OPINION ENTERED: June 28, 2013

CLAIM NO. 200786619

HODGES TRUCKING COMPANY PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

ROBERT W. WALDECK
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Hodges Trucking Company ("Hodges") seeks review of the December 26, 2012, opinion and order rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), finding Robert W. Waldeck ("Waldeck") sustained a worsening of his May 29, 2007 work-related injury subsequent to the

opinion rendered by Hon. Grant S. Roark ("ALJ Roark") on March 2, 2009, and is now totally occupationally disabled. Hodges also appeals from the February 8, 2013 order denying its petition for reconsideration.

On appeal, Hodges contends the ALJ erred in finding Waldeck permanently totally disabled, because his functional abilities remain the same, or better than at time of the original opinion and award. Hodges also contends the ALJ erred in considering Waldeck's psychological impairment in the determination of the extent of disability. Because we determine the ALJ's award of permanent total disability ("PTD") benefits is supported by substantial evidence, and he did not err in considering psychological impairment, those portions of his decision are affirmed. We *sua sponte* vacate the award of benefits, and remand for determination of whether an exclusion for a pre-existing active disability is appropriate.

Waldeck first experienced low back problems in 2000. He underwent lumbar injections and continued to work. On June 30, 2004, while working for a previous employer, Waldeck sustained a low back injury for which Dr. John Guarneschelli, a neurosurgeon, performed surgery in 2005. Waldeck did not file a claim for the 2004 injury.

On June 9, 2008, Waldeck filed a Form 101 alleging a low back injury affecting both legs and hips when he fell from a truck he was operating for Hodges on May 29, 2007. In an opinion rendered March 2, 2009, ALJ Roark stated the parties recognized Waldeck had a pre-existing active low back condition due to the 2004 injury for which surgery was performed in 2005, resulting in a 10% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). ALJ Roark further noted Waldeck's current low back pain, and need for additional treatment arose from his 2007 injury. ALJ Roark opined Waldeck had no permanent impairment due to the 2007 low back injury. He awarded temporary total disability ("TTD") benefits from the date of injury through September 24, 2008, at the rate of $357.86, and awarded medical benefits.

Dr. Christopher Shields, a neurosurgeon, and Dr. John Johnson, an orthopedic surgeon, performed surgery on September 23, 2009, consisting of a laminectomy, foraminotomy, and facetectomy with fusion at L4-5 and L5-S1. On May 2, 2012, Waldeck filed a motion to reopen alleging a worsening of his condition due to the surgery.

In support of the motion to reopen, Waldeck filed the August 9, 2011 report prepared by Dr. Warren Bilkey. He opined Waldeck has a 29% impairment rating based upon the AMA Guides, of which 10% was attributable to the previous discectomy performed by Dr. Guarnaschelli in 2005, with the remainder to the 2007 injury, and subsequent surgery. Dr. Bilkey restricted Waldeck from lifting twenty pounds, with no repetitive bending, and advised he should avoid climbing.

Waldeck also supported his motion to reopen with the October 23, 2011 report prepared by Dr. Steven Simon, Ph. D., who performed an evaluation on August 1, 2011. Dr. Simon diagnosed Waldeck with mood disorder with major depression secondary to his back injury and chronic pain. He assessed a 20% impairment rating pursuant to the AMA Guides, 2nd Edition.

Finally, Waldeck attached records from Dr. Shields, including the operative note from the surgery performed September 23, 2009.

Hon. J. Landon Overfield, Chief Administrative Law Judge, entered an order on June 8, 2012, sustaining the motion to reopen, and ordered the claim be assigned to an administrative law judge. On June 15, 2012, a scheduling order was issued assigning the claim to the ALJ.

Waldeck testified by deposition on August 31, 2012, and at the hearing held October 25, 2012. He was born on August 22, 1968, and is a resident of Bonnieville, Kentucky. Waldeck testified his employment history consists of working as a roofer and as truck driver. All of his jobs required lifting, bending, stooping, kneeling and squatting.

Waldeck first experienced low back problems in 2000, for which he treated with injections. He sustained a low back injury in 2004 while working for a previous employer, for which Dr. Guarnaschelli performed surgery in 2005. He returned to work with no restrictions. He subsequently began driving a dump truck for Hodges. He was required to enter and exit the truck numerous times daily, and wash the truck. On May 29, 2007, he fell while exiting the truck, and developed low back pain, hip pain and bilateral leg pain. He had no surgery between the date of injury, and March 2, 2009, when the opinion was rendered by ALJ Roark.

In March 2009, Waldeck stated he experienced tingling and numbness in his legs and feet. He also experienced swelling and pressure in his low back. He sought treatment with Dr. Shields. Since the surgery performed by Drs. Shields and Johnson, his leg symptoms

have improved, but he continues to experience pain and swelling in his low back. He also stated he experiences leg numbness if he walks very far. He stated although he was taking medication for depression and anxiety prior to the surgery, both his physical and mental conditions have worsened. He stated he cannot drive a manual transmission vehicle, which was required in his job as a dump truck driver. Waldeck stated he is unaware of any jobs he can perform.

Hodges filed the August 7, 2012 report prepared by Dr. Thomas Loeb, an orthopedic surgeon. Dr. Loeb diagnosed Waldeck as status post L4-S1 posterior fusion. He stated Waldeck's condition is a transient aggravation of his underlying pre-existing condition. He stated the May 29, 2007 accident did not cause an alteration of the underlying anatomy. He opined Waldeck's condition actually improved due to the surgery, and he has no increase in impairment. Dr. Loeb stated Waldeck has no restrictions due to the May 29, 2007 injury, but should not lift over twenty to twenty-five pounds, and should avoid stooping.

Hodges also filed the July 18, 2012 report prepared by Dr. Tim Allen, a psychiatrist, who evaluated him on July 9, 2012. Dr. Allen diagnosed, "major depression, mild, due to the work injury of October [sic]

29, 2007." Dr. Allen stated Waldeck has major depression due to the work-related injury, but exaggerated his symptoms. He stated Waldeck had reached maximum medical improvement prior to July 2012. He assessed a 5% impairment rating based upon the AMA Guides, 2nd edition. In a supplemental report dated August 6, 2012, Dr. Allen noted the correct injury date was May 29, 2007, rather than October 29, 2007. He noted Waldeck began treating with psychiatric medications in 2007, and his condition has not worsened since 2009.

Hodges filed records from the Hardin Memorial Hospital documenting Waldeck's treatment from June 2007 through September 2008 for low back pain and anxiety. Medications listed include Cymbalta, Lorazepam, and Clonazepam.

A Benefit Review Conference ("BRC") was held October 3, 2012. The BRC order and memorandum reflects the contested issues were benefits per KRS 342.730, and worsening of impairment/disability since March 2, 2009, and if so, entitlement to benefits.

In his opinion rendered December 26, 2012, the ALJ entered the following findings of fact and conclusions of law:

The underlying injury occurred on May 29, 2007 when the plaintiff, Robert Waldeck, stepped down from a ladder or from a step on his dump truck in an awkward position, twisting his back and resulting in immediate pain. In an Opinion and Award dated March 2, 2009, ALJ Grant S. Roark rendered an Opinion determining that Mr. Waldeck had undergone an injurious work-related event on May 29, 2007, but had failed to meet his burden of proof that he had sustained a permanent partial impairment. Mr. Waldeck was awarded temporary total disability benefits and entitlement to future medical care.

Subsequent to the Opinion and Award of Judge Roark, the plaintiff underwent a laminectomy, foraminotomy, and facetectomy with fusion at the L4-L5 and L5-S1 interspaces by Dr. Christopher B. Shields on September 23, 2009. Dr. John Johnson assisted Dr. Shields with the surgery or actually performed the lumbar spinal fusion portion of the procedure. The workers' compensation carrier paid for the surgery and paid temporary total disability benefits from September 23, 2009 through September 13, 2010. Mr. Waldeck filed a motion to reopen his claim on May 1, 2012, alleging a worsening of his condition, and he is now seeking an award of total occupational disability and all reasonable and necessary future medical treatment.

The sole issue before the ALJ at this time is whether or not the plaintiff has sustained his burden of proving a worsening of his condition and his entitlement to increased benefits under KRS 342.125(1)(d), which provides for increased benefits upon a showing of:

> "(d) Change of disability shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order."

Judge Roark's Opinion, Order and Award was issued March 2, 2009. His findings are res judicata and his entire Opinion has been reviewed and carefully considered by the undersigned ALJ. The question presented at this time is whether or not the plaintiff has undergone a worsening of his condition and he is therefore entitled to an increase in his worker's compensation benefits.

It is important to note that Mr. Waldeck has worked his entire life as either a roofer or a truck driver. All of his employment has involved heavy manual labor, requiring lifting, bending, stooping, kneeling, and squatting. The evidence reflects that Mr. Waldeck underwent a previous surgery in 2005 (resulting from a 2004 injury) which left him with a 10% permanent impairment based on the AMA Guides, Fifth Edition. No one disputes this 10% pre-existing active impairment.

The Plaintiff maintains that his permanent impairment has substantially increased, to-wit, 19% to the body as a whole, as a result of his physical impairment and that he has also sustained a psychological impairment of 20% to the body as a whole based on the opinion of Dr. Steven Simon or 5% to the body as a whole based on the opinion of Dr. Timothy Allen. The Defendant-Employer argues that the plaintiff's physical condition has

actually improved with the fusion surgery and that the claimant was treating for depression and anxiety as early as 2007 and 2008. Thus, the defendant-employer argues that the motion to reopen should be denied.

After considering all of the evidence and the arguments and positions of both parties, the ALJ finds that Mr. Waldeck has sustained his burden of proof and that his condition has substantially worsened since the Opinion of Judge Roark. The changes are significant. At the time of Judge Roark's Opinion, Mr. Waldeck had a 10% pre-existing active impairment. Based on the opinion of Dr. Bilkey, Mr. Waldeck now has a 29% permanent impairment to the body as a whole based on the AMA Guides, Fifth Edition, 10% of which is pre-existing active and 19% of which is attributable to the work injury of May 29, 2007 and the residual impairment from the September 23, 2009 surgery by Dr. Shields and Dr. Johnson.

As to the psychological aspects of the claim, at the time of Judge Roark's Opinion, no physician had assessed a permanent impairment as a result of any psychological condition resulting directly from the work-related injury. Based on the opinion of Dr. Steven Simon rendered pursuant to an evaluation on August 1, 2011, Dr. Simon found Mr. Waldeck unable to read and concluded he has mood disorder with major depression secondary to a back injury and chronic pain. Dr. Simon assessed a 20% psychiatric impairment as a consequence of the work-related injury and its sequelae. Dr. Timothy Allen performed a psychiatric evaluation on July 9, 2012 and found the plaintiff to be "borderline

intellectual functioning" and found him to be functionally illiterate. IQ testing revealed plaintiff has an IQ of 70 and that he is suffering from "major depression, mild" due to the work injury. Dr. Allen assessed a 5% whole person impairment as a result.

In summary, it is clear that plaintiff's condition has substantially worsened and in support of this finding, the ALJ finds that plaintiff now has a 29% permanent impairment to the body as a whole based on the AMA Guides, Fifth Edition, 10% of which was pre-existing active, and 19% of which is the result of the injury. In addition thereto, the ALJ finds plaintiff has a 5% impairment for work-related depression. Thus, the plaintiff's permanent impairment has substantially worsened since the Opinion of Judge Roark.

The ALJ is now faced with making a determination as to the claimant's entitlement to increased benefits under KRS 342.730 and other applicable law. It is significant to the ALJ that whereas plaintiff is only 44 years of age, he is of borderline intelligence, has work experience limited to roofing and truck driving, both of which are beyond his current capabilities, and he has residual chronic back pain with major depression as a result thereof.

KRS 342.0011 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 the injury. Work is defined in subsection 34 of the same statute as providing services to another in return for remuneration on a

> regular and sustained basis in a competitive economy. In making the determination of whether or not a claimant is totally occupationally disabled, the Administrative Law Judge must consider the principles enunciated in KRS 342.730, Osborne v. Johnson, 432 S.W.2d 800 (Ky. App. 1968), Ira A. Watson Dept. Store v. Hamiltonm 34 S.W.3d 48 (2001), and McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (2001). Considering the factors set forth in these authorities, the ALJ finds the plaintiff to be permanently totally disabled as a result of the work injury of May 29, 2007. Even Dr. Loeb has opined that plaintiff can not perform repetitive bending, stooping, or lifting greater than 20 to 25 pounds. He also stated that plaintiff can not function as a truck driver. Dr. Bilkey has opined that plaintiff can perform "light duty" only. In light of the restrictions imposed upon him, it is evident that Mr. Waldeck is incapable of performing any work for which he has prior training and experience. His limited intellectual capacity serves as a severe limiting impairment and has been considered in this determination that Mr. Waldeck is incapable of "work" as defined by the statute.

Hodges filed a petition for reconsideration arguing, as it does on appeal, the ALJ erred in considering the psychological impairment, and finding Waldeck permanently totally disabled. The petition for reconsideration was denied by order dated February 8, 2013.

Waldeck, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful in that burden, the question on appeal is whether substantial evidence existed to support the ALJ's decision. 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).

Authority has long acknowledged that 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). 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. 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). 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 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 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).

Regarding the award of PTD benefits, the ALJ determined Waldeck's condition has worsened. Subsequent to the ALJ Roark's March 2, 2009 opinion, Waldeck underwent lumbar surgery. Dr. Bilkey's report supports the finding of an increase of impairment. His report, coupled with Waldeck's testimony his condition has worsened and he cannot perform his previous work, supports the ALJ's determination.

After reviewing the evidence of record, the ALJ applied the appropriate legal standard for determining whether Waldeck is permanently totally disabled in accordance with the Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, supra. Substantial evidence of record exists to support the ALJ's determination. For that reason, we cannot say the outcome is so unreasonable under the evidence the decision must be reversed as a matter of law.

Likewise, the ALJ's determination Waldeck sustained a psychological impairment due to the work-related injury is supported by the opinions of Drs. Simon and Allen, neither of whom evaluated him prior to March 2009. Although Waldeck treated with anti-depressant/ anxiety medication beginning in June 2007, there is no evidence he was diagnosed with a psychological condition

until he saw Dr. Simon in August 2011. The evidence supports the ALJ's determination of a work-related psychological condition, which was not diagnosed prior to March 2009. This finding further supports the ALJ's determination Waldeck sustained a worsening of his condition.

In addition to the foregoing, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Although neither party raises an issue on appeal regarding a "carve out" of pre-existing active disability, the ALJ clearly stated in his opinion it is undisputed Waldeck had a 10% pre-existing active impairment. KRS 342.285 grants the Board the authority to decide questions of law regardless of whether either party raises the issue on appeal. It is the Board's province on appeal to assure orders and awards of an ALJ are in conformity with Chapter 342. In this case, the ALJ's award is not in conformity with the law. we therefore vacate the award of PTD benefits.

In Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), the Kentucky Supreme Court instructed under KRS 342.730(1)(a), the provision governing awards for permanent total disability, an exclusion from a

permanent total disability award based on pre-existing active disability must be determined under the same standard for disability established in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968). The Court likewise held in Ira A. Watson Dept. Store v. Hamilton, supra, it is among the functions of the ALJ, as fact finder, to translate the lay and medical evidence when determining the extent of an employee's occupational disability at a particular point in time.

Campbell v. Sextet Mining Co., supra, and its companion cases of Spurlin v. Brooks, 952 S.W.2d 687 (Ky. 1997), Fleming v. Windchy, 953 S.W.2d 604 (Ky. 1997), and Whittaker v. Fleming, 25 S.W.3d 460 (Ky. 2000), direct how claimants who are rendered totally disabled by a series of work-related injuries resulting in different awards are to be compensated. The overriding principle in Campbell, supra, and progeny, is injured workers, such as Waldeck, who are determined to be totally and permanently disabled must receive benefits which correspond to the whole of their disability on the date that disability begins. *See also* Beale v. Shepherd, 809 S.W.2d 845, 849 (Ky. 1991).

Where the last injury in a succession of work-related injuries results in an employee being rendered permanently and totally disabled, the key to whether the

permanent total disability award is subject to a reduction for pre-existing active disability is determined by the length of time between injuries and whether the periodic awards for those injuries overlap.

In cases such as this, in accordance with KRS 342.730(1) where there is no overlapping periodic award between injuries, the employee is deemed as a matter of law to have been "fully compensated" for the previous injury and the last employer is liable only for that percentage of the employee's permanent total occupational disability attributable to the latest injury. Spurlin v. Brooks, 952 S.W.2d at 690-691; Fleming v. Windchy, supra. In such circumstances, the award of permanent total disability is reduced over its duration by the percentage of active occupational disability found to exist immediately preceding the last injury, as determined within the ALJ's discretion as fact finder based upon the medical and lay testimony. Id. An award of permanent total disability "may" only be reduced by the amount of any prior active disability experienced by an injured worker for which the worker has been entirely compensated prior to the rise of his permanent total disability. Id. Any prior active disability for which an injured employee remains entitled to receive periodic benefits, either in fact or

statutorily, will have no effect and will not result in a reduction, other than the dollar-for-dollar offset described above. Id.

Such findings regarding the occupational impact of the prior work-related injury would necessarily include the extent and duration of the employee's entitlement to TTD benefits and permanent disability benefits for the injury, including the number of weeks for which benefits would have been awarded in accordance with KRS 342.730(1)(a) and (b). Only then is an ALJ in a position to make an essential finding as to whether the statutory period of recovery for the prior injury overlapped the employee's PTD award for purposes of distinguishing excess disability.

The ALJ in this instance noted it is undisputed Waldeck had a 10% pre-existing active impairment rating as determined by ALJ Roark on March 2, 2009. However, he failed to determine whether the pre-existing active impairment resulted in any occupational disability. Since no claim was ever filed for the 2004 injury, and resulting surgery, there is no overlap in the award period.

Since Waldeck's prior lumbar low back injury in 2004, which resulted in surgery, was work-related, the ALJ must determine whether the injury and impairment resulted

in any occupational disability. If so, that percentage must be deducted from the award of PTD benefits.

Accordingly, the decision of the ALJ determining Waldeck sustained a worsening of his May 29, 2007 work-related injury, and is permanently totally disabled is **AFFIRMED**. The ALJ's award of permanent total disability benefits is **VACATED** and this matter is **REMANDED** for entry of an amended award of permanent total disability benefits in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

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