Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 27, 2013

CLAIM NO. 201075742

MCLANE COMPANY, LLC PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, ADMINISTRATIVE LAW JUDGE**

KEVIN ROBERTS
and HON. OTTO DANIEL WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. McLane Company, Inc. ("McLane") appeals from the opinion, order and award rendered April 1, 2013 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") awarding Kevin Roberts ("Roberts") permanent total disability ("PTD") benefits and medical benefits for a work-related left leg injury with a psychological component

sustained on September 27, 2010. McLane filed a petition for reconsideration raising an error unrelated to this appeal, which was subsequently granted by order dated June 18, 2013. On appeal, McLane argues the ALJ erred as a matter of law in finding Roberts entitled to PTD benefits by relying upon Dr. Robert Granacher's opinion, who determined Roberts had not reached maximum medical improvement ("MMI") at the time of his examination. We disagree and affirm.

Roberts filed a Form 101 on August 24, 2012 alleging he "missed the dock plate and fell into an unseen hole beside it" on September 27, 2010 resulting in the following injuries: "Left leg; RSD; depression." He ultimately underwent two surgical procedures on his left knee.

Roberts testified by deposition on November 12, 2012, and at the hearing held January 30, 2013. Roberts, a high school graduate, was born on April 22, 1985 and resides in Lancaster, Kentucky. Roberts received computer training at ITT Technical Institute for approximately a year and a half without completing any course of study. He did not earn a degree or certificate and has not worked in the computer field. Roberts' employment history includes work as a machine operator for two different companies. He was also a "hod packer" for a masonry company which required

carrying bricks and blocks, pushing wheelbarrows and keeping bricklayers stocked with supplies. Roberts testified he has had two prior left knee injuries. He tore his ACL in 2003 while playing high school football, which was surgically repaired by Dr. Rick Lyons. Roberts also sustained a work-related meniscus tear in 2005 which was also repaired by Dr. Lyons. Roberts testified he fully recovered from both injuries and resulting surgeries.

Roberts began working for McLane in July 2010 loading merchandise by hand from the warehouse to trailers. This required lifting totes weighing up to one hundred pounds, and standing for the majority of an eight hour shift. On September 27, 2010, he was stacking totes inside a trailer. The dock plate connecting the trailer to the building was eight feet from the ground and had gaps on either side. As Roberts was pushing totes from the front of the trailer to the back, his left leg fell into the hole up to his hip.

The company nurse sent Roberts to the Urgent Treatment Center, where he was diagnosed with a broken knee cap and referred to Dr. David Dome at the Lexington Clinic. Dr. Dome eventually performed surgery on November 18, 2010, which Roberts stated did not improve his symptoms. Dr. Dome referred Roberts to Dr. Trevor Wilkes, who practices in the

same office. Dr. Wilkes performed a second procedure on August 26, 2011 to replace his meniscus and realign his bone. Roberts testified he experienced shooting pain throughout his entire left leg and foot following surgery. Roberts testified Dr. Wilkes restricted him to sit-down duty, and referred him to Dr. Michael Harned for pain management who prescribed Neurontin, Oxycontin and Cymbalta. Dr. Harned also administered injections which did not provide relief. Roberts testified he has been unable to continue treatment with Dr. Harned due to his financial situation.

Since the work accident, Roberts has either been restricted from work or placed on light duty performing paperwork. Prior to his second procedure, Roberts acknowledged he was released to regular duty for approximately two weeks. Roberts was terminated from McLane in May 2011 because his restrictions could no longer be accommodated.

Roberts testified he continues to experience left leg pain which feels like “thousands of needles are jabbing me all at once.” He also complains of a burning sensation in his left foot, and his left knee gives way six to seven times a day causing him to fall. He stated his pain interferes with his ability to concentrate. He uses a cane

whenever he is outside his home to prevent him from falling. His home is now equipped with handrails. Without his cane, he can stand for approximately twenty minutes and walk for approximately thirty minutes. Roberts testified he developed symptoms of depression following the second procedure. Roberts stated he felt guilty because he could no longer provide for his family or play with his children. He does not leave his home and is unable to participate in most household chores. Roberts testified the Cymbalta does not relieve his symptoms.

Roberts testified he is unable to return to McLane as a loader due to the physical demands, heavy lifting and strict time requirements. He also testified he cannot perform the light duty work due to his pain, inability to sit for prolonged periods of time and lack of concentration. He testified he cannot return to his former job as a machine operator due to limitations on standing. Roberts indicated at his deposition he could perform sedentary work such as driving a forklift as long as he is able to “get up and move around” about every thirty or forty minutes. At the hearing, Roberts testified he no longer believes he is capable of performing that job since he cannot use both legs and is unable to operate a clutch.

In support of his claim, Roberts filed the treatment records from Drs. Dome, Wilkes and Harned, all of whom practice at the Lexington Clinic. Roberts treated with Dr. Dome from October 4, 2010 through April 13, 2011. Dr. Dome diagnosed ACL insufficiency vertical graft and varus alignment, and recommended surgery. On November 18, 2010, Dr. Dome performed a left knee arthroscopic partial medial meniscectomy and a revision of arthroscopic anterior cruciate ligament reconstruction. Despite several follow-up visits and physical therapy, Dr. Dome assessed medial compartment overload due to partial meniscectomy and varus malalignment, and referred Roberts to Dr. Wilkes to discuss a possible meniscus transplant.

Roberts treated with Dr. Wilkes from April 2011 through August 2012. Dr. Wilkes assessed painful medial compartment with varus alignment and medial meniscal deficiency, and recommended a high tibial osteotomy and medial meniscus transplantation. He noted surgery would not eliminate Roberts' pain and stated it would be difficult for him to perform a job requiring prolonged standing. Dr. Wilkes performed a high tibial osteotomy and open medial meniscus transplantation including chondroplasty of the patella on August 26, 2011. Dr. Wilkes restricted Roberts from work through November 22, 2011, and subsequently

allowed him to return to a four hour work day through January 2012. Roberts continued to complain of pain throughout this period of time. Dr. Wilkes advised Roberts to consider less physical work.

Dr. Wilkes again restricted Roberts from work beginning on January 3, 2012 after noting complaints of pain and antalgic gait. He also noted significant quadriceps atrophy and effusion. Dr. Wilkes recommended he pursue work which does not require long periods of time on his feet. Dr. Wilkes noted Roberts was pursuing a seated occupation, such as driving a forklift. On March 28, 2012, Dr. Wilkes noted Roberts' chronic pain continued despite multiple surgeries. He stated Roberts had attained MMI, but is unable to return to work. On April 15, 2012, Dr. Wilkes assessed a 15% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). In a letter dated November 27, 2012, Dr. Wilkes stated as follows regarding restrictions:

> I do feel that it is unreasonable to expect Kevin Roberts to perform a job which requires extended periods of time on his feet, or heavy carrying of loads. Clearly he lacks the strength, stability, and walking tolerance to perform such job duties. . . . In summary, it is my opinion that his work

> restrictions would involve limited weightbearing and load-carrying.

Roberts also filed Dr. Harned's pain management records from February 2012 to June 2012. Dr. Harned prescribed Oxycontin, Neurontin and Lidoderm patches. He also administered a left lumbar sympathetic block, which was unsuccessful. Dr. Harned reported Roberts inquired about amputation due to his pain.

McLane also filed the records of Dr. Lyon who performed an ACL reconstruction and medial meniscus repair on November 19, 2002. Dr. Lyon noted Roberts fell at work and he subsequently performed a partial medial meniscectomy to repair a medial meniscus tear in 2005.

Roberts filed the July 9, 2012 report of Dr. Warren Bilkey, who diagnosed a left knee strain; ACL tear; meniscus tear injuries; status post ACL reconstruction and total medial meniscectomy; high tibial osteotomy; and meniscus transplant procedure. Dr. Bilkey also stated Roberts has residual chronic knee pain, knee instability, pes bursitis related to weakness of the hamstrings, patella tendinitis related to quad weakness, and has RSD/CRPS. Dr. Bilkey stated the above diagnoses were due to the September 27, 2010 work injury, and opined Roberts has attained MMI. Dr. Bilkey recommended continuing pain management with

possible use of a cane management device, as well a home strengthening exercise program. Dr. Bilkey restricted Roberts to sit-down duty, which would preclude him from resuming the usual work duties he performed prior to September 27, 2010. Dr. Bilkey assessed a 20% impairment rating pursuant to the AMA Guides. In an addendum dated January 23, 2013, Dr. Bilkey critiqued the December 12, 2012 opinion of Dr. Thomas Huhn. However, he agreed with Dr. Huhn's assessment of a 2% active pre-existing impairment rating for the prior left knee surgeries.

McLane filed Dr. Huhn's December 12, 2012 report diagnosing a medial meniscus tear with varus angulation, resulting in surgical intervention, causally related to the September 27, 2010 work injury. Dr. Huhn assessed a 2% impairment rating pursuant to the AMA Guides for Roberts' previous 2002 and 2005 left knee procedures. Dr. Huhn stated Roberts would have reached MMI three to four months following surgery on December 26, 2011. He opined Roberts' current pain is partly attributable to his unsuccessful and self-limited physical therapy and attempts to strengthen his left leg, as well as his failure to follow medical advice to use the cane as infrequently as possible. Pursuant to the AMA Guides, Dr. Huhn assessed an 11% impairment rating. Dr. Huhn declined to assign permanent restrictions for Roberts'

left knee, noting the regression and disuse atrophy leading to cane utilization is unrelated to the work injury. Likewise, he opined Roberts would have been able to return to work had it not been for his disuse atrophy and regression. Dr. Huhn stated Roberts does not have a shortened work life or loss of job opportunity due to the work injury. Dr. Huhn also criticized the opinions of Dr. Bilkey.

Roberts filed the July 3, 2012 107-P psychological report and "Independent Psychological Evaluation" of Dr. Dennis Sprague, who diagnosed major depressive disorder, generalized anxiety disorder and pain disorder associated with a general medical condition, all related to the September 27, 2010 work injury. Pursuant to the 2nd and 5th Editions of the AMA Guides, Dr. Sprague assessed a 12% impairment rating. Dr. Sprague opined Roberts does not have the capacity to return to work from an emotional perspective, but deferred to a "medical opinion for physical status." He also opined Roberts cannot return to work in his previous capacity since he is more prone to make mistakes, may be less aware of normal hazards, or less capable of taking appropriate precautions. Dr. Sprague noted Roberts was taking Oxycodone, Neurontin and Cymbalta. He also stated test results revealed a low average range of

intellectual functioning. Dr. Sprague recommended continued medical monitoring and treatment for his physical problems, psychiatric and psychological intervention and treatment.

McLane filed the January 2, 2013 psychiatric report of Dr. Robert Granacher who noted Roberts had not taken any pain medication or antidepressants for at least two weeks due to his financial situation. Testing revealed Roberts had low average reading skills and average intellectual capacity. Dr. Granacher diagnosed mood disorder (major depression), single episode, due to the September 27, 2010 injury. He opined Roberts had not reached MMI caused by his inability to take his medications due to financial reasons and lack of treatment. Dr. Granacher assessed a 20% impairment rating pursuant to the 2nd and 5th Editions of the AMA Guides, but noted the impairment is "much higher than it would have been had I seen him on or about the time Dr. Bilkey saw him when he was medicated." When asked to assign permanent restrictions, Dr. Granacher stated "based on his appearance at his examination today, he could not work." He deferred to an orthopedic surgeon to address Roberts' physical capacity to return to the type of work he performed at the time of the work injury. He also stated if Roberts continues to work in the same physical capacity, "I would assume he would have a

shortened work life, as he has a severely damaged leg, which undoubtedly will come to total knee replacement eventually." Dr. Granacher recommended Roberts be placed back on Oxycontin, Neurontin and Cymbalta. Finally, after reviewing Dr. Sprague's report, Dr. Granacher concluded his 12% impairment rating "seems reasonable to me, as I found a higher impairment rating today in his unmedicated [sic] today."

McLane filed the January 8, 2013 vocational report of Dr. Stephanie Barnes, whose testing indicated Roberts' academic skills were lower than expected. Dr. Barnes stated Roberts would be unable to return to the work performed at the time of injury based upon the restrictions assigned by Drs. Bilkey and Wilkes. However, he would be able to do so based upon Dr. Huhn's report. Dr. Barnes found pursuant to the limitations assigned by Drs. Bilkey and Wilkes, Roberts is only capable of sedentary work. Dr. Barnes concluded Roberts is not permanently and totally occupationally disabled since no physician assigned restrictions preventing all work.

In his opinion rendered April 1, 2013, the ALJ found Roberts permanently totally disabled. The ALJ was convinced Roberts provided credible testimony, and was in a great deal of pain. The ALJ determined Roberts has a work-

related psychological condition, primarily based upon the opinion of Dr. Granacher who he found credibly established causation of the condition, as well as the impact on employment. The ALJ determined Dr. Granacher's opinions, "in large part" were consistent with those of Dr. Sprague.

Concerning Roberts' physical condition, the ALJ relied upon his self-assessment of capabilities, as well as the opinions of Drs. Bilkey, Wilkes, and Harned.

The ALJ then appropriately addressed all factors necessary for assessing PTD pursuant to Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Specifically, the ALJ found as follows:

> Under Ira A. Watson Department Store, supra, the last factor to consider is the likelihood he can resume some type of "work" under normal employment conditions. Based upon Plaintiff's education level, basic total lack of transferable vocational skills, substantial post-injury medical restrictions and limitations, it is unlikely Plaintiff could resume some type of regular and sustained employment.
>
> Based upon the above examination of Plaintiff's occupational status, it is determined Plaintiff is permanently totally disabled, as that term is defined in KRS 342.0011 (11)(c).

The ALJ awarded PTD benefits in the sum of $347.67 commencing on September 28, 2010 and medical benefits for

Roberts' "left shoulder, right knee, psychological and hearing loss work-related injuries." McLane filed a petition for reconsideration, requesting the ALJ correct his award of medical benefits to reflect injuries to Roberts' left leg and a psychological component only. McLane did not challenge any aspect of the ALJ's findings regarding the award of PTD benefits. The ALJ granted the petition on June 18, 2013.

On appeal, McLane argues the ALJ erred as a matter of law in finding Roberts permanently and totally disabled. McLane argues the ALJ erred in relying upon the opinion of Dr. Granacher since an assessment of impairment may only be made after a claimant has reached MMI. Further, McLane asserts the totality of the evidence compels a finding Roberts is not permanently and totally disabled when one considers his young age, education, and employment history.

The crux of this appeal concerns whether the ALJ's determination of permanent total disability is supported by substantial evidence. Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, 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). 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). 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). An ALJ may reject, 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such 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).

After reviewing the evidence of record, the ALJ's determination Roberts is permanently totally disabled was in accordance with the Kentucky Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, supra. Taking

into account Robert's age, education and past work experience, in conjunction with his post-injury physical status, along with the opinions of Drs. Granacher, Sprague, and Bilkey and Roberts' own testimony, the ALJ was persuaded due to the effects of the work-related injury, both physically and psychologically, he is totally disabled.

We disagree with McLane's argument the ALJ erred by relying on the opinion of Dr. Granacher, who determined Roberts had not reached MMI at the time of his examination. The ALJ's decision does not solely rest upon Dr. Granacher's opinion. The ALJ provided a thorough analysis regarding his determination considering both physical and psychological aspects stemming from the September 27, 2010 work event. Regarding Robert's psychological condition, the ALJ relied on Dr. Granacher and Dr. Sprague, both of whom concluded Roberts' psychological problems were caused by the work injury, which along with his physical infirmities, prevent him from working.

The ALJ relied in part upon Roberts' testimony regarding his inability to work. The ALJ reviewed the treatment records of Drs. Dome, Wilkes and Harned, as well as the reports from Drs. Bilkey, Huhn and Barnes. The ALJ acknowledged Roberts' relatively young age, but also found

he was not well educated. He also considered Roberts' work history which he beliebved consisted primarily of heavy physical labor. He also noted the physical restrictions, as well as the opinions of Dr. Granacher and Barnes, in concluding his "post-injury medical restrictions and limitations strongly suggest [Roberts] is permanently and totally disabled."

Considering the above analysis, even if the psychological condition is not considered, substantial evidence supports the ALJ's award of PTD benefits. We also note McLane neither challenged the ALJ's reliance on Dr. Granacher, nor requested additional findings of fact, in its petition for reconsideration.

Finally, we acknowledge Dr. Granacher found Roberts had not attained MMI at the time of the evaluation. Dr. Granacher assessed a 20% impairment rating based upon Roberts' un-medicated condition. However, Dr. Granacher stated as follows in reviewing Dr. Sprague's assessment:

> When Dr. Sprague examined this gentleman, he was being treated with Oxycodone for pain, Neurontin for pain, and Cymbalta for depression. He is on none of those medications today. Thus, Dr. Sprague's impairment rating of 12% seems reasonable to me, as I found a higher impairment rating in his unmedicated [sic] today.

Therefore, although Dr. Granacher assessed Roberts' impairment when he was not at MMI, he also agreed with Dr. Sprague's assessment of impairment, which was given while Roberts was properly medicated.

Because the ALJ's determination is supported by substantial evidence, we are without authority to disturb his decision on appeal. *See* KRS 342.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For that reason, we cannot say the award of PTD benefits is so unreasonable under the evidence the decision must be reversed.

Accordingly, the decision rendered April 1, 2013 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, and the order on reconsideration issued June 18, 2013, are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON ALLYSON WATTS
300 EAST MAIN ST, STE 400
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON MARK D KNIGHT
PO BOX 49
SOMERSET, KY 42502

ADMINISTRATIVE LAW JUDGE:

HON OTTO D WOLFF
8120 DREAM STREET
FLORENCE, KY 41042