Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 4, 2014

CLAIM NO. 201100089

OFFIE MACKS, JR. PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

UNITED PARCEL SERVICE
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Offie Macks, Jr. ("Macks") appeals from the January 21, 2014 Opinion and Award and the March 10, 2014 order rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). The ALJ awarded permanent partial disability benefits and found United Parcel Service ("UPS") committed no safety violation. Macks argues the ALJ erred

in failing to find him permanently totally disabled, in relying on an impairment rating assessed contrary to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), and in failing to find a safety violation. We disagree and affirm.

Macks testified by deposition on May 4, 2011 and at the hearing held November 25, 2013. Born February 12, 1950, he is a former Army helicopter pilot who completed some college coursework at Pensacola Junior College. He has worked as a commercial pilot since 1976 and has worked for UPS since 1989.

Macks alleged an injury to his back on January 20, 2009 when he slipped while descending icy mobile stairs, causing him to land hard on his left foot. He felt an "electric shock" in his low back. Macks treated with a chiropractor and a physical therapist. He was taken off work from February 8 through February 21, 2009. He returned to work, but his symptoms worsened and he concluded it was not safe to continue flying due to loss of muscle control in his left leg. He was again taken off work until September 21, 2009. As a result of his low back injury, he is now unable to pass a flight physical.

Macks lives on a 36 acre farm where he raises blackberries. He performs chores such as watering his lawn

and light gardening. He exercises daily. Macks stated he is qualified for ground instructor positions, but noted the majority of those positions go to retired Navy and Air Force personnel. He did not believe he was capable of returning to any type of employment because he requires a sit/stand option and the ability to lie down occasionally.

Ashok Sunak, ramp supervisor for UPS, testified by deposition on December 19, 2013. Sunak stated replacement stairs were being used on the date in question because the regular stairs were being repaired. There was light snow on the date of Macks' injury, however Sunak indicated he cleared the snow off with his clip board. He ascended the stairs and greeted the crew. Sunak warned the crew to be careful because they often did not wear proper footwear for the conditions. The crew then followed him down the stairs. Sunak was not aware of Macks' injury until the following day.

UPS filed the November 6, 2009 report of Dr. Charles Wolff who assigned a 10% impairment rating. The form did not indicate the source used to determine the rating. Dr. Wolff opined Macks was not at maximum medical improvement ("MMI"), and anticipated residual clinical dysfunction or functional loss.

UPS also filed the June 25, 2013 report of Dr. Stephen Slobodian who performed an independent medical evaluation ("IME") on June 9, 2009. He diagnosed multilevel disc herniation secondary to the January 20, 2009 work injury. He placed Macks at MMI and indicated he was not a candidate to return to flying duties. Using the range of motion method, Dr. Slobodian assigned a 10% impairment rating pursuant to the AMA Guides. Dr. Slobodian felt Macks was capable of returning to some light and sedentary employment.

Dr. Jules Barefoot performed an IME on April 17, 2013. He diagnosed left L5 radiculopathy and left SI joint dysfunction. He opined Macks had reached MMI, and placed him in DRE category III with a 13% impairment rating pursuant to the AMA Guides. Dr. Barefoot stated Macks will continue to have significant problems with chronic pain, loss of strength and limited mobility. He would have marked difficulty with any job requiring prolonged standing or walking and is not able to operate machinery with foot controls. Macks would not be able to return to his work as a pilot.

UPS filed treatment records from Dr. Michael Harris from March 26, 2012 through June 29, 2012. Dr. Harris diagnosed left SI joint dysfunction, L5-S1 herniated

disc with left L5 radiculopathy and chronic pain syndrome. Dr. Harris noted Macks would be limited in his ability to climb ladders and stairs, stand for long periods or walk for long distances and likely would not be able to obtain a medical certificate to return to work as a pilot.

Macks filed records from Dr. Harris including an October 28, 2013 note stating injections would only provide Macks with temporary relief. Surgery was not recommended at this point, but was likely to be necessary within five to ten years.

UPS filed the report of Lisa Jernigan who performed a vocational evaluation on December 3, 2013. She noted Macks "has a plethora of transferable skills" but is a poor candidate for rehabilitation due to a total lack of interest in working away from his farm and a lack of financial incentive. Macks has return-to-work assets of a strong work history, extensive transferable skills, veteran's preference, appropriate presentation/communication and age. However, Macks objected to every possible work suggestion, citing a need to relax at will and the fact he did not need the income. Further, Macks was noncompliant with his pain medication.

The ALJ ultimately relied on the 10% impairment rating assessed by Drs. Slobodian and Wolff. He awarded

Macks temporary total disability benefits, permanent partial disability benefits, and medical benefits. Furthermore, he rejected Macks' assertion UPS had committed a safety violation that resulted in his work injury. Macks' subsequent petition for reconsideration, raising the same arguments he now makes on appeal, was denied by Order dated March 10, 2014.

On appeal, Macks first argues the evidence compels a finding he is permanently totally disabled. As the claimant in a workers' compensation proceeding, he bore the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

As the ALJ correctly noted, an employee is permanently totally disabled when he has a permanent disability rating and has a complete and permanent inability

to perform any type of work as a result of the injury. KRS 342.0011(11)(c). In making a determination of total disability, the ALJ must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood he can resume some type of work under normal employment conditions. Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). After accepting Macks is unable return to work as a pilot, the ALJ also noted his relatively advanced age and his physical discomfort which necessitates the ability to lie down during the day. However, the ALJ was more persuaded by other factors. He found Macks to be a confident and intelligent man with a long and dedicated work history. As substantiated by Ms. Jernigan's report, Macks has many transferable skills and would qualify for work as a flight instructor or simulator operator. Furthermore, the ALJ noted the level of physical activity Macks maintains between his farm work and his personal exercise regimen. The ALJ concluded these factors outweighed any disadvantage Macks might have in obtaining work due to his age and physical restrictions.

The ALJ applied the correct standard and considered the Watson factors in determining the extent of Macks' disability. While Macks has pointed to some evidence

which might support a different result, it does not compel a finding of permanent total disability. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, the ALJ properly exercised the wide discretion afforded him in granting or denying an award of permanent total disability. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006).

Macks next argues the ALJ erred in relying on the 10% impairment rating assessed by Drs. Slobodian and Wolff because they are not in conformity with the AMA Guides. We agree that the report of Dr. Wolff does not sufficiently establish that his impairment rating was assessed pursuant to the AMA Guides. For this reason, it cannot be considered substantial evidence supporting the award.

However, Dr. Slobodian did assess his impairment rating pursuant to the AMA Guides. Nonetheless, Macks argues Dr. Slobodian's rating is not substantial evidence because his report does not indicate why he employed the range of motion ("ROM") method over the diagnosis related ("DRE") method. As the ALJ noted in the Order on Reconsideration, Dr. Slobodian diagnosed multilevel disc involvement. According to the AMA Guides, the ROM method is used to evaluate individuals with more than one level of

injury in the same spinal region. As such, the ALJ was well within his authority to rely on Dr. Slobodian's rating.

Finally, Macks argues he sufficiently proved a safety violation entitling him to enhancement of his award. He contends his testimony is uncontradicted that he slipped on stairs encased in ice, and UPS violated safety statutes and regulations by supplying mobile stairs that had been out in the elements for an extended period of time. To support this argument, Macks submitted portions of 29 CFR 1910 which regulate an employer's use of mobile ladder stands.

KRS 342.165(1) provides as follows as it pertains to an alleged safety violation:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally fail to comply with known safety regulations. Apex Min. vs. Blankenship, 918 S.W.2d 225 (Ky. 1996). Application of this provision requires proof of two

elements: evidence of the existence of a violation of a specific safety provision and evidence of an intent to violate that provision. Id.

Macks had the burden to prove entitlement to the application of the 30% penalty. Cabinet for Workforce Development vs. Cummins, 950 S.W.2d 834 (Ky. 1997). Because Macks was unsuccessful on this issue, the question on appeal is whether the evidence compelled a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The specific regulations Macks attempts to rely upon do not appear to be related to the stair system in use at the time of his injury. Rather, they primarily relate to the construction and use of work platforms, ladders and towers. There is no evidence of record to indicate UPS was ever cited for violation of any statute or regulation. We cannot say the ALJ was clearly erroneous in finding no violation of a specific regulation or statute.

Likewise, we cannot say the ALJ was clearly erroneous in concluding there was no obvious and egregious violation of basic safety concepts sufficient to impose the safety violation penalty. Violation of the “general duty” clause set out in KRS 338.031(1)(a) may be grounds for assessment of the safety penalty in the absence of a

specific regulation or statute addressing the matter. Apex Min. vs. Blankenship, supra; Brusman vs. Newport Steel Corp., 17 S.W.3d 514 (Ky. 2000). KRS 338.031(1)(a) requires the employer to furnish the employee a place of employment free from recognized hazards causing or likely to cause death or serious physical harm to the employee.

Here, the ALJ clearly did not believe the condition of the stairs was sufficiently egregious to warrant the imposition of a penalty for violation of KRS 338.301. Mr. Sunak testified there was only light snow on the stairs. Macks' testimony that the stairs were encased in ice is contradicted by Sunak's testimony. The ALJ's determination that the circumstances surrounding Macks' injury were not sufficient to warrant an increase in compensation is not so wholly unreasonable under the evidence that it must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000); Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971) and Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the January 21, 2014 Opinion and Award and the March 10, 2014 Order rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MAT A SLECHTER
2507 BUSH RIDGE DR STE A
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON CHRISTOPHER G NEWELL
10503 TIMBERWOOD CIRCLE STE 213
LOUISVILLE, KY 40223

ADMINISTRATIVE LAW JUDGE:

HON JOHN B. COLEMAN
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601