn anterior cruciate ligament, sprain of the medial collateral ligament, tear of the meniscus and osteochondral damage as a result of the November 17, 2006 work-related injury. Dr. Gleis opined Bercik's bilateral plantar fasciitis and low back pain were not causally related to the work-related incident. Dr. Gleis assigned a 7% functional impairment rating pursuant to the 5th edition of the AMA Guides for the knee injury. Dr. Gleis stated Bercik did not retain the physical capacity to return to the type of work he was performing at the time of the injury and recommended he be seen by an orthopedic surgeon with expertise in ACL reconstruction failure with continued symptoms. Dr. Gleis felt Bercik may need repeat surgery.

Both parties submitted medical reports from Dr. David Moore, an orthopedic surgeon. Dr. Moore initially saw Bercik on November 13, 2007. He received a history of a twisting injury to the left knee at work in November, 2006. An MRI scan demonstrated an ACL tear and medial meniscus tear. Dr. Moore performed a physical examination, obtained x-rays and an MRI report. Dr. Moore diagnosed a complete disruption of the ACL with a large posterior horn medial meniscus tear. He stated the condition was causally related

to Bercik's work and recommended ACL reconstruction in conjunction with a medial meniscectomy.

On November 10, 2009, Dr. Moore noted Bercik underwent an ACL reconstruction in November, 2007 and postoperatively had persistent and severe quadricep atrophy of the left knee. Dr. Moore recommended additional physical therapy. On February 11, 2010, Bercik stated his knee felt like it was giving way on several occasions. Dr. Moore performed an examination and obtained updated x-rays. Dr. Moore noted Bercik continued to have left sided knee pain, but his ACL remained stable. Dr. Moore felt the give way symptoms were the result of persistent severe quadriceps atrophy. Dr. Moore indicated Bercik could return to work with restrictions of no stooping, squatting, bending, or prolonged standing.

Dr. Moore performed surgery on the left knee on July 23, 2010, consisting of a partial medial meniscectomy, partial lateral meniscectomy, chondroplasty, trochlea patella left knee, chondroplasty medial femoral condyle, and chondroplasty lateral femoral condyle. On July 29, 2010, Dr. Moore noted Bercik felt much improved compared to his preoperative status. Dr. Moore indicated Bercik could return to work with restrictions of no stooping, squatting, bending or prolonged standing.

On September 21, 2010, Dr. Moore noted Bercik was doing quite well and had reached maximum medical improvement. Dr. Moore indicated Bercik could return to work without restrictions.

On November 18, 2010, Dr. Moore concluded Bercik could return to work with restrictions of limited kneeling, climbing, squatting, stooping, bending or unprotected heights pending a functional capacity evaluation.

In an October 7, 2010 letter, Dr. Moore indicated Bercik had a 7% functional impairment rating pursuant to the 5th edition of the AMA Guides.

Hardy submitted a May 11, 2011 letter from Dr. Moore indicating Bercik had completed a functional capacity evaluation and was capable of performing work in the medium category. The FCE report indicated Bercik could frequently lift 30 pounds from floor to waist or waist to overhead, occasionally lift 40 pounds from floor to waist or waist to overhead, occasionally lift 45 pounds from waist to shoulder and frequently lift 34 pounds from waist to shoulder. Bercik could carry 38 pounds frequently and 50 pounds occasionally. He could exert 38 pounds of pushing force frequently and 50 pounds occasionally and exert 26 pounds of pulling force frequently and 35 pounds occasionally.

After reviewing the evidence, the ALJ determined Bercik had not met his burden of proving his bilateral foot, lumbar, and psychiatric conditions were causally related to the November 17, 2006 work-related incident and dismissed Bercik's claim for benefits resulting from those conditions. The ALJ concluded Bercik had a 7% functional impairment rating for his knee as a result of the work injury. The ALJ then found as follows:

Mr. Bercik argues that as a result of his work-related left knee injury, the bad outcome he received as a result of his two surgeries, and his current residuals, that he is permanently and totally occupationally disabled. The Defendant Employer argues that Mr. Bercik only suffers from a permanent partial disability benefits [sic] yet concedes that he is entitled to application of the three-time statutory multiplier based on his lacking of the functional capacity to return to the type of work he was performing at the time of his injury.

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."

In a permanent total disability claim, the Supreme Court determined that when considering whether or not an individual is permanently and totally disabled, some of the factors 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 capable of performing any work, medical assessments remain only one of the many elements to be considered, along with such thing [sic] as [an] individual[']s own testimony, vocational testimony, and physiological testimony. *Ira Watson vs. Hamilton*, 34 SW 3d 48 (KY 2000).

Further, an individualized determination is [sic] of what an injured worker is and is not able to do after recovering from a work injury must be made; such a determination necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact and also includes a 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 undersigned Administrative Law Judge had the opportunity to observe Mr. Bercik at the final hearing and found him to be a very credible individual. It was readily apparent that Mr. Bercik suffers from severe residuals as a result of his two knee surgeries and has had difficulty in rehabilitating his left leg and rebuilding his muscles that have severely atrophied.

Mr. Bercik has attempted to rehabilitate himself by availing himself to the benefits of the Tennessee Department of Vocational Rehabilitation, but been unsuccessful in finding employment within the restrictions assessed him. Mr. Bercik clearly cannot return to his work performing commercial heat and air-conditioning installation, and [sic]

occupation he has performed for the past 25 years, based upon the condition of his left knee and the restrictions placed upon him by his treating physicians. In addition, the fact that he went from 2007 until 2010 before he underwent the appropriate surgery to repair his left knee condition clearly had a detrimental impact on his recovery and caused the severe atrophy in his left leg that he has admirably been trying to rehabilitate.

The Administrative Law Judge is cognizant of the fact that the plaintiff underwent a functional capacity evaluation that reflected that he was capable of performing medium work. However, Mr. Bercik testified quite credibly that he is been continuously seeking medium type work, with the assistance of the Tennessee Department of Vocational Rehabilitation, but has not been successful.

Therefore, in this specific instance, the Administrative Law Judge finds it [sic] when you compare the principles in the case of *Osborne vs. Johnson*, Supra., to Mr. Bercik's current situation, that [he] is permanently and totally occupationally disabled and has been so since February 27, 2007.

Hardy filed a petition for reconsideration arguing the ALJ failed to address the issue of vocational rehabilitation and the ALJ erred in finding Bercik is permanently totally disabled.

By order dated February 17, 2012, the ALJ sustained the petition for reconsideration to the extent Bercik was referred to the Department of Vocational Rehabilitation for

an evaluation. The ALJ overruled the remainder of the petition for reconsideration as a re-argument of the merits of the case.

On appeal, Hardy argues the ALJ's finding of a permanent total disability is not supported by substantial evidence. Hardy notes no physician stated Bercik was permanently and totally disabled. It asserts Dr. Moore assessed restrictions within which Bercik could find and obtain gainful employment. Hardy notes Dr. Moore is the only physician who examined Bercik after the second surgery. Initially, he released Bercik without restrictions. He then placed temporary restrictions, pending the completion of an FCE. The FCE established Bercik was capable of medium duty work. Hardy contends the ALJ ignored the medical evidence and found Bercik to be totally disabled based upon Bercik's own testimony that he had been continuously seeking medium type work with the assistance of the Tennessee Department of Vocational Rehabilitation. However, Hardy notes Bercik did not file any documentation to support that contention. Hardy notes Bercik filed for Social Security disability benefits in 2008 and is continuing to seek an award. Hardy also notes in the December 3, 2008 record of Centerstone Community Health Care Centers, a counselor stated Bercik refused to take anything less than a \$35 per hour job.

Hardy contends it is apparent Bercik will not return to his pre-injury work with his restrictions but the entirety of the medical proof documents he could return to regular gainful employment if he so desired. Hardy argues Bercik is only entitled to a permanent partial disability award based upon a 7% rating enhanced by the three multiplier pursuant to KRS 342.730(1)(c)2.

Hardy also believes the ALJ did not provide a sufficient discussion or explanation as to why he ignored the medical findings of Dr. Moore and the FCE results. Hardy acknowledges the ALJ cited to Osborne v. Johnson, 432 SW 2d 800 (KY 1968), but did not explain his findings in light of the factors to be considered. Therefore, Hardy argues the award of a permanent total disability is not well-founded. Hardy does not believe the decision adequately set forth the basic facts upon which the ultimate conclusion was drawn so that the parties could be reasonably apprised of the basis for the decision.

Similarly, Hardy argues the Opinion, Order and Award was arbitrary or capricious and was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Hardy believes the ALJ erred and abused his discretion in finding a permanent total disability because Bercik was clearly capable of returning to some form of

gainful employment given his permanent restrictions. Hardy argues the totality of the medical evidence following the successful 2010 surgery is compelling evidence requiring a finding Bercik is not permanently totally disabled. Again, Hardy notes no physician stated Bercik was permanently and totally disabled and Dr. Moore assigned medium duty limitations.

Bercik, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation/work-relatedness and extent and duration. KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Bercik was successful in his burden, the question on appeal is whether the ALJ's finding is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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 (Ky. 1977). Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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. 2005). Although a party may note evidence supporting a different outcome than 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 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).

After reviewing the evidence, the ALJ noted 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 SW 3d 48 (Ky. 2000). Taking into account Bercik's age, education, and past work experience, in conjunction with his post-injury physical and psychological status due to the effects of his work-related injury and subsequent surgery, the ALJ was persuaded Bercik was permanently totally disabled. Substantial evidence exists to support that conclusion. The ALJ noted Bercik performed the same type of work for 25 years and found he could not return to that work. Although Bercik had some training as an EMT, he testified he was not physically capable of performing that work. The evidence established Bercik had significant atrophy of his leg. The ALJ found Bercik's testimony credible regarding the residual effects of the injury and his attempts to find employment. The law is well settled that a claimant's own testimony concerning his ability to labor, both pre-injury and post-injury, constitutes probative evidence. Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). We cannot say the ALJ's finding Bercik was entitled to an award of permanent total disability benefits is so unreasonable under the evidence the decision must be reversed as a matter of law.

We are satisfied with the sufficiency of the ALJ's findings of fact and analysis with reference to the determination of the extent of Bercik's disability. While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Here, the ALJ identified the appropriate standards for the determination and had a correct understanding of the evidence before him. He indicated he had considered the principles enunciated in Osborne v. Johnson *supra* and their application to Bercik's current situation in finding Bercik permanently totally disabled. We cannot say the ALJ's findings are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, *supra*.

Accordingly, the Opinion, Order and Award rendered December 19, 2011 and the order rendered February 17, 2012

by Hon. R. Scott Borders, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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