

OPINION ENTERED: MAY 7, 2012

CLAIM NO. 200971641

JACK COOPER TRANSPORT CO., INC.

PETITIONER

VS.

APPEAL FROM HON CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

LYNN MARSH
and HON. CHRIS DAVIS
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

* * * * *

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

SMITH, Member. Jack Cooper Transport Company ("Cooper") appeals from the October 10, 2011 opinion, order, and award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"), awarding Lynn Marsh permanent total disability benefits for injuries sustained on December 3, 2009. Cooper also appeals from the ALJ's

November 21, 2011 order denying Cooper's petition for reconsideration.

Cooper filed a Form 101, Application for Resolution of Injury Claim, on January 31, 2011 asserting Lynn Marsh, its employee, sustained a work injury on December 3, 2009 as he was climbing a ladder on a trailer and lost his footing. As a result, Marsh sustained bilateral shoulder strains requiring medical treatment. After resolution of some procedural issues, Marsh also filed a Form 101 on March 14, 2011 asserting the same injury. By order of April 20, 2011, the Department of Workers' Claims assigned the claim to Hon. Chris Davis for adjudication.

Marsh testified he had been a truck driver since 1971. He started working as a car hauler in 1988. Those duties required the ability to reach, climb and pull. In his October 10, 2011 opinion, order and award, the ALJ summarized Marsh's testimony as follows:

Lynn Marsh is a sixty-three year old who has finished the eleventh grade. His work experience has been in the United States Army, farmer, dump truck driver, and tractor-trailer driver. Marsh began working for Allied Domain in 1988 as a truck driver delivering new automobiles from the factory to dealerships. His job required him to climb

on the car hauler and tighten four chains on each vehicle. The car hauler held seven to eleven vehicles. Allied Domain was bought by Jack Cooper Transport Company. Marsh states his job duties remained the same with the transfer of the business.

On December 3, 2009, Marsh was on the hauler ladder when he slipped. He reached out and grabbed the ladder to keep from falling. Marsh had pain in both shoulders and reported the incident to Cheryl Wood, who worked for the Defendant. Marsh was able to drive back to Louisville, Kentucky before seeking medical attention at Concentra.

He underwent x-rays and was referred to Dr. Jacob. After having MRIs of his shoulders, Marsh was referred to Louisville Orthopedics. Dr. Smith with Louisville Orthopedics recommended a shoulder replacement but Marsh decided not to undergo this procedure.

Marsh states he has not returned to work and does not believe he is physically able to return to work. Marsh is receiving social security disability benefits, teamsters' benefits retirement, and veterans' retirement benefits.

Marsh continues to have right shoulder pain if he lifts his arm above shoulder level and when he sleeps on the arm.

Marsh plays golf several times a month.

Marsh had a back and left upper extremity injury in 2001, a right knee injury in January, 2003, and a right knee injury in February, 2003. He underwent two left shoulder surgeries. After these injuries and surgeries, Marsh was able to return to work.

Dr. Ronald Fadel conducted an independent medical examination on behalf of Cooper on May 11, 2010. He noted the prior left rotator cuff surgery and repair and Dr. Stephen Smith's recommendation of a total right shoulder replacement as a result of the December 2009 work injury. However, preoperative screening revealed substantial cardiac risk since Marsh had a 10 to 15 year history of cardiac occlusive disease. Dr. Fadel diagnosed a "large tear rotator cuff right shoulder involving supraspinatus and infraspinatus tendons with retraction and muscle atrophy." He opined Marsh was at maximum medical improvement ("MMI") so long as there was no attempt at a surgical remedy. Dr. Fadel assigned a 10% whole person impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), for the right upper extremity.

Marsh saw Dr. Jacob on December 16, 2009, shortly after the work injury incident. Dr. Jacob recalled performing a left rotator cuff repair about eight or nine years before. Marsh reported he was climbing a ladder when his foot slipped and he started to fall. He reached out to grab the ladder to avoid falling, but his full weight then pulled on both shoulders causing the injuries. Dr. Jacob opined Marsh had rotator cuff tears in one or both shoulders.

On January 18, 2010, Marsh returned to Dr. Jacob for evaluation of his right shoulder after an MRI confirmed a full thickness tear of the supraspinatus tendon with marked retraction and atrophy and what appeared to be a nearly complete tear of the infraspinatus tendon with some retraction and atrophy, AC joint DJD, and mild labral abnormalities. Upon examination, Dr. Jacob concluded a reverse total shoulder arthroplasty was needed.

On March 15, 2010, Dr. Jacob noted Dr. Smith had seen Marsh for his pre-operative evaluation for reverse shoulder surgery. However, Dr. Smith had determined Marsh was at significant cardiac risk, noting he only had 40% of his cardiac muscle still functioning. Therefore, the risk of surgery outweighed the benefits. Dr. Jacob indicated Marsh

should have a permanent restriction of lifting no more than 15 pounds.

On June 21, 2010, Dr. Jacob assigned a 10% impairment to the body as a whole for the right shoulder and a 2% impairment for the left shoulder, each pursuant to the AMA Guides.

Marsh presented at Concentra Medical Centers on December 3, 2009. X-rays of the left shoulder revealed a small ovoid calcification and mild degenerative changes of the glenohumeral joint. Right shoulder x-rays revealed mild degenerative changes and a small ovoid calcification between the humerus and acromion process. Marsh returned on December 8, 2009. He was unable to raise his right shoulder and raising his left shoulder produced pain. Marsh was diagnosed with bilateral rotator cuff tendinitis, placed on modified duty, and referred to Dr. Jacob. Marsh was re-examined on February 12, 2010. He had abnormal upper extremity strength and range of motion. Marsh was restricted to no reaching above the shoulder and instructed to keep his elbow to his side. Marsh was placed at MMI and released to return to his regular work duties.

Dr. Steve Smith examined Marsh on January 18, 2010 and found limited strength with abduction of the right shoulder. Dr. Smith diagnosed right shoulder rotator cuff

tear arthropathy with degenerative joint disease and AC joint arthritis. He then recommended a reverse total shoulder arthroplasty. Surgery was scheduled for February 24, 2010 pending cardiac clearance. Marsh was given cardiac clearance as of February 22, 2010. However, the next day Marsh contacted Dr. Smith's office and cancelled the surgery.

The ALJ's findings relevant to this appeal are as follows:

The Administrative Law Judge finds that the Plaintiff has a pre-existing, active condition, for the left shoulder. The Plaintiff had a previous work-related left shoulder injury. He filed a claim for it and received an impairment rating. Plaintiff has admitted that his left shoulder condition has returned to its pre-December 3, 2009 condition insofar as pain and limitations are concerned. Dr. Fadel assigned no new rating for the left shoulder. Based on the foregoing the left shoulder condition is a pre-existing, active condition.

As the defendant concedes the plaintiff was assigned a 10% impairment rating by Dr. Fadel. This is accepted. Further, the Plaintiff was assigned restrictions by Dr. Jacobs [sic] including limitations on lifting more than 15 pounds. The Plaintiff has further testified that he does not feel as if he can return to his prior job due to the rigors of climbing and tightening the chains used to hold the vehicles in place. All of this is accepted. Accordingly, the Plaintiff lacks the capacity to return to the

type of work done on the date of injury.

Finally, the Administrative Law Judge finds the Plaintiff to be permanently, totally disabled within the meaning of the Act. The Plaintiff cannot return to the type of work he has done for the majority of his life and for the last 20 years. He is over 60 years of age. Job retraining would be necessary, but extremely unlikely to succeed. I understand that he plays golf twice a week and the impression this may create. Playing golf twice a week is not a job and the fact that he plays golf will not, in the entire context of the claim, be sufficient to change my mind.

Cooper filed a petition for reconsideration raising essentially the same issues it now raises on appeal to the Board. By order dated November 21, 2011, the ALJ denied the petition for reconsideration.

On appeal, Cooper argues the ALJ's finding of permanent total disability is not supported by substantial evidence and is therefore clearly erroneous. Cooper further argues the opinion, order and award was arbitrary or capricious and was characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Cooper contends the ALJ's decision was not sufficient to allow the parties to completely understand the basis for the decision. Cooper states "there is just very brief discussion of the Judge's reasoning for his findings."

Cooper notes no physician found Marsh to be permanently totally disabled. Cooper contends Marsh could find other gainful employment within the restrictions assigned by Dr. Jacob, the treating physician. Cooper further notes Marsh acknowledged he was able to golf, sometimes twice a week, and is able to drive a car. Cooper notes Marsh testified his left shoulder returned to its pre-injury state. Cooper argues Marsh's age should not be an issue. Cooper notes Dr. Jacob allowed Marsh to return to work. Cooper contends the evidence shows Marsh is simply not motivated to return to work.

Cooper argues the appropriate award would be based upon a 10% functional impairment rating with application of a 3.8 multiplier pursuant to KRS 342.730 (1)(c)1 and 3. Cooper further argues it would be appropriate to have Marsh undergo vocational training so he could find new employment until his normal Social Security retirement age.

Marsh had the burden of proving each of the essential elements of his cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Marsh was successful before the ALJ in proving a permanent total occupational disability, 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 people. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). It is within the ALJ's discretion alone to judge the weight to be accorded to and the inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ, as fact-finder, 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky.App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

It is well established an ALJ has wide discretion in making a determination of permanent total disability. Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976); Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). It is also well settled a claimant's own testimony as to his capabilities and limitations may be relied upon by the fact-finder in making a determination as to the physical capacity to return to work. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Ruby Construction Co. v. Curling, 451 S.W.2d 610 (Ky. 1970). If the evidence establishes a permanent impairment resulting from the work-related traumatic event, the claimant's testimony alone concerning his inability to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy qualifies as substantial evidence sufficient to support a finding of permanent total disability under the Act. See KRS 342.0011(11)(c) and 34; Transportation Cabinet v. Poe, 69 S.W. 3d 60 (Ky. 2001); Commonwealth of Kentucky, Transportation Cabinet v. Guffey, 42 S.W.3d 618 (Ky. 2001).

The Supreme Court held in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) the determination of whether a worker has sustained a total or partial occupational disability requires a weighing of the

evidence concerning whether the worker will be able to earn an income by providing services on a regular or sustained basis. The Court stated some of the principals set forth in Osborne v. Johnson, supra, must be weighed. These factors include the claimant's post-injury physical, emotional, intellectual, and vocational status and the likelihood of finding work consistently under normal employment conditions, which include whether the plaintiff will be able to work dependably and whether his physical restrictions will interfere with vocational capabilities. "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

Here, the ALJ found Dr. Fadel persuasive regarding Marsh's impairment and Dr. Jacob's persuasive regarding Marsh's restrictions. Dr. Jacob limited Marsh to no lifting greater than 15 pounds. The ALJ also was persuaded by Marsh's testimony that he did not feel he could return to his past work due to the rigors of climbing and tightening chains. Dr. Jacob's significant restrictions, combined with Marsh's testimony, would preclude Marsh from performing any work for which he had past experience. Marsh was over sixty-three years of age at the time of the ALJ's decision and had only completed the eleventh grade.

His age and education would clearly impact his ability to secure and maintain employment in a competitive economy. The ALJ considered Marsh's education, work history, impairment rating, restrictions, and advanced age in reaching the determination Marsh was permanently and totally disabled. The ALJ considered the fact Marsh participated in golfing, but stated that was not sufficient to change his mind regarding the extent of Marsh's disability. The ALJ identified substantial evidence upon which he could reasonably find Marsh sustained a permanent total occupational disability as a result of the work injury.

We are satisfied with the sufficiency of the ALJ's findings of fact and analysis regarding permanent total disability. While an ALJ must 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). Since the ALJ's decision is supported by substantial evidence, we may not reverse.

Although Cooper suggests vocational training should be ordered, we find no error in the ALJ's refusal to do so. Vocational rehabilitation was not a contested issue at the BRC and was not raised prior to the hearing. Cooper did not raise the issue until its petition for reconsideration. This issue was directly addressed in Carnes v. Parton Bros. Contracting, Inc., 171 S.W.3d 60 (Ky. App. 2005). The court noted KRS 342.710(3) provided that an ALJ, 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 to a qualified physician or facility for evaluation. The court noted the use of "may" in KRS 342.710(3) placed vocational rehabilitation entirely within the ALJ's discretion. Further, the court found it significant neither party requested a vocational evaluation when the matter was before the ALJ. A petition for reconsideration is not the proper vehicle to request a vocational rehabilitation evaluation, nor is an appeal to the Workers' Compensation Board.

Cooper, in its brief, requested oral argument before this Board. We have reviewed the record and arguments on appeal and find no novel or complicated issues. Therefore, no oral argument is necessary.

Accordingly, the October 10, 2011 opinion, order and award and the November 21, 2011 order denying the petition for reconsideration of Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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