OPINION ENTERED: November 30, 2012

CLAIM NO. 200895849

MURLON T. LILE TRUCKING PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

JASON STEVENS
HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE
HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE
THE MEDICAL CENTER; and
THE MEDICAL CENTER at
SCOTTSVILLE RURAL HEALTH RESPONDENTS

and

JASON STEVENS CROSS-PETITIONER

VS.

MURLON T. LILE TRUCKING
HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE
and HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE CROSS-RESPONDENTS

OPINION
AFFIRMING ON APPEAL
AND CROSS-APPEAL
* * * * * *

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

STIVERS, Member. Murlon T. Lile Trucking ("Lile Trucking") appeals and Jason Stevens ("Stevens") cross-appeals from the July 5, 2012, opinion and award by Richard M. Joiner, Administrative Law Judge ("ALJ") in which the ALJ awarded temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits. Lile Trucking filed a petition for reconsideration which was overruled by Hon. Thomas G. Polites, ALJ ("ALJ Polites") in an order dated August 7, 2012. Lile Trucking also appeals from that order.

The Form 101 alleges on February 13, 2008, Stevens sustained injuries to his "head, brain, face, eye, shoulder, [and] back" in the following manner: "Truck accident- another tractor trailer crossed median on snow and ice, hit another tractor and hit my vehicle head on."

On appeal, Lile Trucking asserts the "finding of permanent and total disability, made in reliance upon the opinions of Dr. Sullivan, is so unreasonable under the evidence that it must be reversed as a matter of law." On cross-appeal, Stevens asserts Lile Trucking's counsel "should not have testified in its brief regarding the extent of pain and suffering, future medical expenses, and wage loss." Stevens further asserts as follows: "If this

case is remanded to the ALJ for any reason, the ALJ should be instructed to strike the testimony of Petitioner's counsel and admit the testimony of Mike Lindsey as evidence."

Concerning the issue of permanent total disability, in the July 5, 2012, opinion and award, ALJ Joiner determined as follows:

> Permanent total disability under the Kentucky Workers' Compensation Act 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. 'Work' means providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. Thus, in order to be found permanently totally disabled, an employee must demonstrate that he has a complete and permanent inability to perform any services to another in return for remuneration on a regular and sustained basis in a competitive economy. The employer concedes that Mr. Stevens is precluded from performing the work that he was doing at the time of the injury. I further believe, based on the behavioral changes and the disfigurement combined with that inability, that Mr. Stevens is precluded from providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. As defined in the Kentucky Workers Compensation Act, he is permanently totally disabled.

Concerning Stevens' impairment, ALJ Joiner found as follows:

> As a result of the motor vehicle accident of February 13, 2008 Mr. Stevens has a 43% whole body impairment based on 25% from facial injuries as indicated by Dr. Gleis, 16% from the loss of vision as indicated by Dr. Rooney, 5% psychiatric impairment as indicated by Dr. Shraberg, and 5% impairment from the lumbar spine as indicated by Dr. Lang. I cannot accept the 72% impairment indicated by Dr. Sullivan because I cannot tell what it is composed of. He has other psychological impairments as there is credible evidence of behavior disorders not measured by Dr. Shraberg, but credibly identified by Dr. Sullivan.

In its petition for reconsideration, Lile Trucking asserted, in part, as follows:

> There is no indication the Administrative Law Judge performed an analysis of the issue (of plaintiff's disability) pursuant to *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968) and *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). As noted in the defendant's argument before the Administrative Law Judge, some of the principles set forth in *Osborne v. Johnson* remain viable when determining whether a worker's occupational disability is partial or total. An analysis of whether Mr. Stevens is permanently partially disabled or permanently totally disabled required determination of what he is and is not able to do following recovery from the work injury. *Watson*, 34 S.W.3d at p.51. The analysis includes consideration of whether Mr.

> Stevens will be able to work dependably and whether his physical restrictions might interfere with vocational capabilities. There is no indication the Administrative Law Judge made this analysis or gave consideration to any factors when deciding the issue of the extent and duration of plaintiff's disability.
>
> What's more, it is also necessary, as a matter of law, for an Administrative Law Judge to provide the parties with sufficient factual findings to support his ultimate conclusions, if for no other reason than to allow a meaningful appellate review. [citations omitted]. Respectfully, the Administrative Law Judge's findings in this case (regarding the issue of disability) were entirely insufficient, with the two sentence explanation certainly inadequate in light of the evidence, and the arguments, presented on the issue.

In the August 7, 2012, order, ALJ Polites concluded as follows:

> As to the finding of permanent total disability, the ALJ indicated in the Opinion and Award that it was conceded that the Plaintiff was precluded from returning to the work he performed at the time of his injury, and that based upon the behavioral changes and disfigurement of the Plaintiff due to his injury, the Plaintiff was precluded from performing any type of work on a regular and sustained basis in a competitive economy and therefore met the definition of permanent total disability as contained in the Kentucky Worker's Compensation act [sic]. The ALJ's determination that Plaintiff's disfigurement and behavioral changes

precluded him from working were based upon the testimony of Dr. Thomas Sullivan. Dr. Sullivan concluded that Plaintiff had suffered a gross degradation of his emotional and behavioral functioning as well as a gross deterioration in his judgment and ability to interact with others as a result of his injury. See page 16, Sullivan report. Dr. Sullivan further found that given the executive impairments noted above, it was unlikely that Plaintiff would be able to return to work during his lifetime, and even if he was able to obtain a job, it was likely that his behavioral problems would cause him to quickly lose it. Pages 16-17 Sullivan report. Dr. Sullivan further testified that Plaintiff's behavioral and emotional deterioration even made it inappropriate for him to live without assistance. The ALJ believes the testimony of Dr. Sullivan is credible and relied on the testimony of Dr. Sullivan in determining the Plaintiff was not capable of performing any type of work in a competitive economy. The ALJ also considered the medical testimony of Dr. Schraberg and while he felt that the Plaintiff had made a greater recovery regarding his traumatic brain injury than Dr. Sullivan, the ALJ would point out that Dr. Shraberg stated as follows: “I believe it would be difficult for him to compete in the workplace with his combination of neuropsychiatric, cosmetic and physical problems". See page 10 Shraberg report. As such, the ALJ believes Dr. Shraberg’s opinion supports the opinions of Dr. Sullivan and both opinions support the finding of the ALJ that the Plaintiff is permanently and totally disabled.

> The ALJ's conclusion that Plaintiff is permanently totally disabled is also consistent with the holding of Ira A. Watson Department Store v. Hamilton [sic], 34 SW3d 48 (Ky. 2000) which requires the ALJ to consider several factors including the workers age, education level, vocational skills, medical restrictions and the likelihood that he can resume some type of work under normal employment conditions in determining whether a claimant is totally disabled. As applied to the instant claim, given Dr. Sullivan's and Dr. Shraberg's opinions regarding Plaintiff's inability to return to competitive employment, and given the Plaintiffs [sic] limited education of only a high school degree with no vocational training, and work experience as only a truck driver and manual laborer, the ALJ remains convinced that the Plaintiff has been rendered totally occupationally disabled despite his young age of 31 years. The Defendants' Petition for Reconsideration is hereby overruled save for the additional findings of fact and analysis contained above.

On appeal, Lile Trucking asserts as follows:

> Thomas Sullivan, Ph.D. saw Stevens on just one occasion. The evaluation was performed September 19, 2008, only seven months after the accident in question.
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> Dr. Sullivan's assessment of Stevens was inconsistent, at best. At one point, Dr. Sullivan indicated 'Mr. Stevens will almost surely show continuing recovery from his injuries over the next two years.' Report of Dr. Sullivan, p. 16. In the same report, Dr. Sullivan assessed a 72% whole person impairment for 'mental status,

> behavior, vision and one upper extremity.' while offering the following in response to an explanation of causal relationship: 'Patient's brain was smashed.' Appropriately, ALJ Joiner indicated he could not accept the 72% impairment 'because I cannot tell what it is composed of.' Opinion, p.4.
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> Certainly, Dr. Sullivan's early and unsupplemented opinions of 'behavioral and emotional deterioration' were inconsistent with Stevens' improved condition over time, and his abilities and activities from 2009 through the time of hearing in 2012. Regardless, both ALJs relied upon Dr. Sullivan and his early premature conclusions regarding Stevens' abilities.
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> ...
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> There was no evidence of record to support a finding that Stevens had behavioral changes which lasted beyond 2008. There was no evidence to support Dr. Sullivan's premature findings of 'behavioral and emotional deterioration.' Respectfully, the administrative law judges' reliance upon Dr. Sullivan in support of a finding of permanent and total disability was error.

Pursuant to KRS 342.0011(11)(c), “permanent total disability” is defined in pertinent part as “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. . ." "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".

The determination of a permanent total disability award remains within the broad authority of the ALJ. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The factors which the ALJ may consider in making this determination include the worker's "post-injury physical, emotional, intellectual and vocational status and how these factors interact." Id at 51. "It also includes a consideration of the likelihood that the particular worker would be able to find work under normal employment conditions." Id. In making his or her assessment, the ALJ may rely on the medical or vocational experts *or* a worker's own assessment of his or her ability to labor. Id.; *See also* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has the sole authority to determine the weight to be afforded the evidence and the inferences to be drawn from that evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ

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). 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 to support the ALJ's decision.

The evidence cited extensively by ALJ Polites in the August 7, 2012, order ruling on the petition for reconsideration comprises substantial evidence supporting ALJ Joiner's determination Stevens is permanently totally disabled. Lile Trucking's argument that Dr. Sullivan's report cannot be relied upon because of its proximity to the February 13, 2008, date of injury is without merit. The ALJ was free to rely on this report. Further, we note that on March 11, 2011, more than three years after the February 13, 2008, injury, Dr. Sullivan filled out a Form 107-I in which he wrote "no" after the following question:

> Does the plaintiff retain the physical capacity to return to the type of work performed at the time of injury?

Additionally, Dr. Sullivan wrote "no work" after the following question:

> Which restrictions, if any, should be placed upon plaintiff's work activities as the result of the injury?

Dr. Sullivan’s response to those two questions are sufficient to support the determination Stevens is permanently totally disabled. Thus, Dr. Sullivan’s opinions constitute substantial evidence supporting the determination Stevens is permanently totally disabled.

In addition, as noted by ALJ Polites in the order on reconsideration, Dr. Shraberg’s opinions are supportive of Dr. Sullivan’s opinions. Dr. Shraberg, Lile Trucking's expert, stated as follows in his December 3, 2009, report: "I believe it would be difficult for him to compete in the workplace with his combination of neuropsychiatric, cosmetic and physical problems." As ALJ Joiner and ALJ Polites were free to rely on Dr. Sullivan’s opinion and other evidence in the record also supports the determination of permanent total disability, this determination cannot be disturbed.

On cross-appeal, Stevens asserts as follows:

> For its cross-appeal, Respondent states that Petitioner's counsel should not have testified in its brief regarding the extent of pain and suffering, future medical expenses, and wage loss. Petitioner submitted no proof to allow its counsel to argue a specific amount of pain and suffering. Petitioner, through its counsel, claims

Respondent's future wage loss is $258,689.60. It reached this figure by calculating a maximum permanent partial disability award and then claiming this as his future loss of earning capacity. This is completely incorrect. The record contains no testimonial proof on behalf of the Petitioner of any sum for future earnings loss of Respondent. The only evidence on future loss of earning capacity was submitted by the Respondent which was accomplished by following the procedure in Paducah Area Public Library v. Terry, 655 S.W.2d 19 (Ky. App. 1983) of multiplying his annual earnings loss by the projected work-life loss of 28.81 years identified in Dr. Schnacke's report. [footnote omitted] Petitioner had the opportunity to controvert Dr. Schnacke's testimony, but failed to do so. Petitioner's opinion for future loss of earning capacity is simply speculation and inconsistent with SCR 3.130 (3.7). No circuit judge would ever allow an instruction for future loss of earning capacity without evidence of such offered by the Respondent.

Likewise, the testimony of Petitioner's counsel regarding the amount of future medical expense is inconsistent with SCR 3.130 (3.7). At page 16 of its Brief, Petitioner argued that future medical expense should be 1.5 x past medical. There is absolutely no proof in the record of any amount of future medical expenses that Respondent may incur. Not only is there no proof by the Petitioner of future medical expenses, but Petitioner's witness, its counsel, would not be qualified to offer such testimony. The assertion that future medical is 1.5 x past medical is without evidentiary

foundation. Such testimony should not have been presented.

With regard to Petitioner's pain and suffering argument, Petitioner submitted no proof to allow its counsel to argue a specific amount for pain and suffering. Again, SCR 3.130 (3.7) precludes Petitioner's counsel from making an argument not based upon the proof introduced into the record. Since it did not introduce proof of the probably jury verdict for pain and suffering, its argument that pain and suffering should be two times past medicals, or, $2,720,996.00 is in fact testimony, not argument. Contrary to Petitioner's actions, we introduced testimony of Mike Lindsey regarding the value of the case and also filed the best evidence available of what a jury would likely award by filing the Kentucky Trial Court Reporter pertinent to the injuries in this case. Thus, Respondent's counsel was entitled to argue for a pain and suffering award within the range supported by the proof offered by Respondent.

...

Petitioner is correct that the ALJ must make a determination of the amount for each element of damages. However, before the ALJ makes a decision, there must be proof to support the decision the ALJ makes. That's the reason we presented the testimony regarding Mr. Steven's work-life expectancy and multiplied it by his annual earnings as provided in the Terry case. If Petitioner believed its counsel could offer testimony on the issues in the Brief which are his testimony, it should have had him withdrawal [sic] as counsel, employ another attorney, and then present Mr. Hutson's testimony in

> order that he might be cross-examined as to the basis for his opinions. That did not occur in this case which clearly shows that the procedure undertaken by the Petitioner was not appropriate. If this case is remanded to an ALJ, we respectfully request the Board to order Petitioner's claimed amounts for loss of earning capacity, future medical expense, and pain and suffering be disregarded as without evidentiary foundation. And further, to disregard inadmissible testimony by Petitioner's counsel and disregard his calculations based on past medical charges as the basis for Petitioner's subrogation rather than the actual medical expense by Respondent.
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> ...
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> If this case is remanded to the ALJ for any reason, the ALJ should be instructed to strike the testimony of Petitioner’s counsel and admit the testimony of Mike Lindsey as evidence.

In the July 5, 2012, opinion and award, regarding any subrogation credit to which Lile Trucking might be entitled, ALJ Joiner determined as follows:

> The Workers Compensation Board in *Quillen v. Tru-Check Inc.*, Claim Number 08-99276, determined that an allocation was erroneous because the ALJ had reduced the entire civil settlement by the attorneys [sic] fees and costs to arrive at the credit subject to allocation. For example, in this case that would have been $981,500.00 - $444,388.98 = $537,111.02, portions of which would have been applied to Murlon T. Lile’s immediate liability in this claim.

Instead, the Board in *Quillen* reasoned that the proper method of calculating the credit subject to allocation was to remove those elements of damages from the civil settlement that are not duplicative of workers compensation, and subtract the attorneys [sic] fees/costs from that figure to arrive at the employer's subrogation credit.

The items of damage that are not duplicative of workers compensation are pain and suffering, loss of consortium, and attorneys [sic] fees and expenses. The prorated amounts of these damages are $537,827.34 for Mr. Stevens's pain and suffering and $100,842.63 for Mrs. Stevens on the loss of consortium claim. The actual amounts of attorney fees and expenses are $406,488.98. The plaintiff's attorney in the civil action also appears to have recognized other liens in the amount of $37,900.00.

The calculation to arrive at these numbers begins with reducing the $981,500 settlement by the sums that are not duplicative of workers compensation. For these calculations I will use a pro-rated figure representing the ratio of the specific element of damage to the entire amount of damages found above.

The settlement of $981,500 represents 13.45% of the amount determined above that Mr. and Mrs. Stevens would have been awarded if the third party claim had been fully litigated. 13.45% of the $4,000,000 allocated for pain and suffering is $537,827.34 for which the employer is not entitled to credit. Deducting that amount from the amount of the settlement leaves a balance of $443,672.66, representing that portion of Mr. Stevens' third party recovery

> for past and future lost wages, and medical treatment amenable to subrogation under KRS 342.700(1) and loss of consortium for Mrs. Stevens. Deducting $100,842.63 for loss of consortium which is not amenable to subrogation leaves $342,830.03. Taking away the amount of the attorney fee and expense leaves a negative balance, so there is no residual subrogation credit for the employer, regardless of whether the reserved $37,900 for other liens is to be included or excluded.
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> Some of these items have already been distributed to the parties, including $282,694.33 to both Mr. Stevens and his wife. I do not believe I have jurisdiction to resolve the question of additional payments for loss of consortium or distributions under the divorce litigation.

First, we note Stevens failed to file a petition for reconsideration or a motion to strike portions of Lile Trucking's brief to the ALJ.

Second, in Whitaker v. Hardin, 32 S.W.3d 497 (Ky. 2000), the Kentucky Supreme Court specifically concluded in situations involving a settlement between an injured employee and a tortfeasor containing no allocation of damages, the ALJ has the authority to determine the appropriate amounts to be apportioned between pain and suffering, lost wages, and medical expenses. The Court explained the right to subrogation credit in a workers' compensation case is purely statutory. As such, the Court

reasoned ". . . because the statutory right to subrogation falls within the workers' compensation chapter, then by definition, the ALJ has jurisdiction to resolve any subrogation issues." Id. at 499. In doing so, the ALJ has full discretion to appropriately determine the allocation of damages.

Third, Stevens has offered no evidence indicating the ALJ relied upon these assertions in Lile Trucking's brief, and a review of that brief and the July 5, 2012, opinion and award indicates ALJ Joiner did not. Since we find no error in the determination Stevens is permanently totally disabled and the ALJ did not grant Lile Trucking a credit for any portion of the personal injury settlement, we find Stevens' argument to be moot. Since Stevens' argument is irrelevant to the ultimate resolution of this case, this Board sees no reason to remand. Therefore, on cross-appeal, we affirm the ALJ's decision.

Accordingly, the July 5, 2012, opinion and award of ALJ Joiner and the August 7, 2012, order of ALJ Polites are **AFFIRMED**.

ALL CONCUR.

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