

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 24, 2014

CLAIM NO. 201370103

JOHNNY WHEELS, INC.

PETITIONER

VS.

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

JESSIE INMAN
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Johnny Wheels, Inc. ("Johnny Wheels") appeals from the May 19, 2014, Opinion and Order and the June 11, 2014, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the Opinion and Order, the ALJ awarded Jesse Inman ("Inman") temporary total disability ("TTD") benefits,

permanent total disability ("PTD") benefits, and medical benefits.

The Form 101 alleges Inman sustained injuries to his lower back, right hip, and leg on August 16, 2013, in the following manner: "Working on a truck removing rotor for repair, pulled rotor off and turned while in squatting position and pulled back." The Form 104 attached to Inman's Form 101 indicates Inman worked as a mechanic and a brick layer before his employment at Johnny Wheels.

Johnny Wheels' Notice of Claim Denial denied the claim for the following reason:

The Defendant contends the Plaintiff has the burden to establish that the traumatic event is the proximate cause of a permanent harmful change to the human organism evidenced by objective medical findings to the exclusion of the natural aging process. The Defendant is not responsible for payment of medical expenses in that same is neither reasonable or necessary nor related to the work injury as alleged.

The March 12, 2014, Benefit Review Conference Order and Memorandum lists the following contested issues: work-relatedness/causation; benefits per KRS 342.730; TTD (overpayment/underpayment); medical benefits; injury temporary or permanent? [handwritten]; permanent total

disability [handwritten]. The parties stipulated Inman sustained a work-related injury on August 16, 2013.

In the May 19, 2014, Opinion and Order, the ALJ provided the following findings of fact and conclusions of law:

Workers' compensation is a very important field of law. If not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of business, and the pocketbooks of consumers are affected daily by it." --- comment by Judge E. R. Mills in *Singletary v. Mangham Construction*, 418 So.2d 1138 (Fla.1st DCA, 1982).

A. Work-relatedness/causation.

KRS 342.0011(1) defines "injury" to mean any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.

I saw and heard the plaintiff Mr. Inman testify in detail at the Final Hearing. I carefully observed his facial expressions during his testimony. I carefully listened to his voice tones during his testimony. I carefully observed his body language during his

testimony. The defendant's vocational witness, Dana Ward, stated that Mr. Inman is a friendly, capable and cooperative person, and I agree with her assessment of Mr. Inman. I make the factual determination that he was a credible and convincing lay witness.

Based upon Mr. Inman's testimony, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Hughes, which is covered in detail above, I make the factual determination that on August 16, 2013, while Mr. Inman was working for the defendant, he sustained serious physical injuries to his low back, right hip and leg.

B. Temporary total disability.

KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky.App.2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in *Helms, supra*, stated:

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
Id. at 580-581.

In the Benefit Review Conference Order, the parties stipulated that Mr. Inman last worked on August 26, 2013. Based upon Mr. Inman's testimony, which is covered in detail above, and the persuasive and compelling medical evidence from Dr. Hughes, who stated that Mr. Inman reached maximum medical improvement on November 16, 2013, I make the factual determination that the plaintiff is entitled to recover from the defendant-employer and its workers' compensation insurer weekly temporary total disability benefits from August 26, 2013 to November 16, 2013.

C. Benefits per KRS 342.730; injury temporary or permanent?; 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).

This case calls to mind the Opinion of the Kentucky Court of Appeals in Jeffries v. Clark & Ward, 2007 WL 2343805 (Ky.App.2007), in which the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, where he made the following statement ... "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge

Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.

As stated above, I make the factual determination that Mr. Inman was a credible and convincing lay witness. I also make the factual determination that the medical evidence from Dr. Hughes was persuasive and compelling. Mr. Inman testified that he is taking prescription pain medication ordered by his treating physician, Dr. McQueen, and that he still has low back pain and also hip and leg pain. He testified that he cannot physically return to work at his job with the defendant and cannot physically return to work at his past jobs. Dr. Hughes stated that Mr. Inman will under the AMA Guides, Fifth Edition, sustain a permanent whole person impairment of 5% due to his lower back pain with probable radiculopathy and his right hip pain. Dr. Hughes stated that Mr. Inman had described to him the physical requirements of his work and that the plaintiff does not retain the physical capacity to return to the type of work performed at the time of his injuries. Dr. Hughes stated that the following restrictions should be placed on the plaintiff's work activities as a result of his injuries: Mr. Inman continues to have some degree of lower back and right hip pain and a restricted tolerance for lifting as well as sitting, standing and walking. He could do tasks which would allow him to stand or sit as needed and I would suggest a lifting restriction of 20 pounds regularly and 40 pounds on occasion. He should avoid tasks which involve repetitive bending and twisting of the lumbar spine and the right hip.

He should avoid tasks involving walking longer than 20 minutes at a time.

"'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).

As indicated above, I saw and heard Mr. Inman testify at the Final Hearing and again make the factual determination that he was a credible and convincing lay witness. I agree with the defendant's vocational witness, Dana Ward, that Mr. Inman is a friendly, capable and cooperative person. As indicated above, during his testimony I

carefully observed his facial expressions, carefully listened to his voice tones and carefully observed his body language. His testimony rang true. I make the factual determination that before his work injuries on August 16, 2013 Mr. Inman had a good work history showing a good work ethic. Dana Ward, the defendant's vocational witness, stated that Mr. Inman performed poorly on math and spelling testing and could not have passed the GED with his 4th grade scores in those areas. It is uncontradicted that the plaintiff has absolutely no specialized or vocational training. It is uncontradicted that Mr. Inman last worked on August 26, 2013. I make the factual determination that due to Mr. Inman's serious and permanent injuries he will experience significant difficulty in returning to work in the competitive job market.

In this case, I considered the serious nature of the plaintiff's work injuries, which are covered in detail above, his work history, which is covered in Dana Ward's vocational report, Mr. Inman's very limited educational attainments, his credible and convincing lay testimony, which is covered in detail above, and the medical opinions of Dr. Hughes, which are covered in detail above. Based on all of those factors, I make the factual determination that the plaintiff Mr. Inman cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled. Of course, both parties have the option to move to reopen this case in the future under KRS 342.125.

Johnny Wheels' first argument is that Dr. Arthur Hughes' report does not constitute substantial evidence as "he did not rely upon objective medical evidence present on the date of maximum medical improvement ("MMI") in reaching his impairment rating." Johnny Wheels argues as follows:

Per the *AMA Guides*, Dr. Hughes cannot assess impairment under Lumbar DRE Category II. He is bound to base his impairment on symptoms occurring once MMI is reached. The only references to radicular pain in his report pre-date MMI. On the date of examination, no radicular pain was noted, and he did not indicate muscle guarding/spasm, or asymmetric loss of range of motion. There are no other bases for his assessment of impairment. Therefore, the ALJ should have found that Respondent has not established proof sufficient to award impairment.

Dr. Hughes' December 17, 2013, Form 107-I medical report was introduced. As a result of his examination, Dr. Hughes wrote:

On examination today, he is a very pleasant gentleman who is 5 feet 9 inches tall, weighs 198 pounds and is right-handed. Knee and ankle reflexes are 2+. **Straight leg raising on the right produces lower back pain extending to the proximal calf at 60 degrees and straight leg raising on the left produces lower back pain at 90 degrees extending into the hamstrings.** He has a full range of motion of the right hip, though does experience some discomfort of the lateral aspect of the hip with full range of motion.

Sensation and strength of the legs are normal. Gait is unremarkable and he can stand on toes and heels. He can flex at the waist to 60 degrees, laterally bend to 20 degrees to both sides and extend to 20 degrees. The paraspinal muscles are right on the right side. (emphasis added).

Dr. Hughes diagnosed "[l]ower back pain with right lumbar radiculopathy, improved." Regarding causation, Dr. Hughes opined as follows:

Mr. Inman did not have any problem with his back or leg prior to the injury of August 16, 2013. He has since improved but nonetheless continues to have a limitation in his activities as a consequence of the injury and ongoing pain. This has limited his ability to stand or sit, walk and lift as well as do recreational activities.

Dr. Hughes opined Inman reached MMI on November 16, 2013. He assigned a 5% impairment rating for "lower back pain with probable radiculopathy" and 0% for "right hip pain" pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Johnny Wheels' argument that Dr. Hughes' report does not constitute substantial evidence because Inman's condition does not satisfy any of the criteria in the AMA Guides for DRE Category II, including radiculopathy, is without merit. While this Board is not a fact-finding

tribunal, it is permitted to locate evidence in the record which supports the ALJ's decision. Despite Johnny Wheels' argument to the contrary, Dr. Hughes' December 17, 2013, medical report reveals he detected radiculopathy during his examination of Inman, as the report states as follows: "Straight leg raising on the right produces lower back pain extending to the proximal calf at 60 degrees and straight leg raising on the left produces lower back pain at 90 degrees extending into the hamstrings." This examination took place after Dr. Hughes opined Inman reached MMI on November 16, 2013.

While an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be afforded a physician's impairment rating, as finder of fact he or she is never required to do so. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). So long as sufficient information is contained within a medical expert's testimony from which an ALJ can reasonably infer the assessed impairment rating is based upon the AMA Guides, the ALJ, as fact-finder, is free to adopt that physician's impairment rating. Here, Dr. Hughes adequately set forth his rationale for assessing a 5% impairment rating for "[l]ower back pain with probable radiculopathy" pursuant to the AMA Guides. The ALJ is not required to

second-guess Dr. Hughes' impairment rating, look into the AMA Guides at the specific criteria under Lumbar DRE Category II, and make an assessment as to whether Inman falls under any of the listed categories. The ALJ has the discretion to rely upon Dr. Hughes' opinions and impairment rating, and that discretion will not be disturbed.

Johnny Wheels second argument on appeal- i.e. the ALJ could not award PTD benefits in the absence of a valid impairment rating- is moot due to our decision regarding the propriety of Dr. Hughes' impairment rating.

Johnny Wheels third argument on appeal is that "no evidence in the record establishes entitlement to PTD benefits." Johnny Wheels asserts Inman is not credible as a witness due to the fact that he is a convicted felon.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). As such, the ALJ is the sole judge of a witnesses' credibility. Here, the ALJ determined Inman was credible, and this Board would be committing egregious error should we hold otherwise.

That said, we vacate the ALJ's award of PTD benefits and remand to the ALJ for additional findings.

The May 19, 2014, Opinion and Order reveals the ALJ relied upon a host of factors in making the determination Inman is permanently totally disabled. One of those factors is the ALJ's erroneous belief Inman did not obtain a GED. However, the record indicates Inman obtained a GED. In the May 19, 2014, Opinion and Order, the ALJ stated "Dana Ward, the defendant's vocational witness, stated that Mr. Inman performed poorly on math and spelling testing and could not have passed the GED with his 4th grade scores in those areas." Indeed, this language mirrors Ward's April 7, 2014, vocational report in which she opined that because Inman scored poorly on math and spelling during her assessment that "[h]e could not have passed the GED with 4th grade scores in these areas." Ward's conclusion and the ALJ's assessment are at odds with Inman's March 21, 2014, deposition testimony and hearing testimony that he obtained a GED. In fact, in Ward's vocational report, she listed GED under the "education" heading.

As to whether he had obtained a GED, during his deposition Inman testified as follows:

Q: Are you a high school graduate?

A: No, sir.

Q: You did obtain a GED though, correct?

A: Yes, sir.

Q: When did you get that?

A: '05, I believe.

Q: And my records indicate you went to formal school through eighth grade. Is that right?

A: Yes, sir.

Q: Do you have any training beyond your GED, like a CDL, welding license, anything like that?

A: No, sir.

At the hearing, Inman testified as follows:

Q: Let's talk a little bit about some of your background. You went to the eighth grade in school?

A: Yes, sir.

Q: You did get a GED, correct.

Q: Yes, sir.

The ALJ may not base his analysis of Inman's occupational disability on an improper understanding of the record. The record clearly indicates Inman obtained a GED. The ALJ must factor this critical piece of information into his analysis concerning the extent of Ward's occupational disability. Thus, on remand, the ALJ must conduct an

analysis regarding the extent of Inman's occupational disability based on the fact Inman has a GED. We emphasize we are not suggesting a result on remand concerning the extent of Inman's occupational disability.

Johnny Wheels did not raise this issue in its May 29, 2014, petition for reconsideration, its June 9, 2014, supplemental petition for reconsideration, or in its appeal brief. However, 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).

Johnny Wheels' final argument on appeal is rendered moot by this decision.

Accordingly, the ALJ's reliance upon Dr. Hughes' impairment rating is **AFFIRMED**. Those portions of the ALJ's May 19, 2014, Opinion and Order and the June 11, 2014, Opinion and Order on Reconsideration 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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