Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 17, 2013

CLAIM NO. 201165747

HITACHI AUTOMOTIVE SYSTEMS AMERICAS, INC. PETITIONER

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

DANA L. MULLINS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. Hitachi Automotive Systems Americas, Inc. ("Hitachi") appeals from the July 11, 2013, Opinion and Order and the August 5, 2013, order ruling on Hitachi's petition for reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the July 11, 2013, Opinion, Order, and Award, the ALJ awarded permanent total disability ("PTD") benefits and medical benefits.

The Form 101 alleges on December 10, 2011, Dana L. Mullins ("Mullins") was struck by a forklift and sustained the following injuries: "Neck and right upper extremity; and anxiety and depression."

In the February 25, 2013, Notice of Claim Denial, Hitachi accepted the neck and right upper extremity injuries as compensable and denied Mullins sustained psychological injuries.

The June 11, 2013, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, and exclusion for pre-existing disability/impairment.

On appeal, Hitachi sets forth three arguments. First, it asserts the ALJ made insufficient findings of fact. Second, Hitachi maintains the evidence does not support a finding of permanent total disability. Finally, Hitachi argues the ALJ erroneously awarded PTD benefits without referring Mullins for a vocational evaluation.

In the July 11, 2013, Opinion, Order, and Award, the ALJ made the following findings regarding permanent total disability:

> In rendering a decision, KRS 342.285 grants the Administrative Law Judge 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 this case I find very persuasive the opinions of Dr. Bilkey and Dr. Sprague and find that as a result of plaintiff's accident on December 10, 2011 she will sustain as a result of her physical injuries a permanent impairment of 8% to the body as a whole under the AMA Guides, Fifth Edition. I also find that as a result of her physical injuries the plaintiff sustained psychological injuries documented by Dr. Sprague's report.

"'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, I considered the severity of the plaintiff's work injuries, both physical and psychological, her age, her work history, her education, the testimony of the plaintiff and the medical opinions of both Dr. Bilkey and Dr. Sprague regarding her impairment and occupational disability. Based on 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 she is permanently and totally disabled.

We first observe as noted by Hitachi, Mullins did not seek an award of PTD benefits. At the July 10, 2013, hearing, counsel for Mullins, in her closing statement, argued as follows:

> So we do believe that it is supported by the AMA Guides and ask you to adopt the ten percent, so we are asking, Your Honor, for a permanent partial disability award based on the ten percent from Dr. Sprague and the eight percent from Dr. Bilkey.

That said, as long as the ALJ cites to substantial evidence in the record in support of a finding of permanent total disability, the ALJ is not bound by what has been pled. "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). This means the ALJ is free to step outside of Mullins' request for permanent partial disability benefits as long as he has identified substantial evidence in support of his conclusion to award PTD benefits. The burden to clearly identify this evidence is heightened when the ALJ chooses to step outside of what the claimant has requested.

In the July 11, 2013, Opinion and Order, the ALJ stated he relied upon "the severity of the plaintiff's work injuries, both physical and psychological, her age, her work history, her education," as well as Mullins' testimony and the opinions of Dr. Warren Bilkey and Dr. Dennis Sprague to determine Mullins is permanently totally disabled. However, Mullins' and Dr. Bilkey's opinions do not constitute substantial evidence in support of the ALJ's award of PTD benefits. Additionally, the ALJ utterly failed to explain how the severity of Mullins' physical and psychological injuries as well as her age, work history, and education factored into his decision to award PTD benefits. More importantly, in his summary of the evidence and in his findings of fact and conclusions of law, the ALJ failed to identify the specific testimony of Dr. Sprague

that supports his finding of permanent total disability. The ALJ summarized the contents of Dr. Sprague’s report but did not summarize or discuss Dr. Sprague’s June 26, 2013, deposition testimony. Therefore, the parties are left to guess what portions of Dr. Sprague’s opinions the ALJ relied upon in determining Mullins is permanently totally disabled. Consequently, we vacate the ALJ's award of PTD benefits and remand for additional findings.

In Mullins' March 27, 2013, deposition, regarding her ability to find future employment, she testified as follows:

> Q: What types of jobs are you looking for?
>
> A: Office, secretarial. Something that would be easier for me to do than- that would- within my restrictions.
>
> Q: Do you have any interviews or callbacks?
>
> A: No, I do not.
>
> Q: Okay. Where are some of the places that you've applied?
>
> A: Bluegrass Orthopaedics in Lexington. I've put in a lot of applications online to different doctors' offices and...
>
> Q: Okay. Is that something you feel like you would be able to do if you were offered a position, work in an office, something like that?

A: I think so.

Mullins further testified as follows:

> Q: If you were physically capable of working, do you think that you would be able to work? Is there anything about your psychological issues that you feel would keep you from working?
>
> A: I'm a little scared about starting over somewhere, yeah.
>
> Q: Were you a little scared, though, about starting in each of these jobs that you had?
>
> A: Yeah. But, I mean, I'm more scared now. I'm just- I don't know. I'm just-
>
> Q: Yeah.
>
> A: -upset. I don't- I mean I'm 38 and I don't want to start over, but I know I have to.
>
> Q: Yeah. Yeah. And you think you will be able to transition-
>
> A: Yes.

At the hearing she testified she not only wishes to return to work, but she believed she <u>will</u> be able to return to some form of employment. Mullins' specific testimony is as follows:

> Q: What types of work are you looking for?
>
> A: Maybe like office work, receptionist, something less demanding than my previous job.

> **Q: Do you feel, Dana, that you'll be able to do that type of work in light of your psychological symptoms?**
>
> **A: Yes.**

(emphasis added).

Regarding the medical opinions relied upon by the ALJ, Dr. Bilkey, in an independent medical examination ("IME") dated February 19, 2013, diagnosed Mullins' physical injuries as follows:

> 12/10/11 work injury cervical strain, right shoulder strain. There is myofascial pain affecting the scapular musculature, sternomastoid muscle. Ms. Mullins has acquired chronic neck pain, headache, right shoulder and upper extremity pain.

Dr. Bilkey assessed an 8% whole person impairment rating and imposed the following restrictions:

> Recommended activity restrictions for Ms. Mullins are that she avoids lifting over 25 lbs occasionally. She should avoid overhead work and any activities that involve repetitive neck motion or repetitive pushing. These restrictions are the result of the 12/10/11 work injury and they preclude Ms. Mullins from being able to resume the usual work duties successfully performed prior to 12/10/11.

The above-cited testimony does not comprise substantial evidence in support of the ALJ's finding of

permanent total disability. KRS 342.0011(c) defines permanent total disability as "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." It is clear from Mullins' testimony that she not only wants to find gainful employment but believes she can find and hold down gainful employment. While he imposes certain restrictions, Dr. Bilkey does not state that Mullins has a "complete and permanent inability to perform any type of work as a result" of her injury.

Dr. Sprague conducted an Independent Psychological Evaluation ("IPE") and completed a Form 107, both dated April 17, 2013. His June 26, 2013, deposition was also introduced. In the IPE, Dr. Sprague diagnosed depression, panic disorder, and pain disorder. In the Form 107, Dr. Sprague answered "yes" to the following question: "Does she have the mental capacity to return to work at the present time?" (emphasis added). Dr. Sprague assessed a 10% impairment rating pursuant to "chapter 12 of the 1984 edition of the AMA Guides to the Evaluation of Permanent Impairment," with 3% attributed to a pre-existing psychological disorder.

In his June 26, 2013, deposition, Dr. Sprague testified as follows:

> Q: Now, as far as Ms. Mullins's condition is concerned, you had indicated, I believe, that you did not believe that she had the mental capacity to return to work at the present time; is that correct?
>
> A: **Psychologically, I do not feel that she's capable of returning to work due to the depression and panic disorder and the pain.** She's more prone to mistakes. And her physical continuity, you'd have to get the physician to give input to that. But this would not be someone at this point that I would want working in my facility because I'd be afraid they'd be more prone to injury or to make mistakes mentally.

(emphasis added).

Dr. Sprague further opined as follows:

> Q: Now, as far as Ms. Mullins herself is concerned, did you talk to her about whether she felt that she could function in a work setting from a psychological standpoint?
>
> A: Well, here's what I found out. She worked in two different settings for seven years, Amazon and the other one-Amazon for I believe it was ten years and then Lexmark for two years. And then she worked for Hitachi for two years. This is a person who has a good work ethic. And she could have broken arms and legs and would still probably say she can work. And she's probably willing to risk going back to work even with her physical incapacities and/or

> her emotional status to be able to work. She wants to return to work.
>
> Q: But let me ask, solely from a psychological--?
>
> A: From a psychological point of view, I indicated before that I think she's at risk because of the proneness toward making mistakes and risk of further injury, lack of concentration, limited attention span, to do the kind of work that, you know, was required in her work.
>
> . . .
>
> Q: **Okay. Now, before you said it's your opinion that she would be jeopardized in returning- compromised in returning to the workplace from a psychological standpoint**?
>
> A: **Yes**. And of course that's- you know, she's been in therapy for a year. Probably her therapist and any other treating physician would probably be the person to make those decisions. But that is my opinion.

(emphasis added).

We disagree with Hitachi's assertion that there is no substantial evidence in the record supportive of the ALJ's finding of permanent total disability, as portions of Dr. Sprague's testimony constitute substantial evidence in support of this finding. However, we do agree the ALJ failed to adequately set forth any analysis in support of his findings. A general recitation of the witnesses and

factors that may support a finding of permanent total disability is not adequate, particularly in light of the fact Mullins has not requested PTD benefits and testified that she not only wants to work but believes she can work.

On remand, the ALJ must set forth the precise testimony from Dr. Sprague that is supportive of his finding of permanent total disability. Additionally, the ALJ must resolve the discrepancy between Mullins' testimony regarding her desire and ability to work and Dr. Sprague's contrary opinions. This is clearly necessary in light of the following statements made by the ALJ in his August 5, 2013, Opinion and Order on Reconsideration:

> I saw and heard the plaintiff, Mrs. Mullins, testify at the hearing and found that she was a credible and convincing witness. Her testimony was very believable and was supported by the expert testimony from Dr. Bilkey and Dr. Sprague.

Even though Mullins may have been a credible and convincing witness, the second sentence recited above is not completely accurate since Mullins testified she was capable of working and Dr. Sprague’s deposition testimony establishes he did not believe she was capable of performing any type of work. Clearly, Mullins’ testimony is not supported by Dr. Sprague’s deposition testimony.

While the ALJ certainly has the discretion to rely on Dr. Sprague's opinions in lieu of relying on Mullins' opinions regarding her ability to work, the ALJ must, at a minimum, acknowledge this discrepancy and provide some analysis resolving this discrepancy in favor of a finding of permanent total disability. The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). The parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful 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).

We strongly emphasize, as we have on several occasions, that a mere recitation of the factors set out in Ira A. Watson Department Store vs. Hamilton, 34 S.W.2d 48 (Ky. 2000) without linking those factors to the specific facts at hand is not an appropriate analysis of a claimant's entitlement to PTD benefits. The ALJ must set forth exactly how the severity of Mullins' physical and psychological injuries as well as how her age, work history, and education factored into his decision to award PTD benefits.

Finally, Hitachi asserts it was error for the ALJ to award PTD benefits without referring Mullins for a vocational evaluation. There is simply no precedent in Kentucky Workers' Compensation law in support of this argument. As Hitachi conceded in its appeal brief, neither party requested a vocational rehabilitation evaluation. Despite Hitachi's assertions, the ALJ was not, by any means, required to order Mullins to undergo a vocational rehabilitation evaluation on his own motion. The applicable portion of KRS 342.710(3) reads as follows:

> The administrative law judge on his own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, **may** refer the employee a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him fit for a remunerative occupation.

When considering the construction of statutes, KRS 446.010(20) provides “may” is permissive, and “shall” is mandatory. Alexander v. S & M Motors, Inc., 28 S.W.3d 303 (Ky. 2000). Being unambiguous on its face, a rule of statutory construction long accepted by Kentucky courts is that unambiguous statutes must be applied as written. "[A]bsent an ambiguity, 'there is no need to resort to the rules of statutory construction in interpreting it.'" Hall

v. Hospitality Resources, Inc., 276 S.W.3d 775, 784 (Ky. 2008). By statute, the ALJ is never required to order a vocational rehabilitation evaluation and one is certainly not required before awarding PTD benefits. We also note that the issue of vocational rehabilitation was not listed as a contested issue at the June 11, 2013, BRC. *See* 803 KAR 25.010 §13(14).

Accordingly, those portions of the July 11, 2013, Opinion and Order and the August 5, 2013, order ruling on Hitachi's petition for reconsideration finding Mullins permanently totally disabled and awarding PTD benefits are **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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