

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 9, 2014

CLAIM NO. 201261021

LIFESKILLS INDUSTRIES, INC.

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

STEPHEN MCDAVITT
BOWLING GREEN MEDICAL CENTER
GRAVES GILBERT CENTER
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Lifeskills Industries, Inc. ("Lifeskills")
appeals from the September 23, 2013, opinion, award, and
order and the October 31, 2013, order ruling on its
petition for reconsideration of Hon. Jane Rice Williams,
Administrative Law Judge ("ALJ"). In the September 23,
2013, opinion, award, and order, the ALJ awarded Stephen

McDavitt ("McDavitt") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits.

On appeal, Lifeskills asserts the ALJ's finding that McDavitt does not retain the physical capacity to perform his pre-injury job based on the fact that he was terminated cannot constitute substantial evidence. Additionally, Lifeskills asserts the ALJ's finding that McDavitt does not retain the physical capacity to perform his pre-injury job based on the job description filed in the record cannot constitute substantial evidence. Lifeskills also argues the ALJ misinterpreted Dr. Dennis O'Keefe's medical report.

The Form 101 alleges McDavitt injured his left arm, chest, neck, and back on November 13, 2012, in the following manner:

Plaintiff was changing an air filter in the air conditioner unit and felt a shock go down his left arm and into his chest. Plaintiff had to be lifted up to the air conditioner using a tow motor with a cage lift. When he was shocked Plaintiff fell to the floor of the cage.

McDavitt was admitted to the hospital on November 29, 2012, due to a herniated disc. He underwent C6-C7 fusion surgery on February 21, 2013.

The July 10, 2013, Benefit Review Conference Memorandum and Order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the ACT, and TTD.

Regarding the applicability of the three multiplier, the ALJ determined as follows:

1. Principle of law.

To qualify for an award of permanent partial or permanent total disability benefits under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, she is also required to prove the harmful change resulted in a permanent disability as measured by an AMA impairment. KRS 342.0011(11), (35), and (36). Furthermore, if, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined. KRS 342.730 (1)(c)(1).

2. Findings of fact and conclusions of law.

Plaintiff suffers 25% whole person impairment as a result of the work injury and does not retain the physical capacity to return to the job he was performing at the time of the injury.

3. Evidentiary basis and analysis.

The assessment of 25% is relatively obvious considering both parties have presented ratings of 25% and 26% and Dr. O'Keefe's opinion has been found most persuasive on this issue. The multiplier, however, is the most problematic portion addressed herein. A review of the job description indicates labor intensive requirements although Defendant Employer argues this is not to be relied upon, as Plaintiff's position was more supervisory. He was, in fact, performing physical labor at the time of the injury and testified he was terminated due to restrictions. At the hearing, however, Plaintiff agreed his position was supervisory, he had help with lifting and he would be physically able to drive a forklift. Even though Dr. O'Keefe did not assign specific lifting restrictions, he stated Plaintiff could return to usual and customary activities of a person his age in overall general health which is not helpful in determining what jobs tasks he can perform. Dr. Farrage whose report is similar in findings and conclusions to that of Dr. O'Keefe, noted Plaintiff would be capable of a "light to medium" occupation which would require lifting of 30 lbs. occasionally and 15 lbs. frequently, far below the job description filed by Defendant Employer.

The strongest determining factor then is Plaintiff was fired for not being able to return to the job. The physical requirements in the job description far exceed what his restrictions would allow him do. Therefore, the 3 multiplier is applicable.

In its petition for reconsideration, Lifeskills contended the ALJ had an erroneous understanding of Dr.

Dennis O'Keefe's opinions concerning permanent restrictions. Additionally, Lifeskills asserted the ALJ had an erroneous understanding of McDavitt's actual job title/classification and his actual duties at the time of the accident. Lifeskills argued McDavitt was a "production supervisor" at the time of the accident, not a "production associate," and the supervisor position did not require any lifting.

Lifeskills also requested recitation of the evidence upon which the ALJ relied in finding McDavitt does not retain the physical capacity to return to the type of work he was performing at the time of the injury. Lastly, Lifeskills requested additional findings with respect to McDavitt's job classification, duties, and the physical requirements of the job at the time of the injury.

In the October 31, 2013, order ruling on Lifeskills' petition for reconsideration, the ALJ made the following additional findings:

This matter comes before the Administrative Law Judge (ALJ) pursuant to the Petition for Reconsideration of October 1, 2013 where Defendant Employer asks the ALJ to reconsider the Opinion, Award and Order of September 23, 2013. It appears in this lengthy petition, the only issue argued is the award of the 3 multiplier. Defendant Employer argues Plaintiff's job did not require him to lift more than the

restrictions assigned by Dr. Farrage, 30 lbs. occasionally and 15 lbs. frequently.

On pages 17 - 18, the Opinion states:

The assessment of 25% is relatively obvious considering both parties have presented ratings of 25% and 26% and Dr. O'Keefe's opinion has been found most persuasive on this issue. The multiplier, however, is the most problematic portion addressed herein. A review of the job description indicates labor intensive requirements although Defendant Employer argues this is not to be relied upon, as Plaintiff's position was more supervisory. He was, in fact, performing physical labor at the time of the injury and testified he was terminated due to restrictions. At the hearing, however, Plaintiff agreed his position was supervisory, he had help with lifting and he would be physically able to drive a forklift. Even though Dr. O'Keefe did not assign specific lifting restrictions, he stated Plaintiff could return to usual and customary activities of a person his age in overall general health which is not helpful in determining what job tasks he can perform. Dr. Farrage whose report is similar in findings and conclusions to that of Dr. O'Keefe, noted Plaintiff would be capable of a "light to medium" occupation which would require lifting of 30 lbs. occasionally and 15 lbs. frequently, far below the job description filed by Defendant Employer.

The strongest determining factor then is Plaintiff was fired for not being able to return to the job. The physical requirements in the job description far exceed what his restrictions would

allow him do. Therefore, the 3 multiplier is applicable.

One of Defendant Employer's arguments relates to the job description filed with lifting limits of 75 lbs. Defendant argues this job description is not applicable.

As noted in the Opinion (cited above), even though Defendant Employer argues Plaintiff was not required to lift beyond 30 lbs., he was performing a task at the time of the injury requiring awkward positions overhead he does not believe he could perform on a regular bases [sic]. Furthermore, the reason Plaintiff was given for termination was because of his lifting restrictions.

Defendant Employer also argues the ALJ misunderstood the opinion of Dr. O'Keefe. As cited above, Dr. O'Keefe and Dr. Farrage addressed different issues and portions of both opinions are relied upon herein.

While Lifeskills makes several arguments in its appeal brief as to what proof does not comprise substantial evidence in support of the ALJ's award of the three multiplier, our task is ultimately to determine whether there is substantial evidence that supports enhancement of the award by the three multiplier. "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).

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). 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). Consequently, when substantial evidence supports enhancement of the award by the three multiplier, this Board is unable to disturb the ALJ's decision.

On May 31, 2013, Lifeskills filed a job description in the record representing it to be the "job description of Plaintiff." The job description, which was signed by McDavitt on July 19, 2012, a mere four months before his accident, clearly states that his position "requires that up to 75 lb be moved on an hourly basis." Additionally, the description provides that up to one-third of McDavitt's job will be spent climbing or balancing as

well as stooping, kneeling, crouching, or crawling. Pursuant to the job description, McDavitt's job duties also include: loading and unloading trucks, performing routine repair and upkeep on production equipment, setting up work stations and stocking them with materials, moving finished material and preparing it for shipping, acting as backup for floor associates in their absence, and performing other duties as required.

The June 3, 2013, report of Dr. James R. Farrage, generated after a post-surgery examination of McDavitt, provides the following impressions:

48-year-old gentleman status post C6-7 anterior cervical discectomy and fusion with minimal left-sided radicular residual who has ongoing issues with pain, reduced cervical range of motion, decreased strength, and impaired functional capacity.

Dr. Farrage's restrictions, in relevant part, are as follows:

The patient satisfies the criteria outlined by the Department of Labor for a 'light to medium' occupation which stipulates an occasional lifting capacity of up to 30 pounds and frequently up to 15 pounds. He can push and pull up to 50 pounds on occasion. He should avoid extremes of neck range of motion as well as above shoulder level activity. He should be afforded the ability to frequently change positions and alter his biomechanics. Based upon information regarding his

previous job description, he should be able to satisfy those requirements with the above mentioned accommodations. If more objective permanent restrictions are desired, then the patient should be referred for a formal functional capacity evaluation. He is a good vocational rehabilitation candidate.

During his May 10, 2013, deposition, McDavitt testified that after he returned to his job on November 15, 2012, his job title was "associate." He also testified that "associate" is the same as "supervisor."

At the July 24, 2013, final hearing, McDavitt testified that at the time of the accident, he was working as a "production supervisor."

During his deposition, regarding the accident and what happened after he received the shock, McDavitt testified as follows:

Q: Where was the unit located?

A: The ceiling.

Q: How high was the unit located off of the ground?

A: How- how tall it was? Uh, that's a good question- maybe 15 or 16 feet high off the ground, maybe.

Q: Were you standing on the forklift while you were changing the air filter?

A: I was inside a cage- inside a cage with a forklift underneath the cage and it lifts me up.

...

A: Well, when I was raised up, it's kind of [sic] awkward spot, because there's a bathroom right here- I kind of- the only way I could reach over, so I had my left arm up there. As soon as I touched it, I felt a sharpness- shock went all the way down my chest, then I went down the cage holding my chest because it hurt.

Q: Did you fall?

A: No, I went straight- it happened so fast, it's hard to say. I don't know if it made me go down or I went down myself. It's hard to say because it happened so fast.

Q: Did you go straight down?

A: I went straight down on my knees- on my knee.

Q: So, you didn't fall over to the left or the right- you went straight down on your knees?

A: No, I just kind of jerked back, then went down.

Q: And you felt a- what you thought was a shocking sensation into your left arm?

A: My left hand. It went all the way down to my chest.

Q: And Mr. Caplinger was working with you at that time?

A: Yes, sir.

Q: Did you say anything to him?

A: Uh, he lowered me down. I didn't say much. I was hurt.

Q: And did you tell him to lower you down?

A: Uh, yeah. He knew what to do. He lowered me down. I told him before he let me go, I - I'm done. I told him that.

Q: Now, when you were reaching, what were you reaching- were you reaching inside the unit?

A: On the outside.

Q: Okay.

A: Here's the bad part. Here- the filter slides into here. There's a hold right here to keep the dust, so you block the filter- you know, the filter at the top to protect it. I was holding my balance over here on the left side. Like I said, there's a bathroom building over here and the only way to get it up, you slide. I had to hold my balance and that's- as soon as I touched it, that's when it did it.

Regarding the task he was performing at the time of his injury and whether he is currently able to perform that task, McDavitt testified as follows:

Q: Whenever you were changing that filter, did you have to reach overhead?

A: Yes.

Q: Okay. Would that be something that you would a difficult time doing now?

A: Yes.

The above-cited evidence comprises substantial evidence in support of the ALJ's decision to enhance McDavitt's PPD benefits by the three multiplier. The job description filed in the record, signed by McDavitt four

months before he was injured, set forth several requirements that McDavitt, pursuant to Dr. Farrage's restrictions, is unable to fulfill. While McDavitt's testimony indicates he was not performing any lifting, there is no indication in the record that his job was not subject to the requirements set forth in the job description in effect at the time of his injury. Significantly, throughout these proceedings, Lifeskills has sought to have the ALJ and this Board disregard the job description it filed in the record. Additionally, McDavitt testified that he would no longer be able to perform the task he was performing at the time of the injury which requires reaching overhead. Similarly, Dr. Farrage's post-surgery restrictions prohibit this activity.

As substantial evidence supports the ALJ's determination to enhance the award by the three multiplier, Lifeskills' arguments are without merit. Nevertheless, this Board will address them.

Lifeskills' first argument is that the ALJ erroneously focused on McDavitt's physical condition at the time he was terminated from Lifeskills on February 1, 2013, instead of his current capabilities after McDavitt underwent surgery on February 21, 2013, twenty days after his termination.

McDavitt's termination and the cause thereof is ultimately irrelevant to a determination of McDavitt's ability to perform his pre-injury work, since he was terminated prior to the fusion surgery. However, this finding is inconsequential, as substantial evidence supports the ALJ's determination the three multiplier is applicable and the ALJ provided other factors in both the September 23, 2013, opinion, award, and order and the October 31, 2013, order which influenced her decision. One additional significant factor is Dr. Farrage's lifting restrictions which are much less than the lifting requirements set forth in the job description filed in the record by Lifeskills.

While the ALJ's reliance on McDavitt's termination as a factor in determining his entitlement to the three multiplier may be misplaced, it is no more than harmless error in light of the substantial evidence in the record relied upon by the ALJ.

Lifeskills also asserts that the ALJ did not have a proper understanding of McDavitt's "actual job title/classification, as well as his actual job duties." It asserts McDavitt was a "production supervisor" at the time of his injury and not a "production associate," and the physical requirements of the two positions are different.

Lifeskills also asserts that the job description was mistakenly placed into evidence.

This argument can be dispensed with quickly. The ALJ was entitled to rely upon the job description filed in the record by Lifeskills. We find Lifeskills' argument that it mistakenly introduced evidence to be disingenuous at best, as there is no evidence in the record indicating Lifeskills attempted to remedy this alleged error by filing a motion to strike or withdraw the job description between the time the job description was filed on May 31, 2013, and the date of the opinion, award, and order.

Additionally, even though at the final hearing McDavitt testified that at the time of his injury he was working as a "production supervisor," McDavitt also testified in his deposition that "associate" was the same as "supervisor." Thus, pursuant to McDavitt's testimony, the "production associate" position was the same as the "production supervisor" position and, by extension, the job requirements filed in the record for "production associate" were still applicable at the time of his injury. In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ was entitled to

rely upon the "production associate" job description filed in the record by Lifeskills, and this Board will not disturb the ALJ's discretion.

Lastly, Lifeskills asserts the ALJ "misinterpreted" Dr. O'Keefe's opinions because she stated his report was not helpful in determining what job tasks McDavitt can perform.

The function of this Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence 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 of the evidence 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).

We will not second-guess the ALJ's interpretation and assessment of a medical opinion. The ALJ is entitled to rely upon any probative medical evidence in the record. Here, the ALJ relied upon Dr. Farrage's restrictions and rejected those of Dr. O'Keefe. We cannot direct the ALJ to rely on or disregard medical opinions in determining what

tasks McDavitt can perform, as such an admonition would be an infringement upon the ALJ's discretion.

Accordingly, the September 23, 2013, opinion, award, and order and the October 31, 2013, order ruling on Lifeskills' petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON BRENT E DYE
455 S FOURTH AVE STE 1500
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON MICHAEL D LINDSEY
1830 DESTINY LN #111
BOWLING GREEN KY 42104

RESPONDENTS:

BOWLING GREEN MEDICAL CENTER
250 PARK STREET
BOWLING GREEN KY 42101

GRAVES GILBERT CLINIC
201 PARK ST
BOWLING GREEN KY 42101

ADMINISTRATIVE LAW JUDGE:

HON JANE RICE WILLIAMS
217 S MAIN ST STE 10
LONDON KY 40741