

OPINION ENTERED: July 12, 2013

CLAIM NO. 201169012

PATTI'S 1880'S SETTLEMENT

PETITIONER

VS.

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

WILLIAM HALE  
and HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER  
AFFIRMING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, and STIVERS, Member.

**ALVEY, Chairman.** Patti's 1880's Settlement ("Patti's") seeks review of the opinion and order rendered March 1, 2013, by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding William H. Hale ("Hale") permanently totally disabled due to a work-related right knee injury he sustained on November 1, 2011. The ALJ awarded Hale

temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits, and referred him for a vocational rehabilitation evaluation. Patti's also seeks review of the March 22, 2013 opinion and order denying its petition for reconsideration.

On appeal, Patti's argues the award of PTD benefits should be reversed based upon the totality of the evidence. Because the ALJ's determination is in accordance with Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) and is supported by substantial evidence, we affirm.

Hale filed a Form 101 stating he injured his right knee on November 1, 2011 while operating a bucket lift. He explained, "when I let off the control to stop the boom from moving, the cage swung around instead. My boot caught on the cage, causing me to twist and injure my knee." At the time of the accident Hale was working as a groundskeeper, which required him to lift, push, pull, stand, stoop, walk, climb and use his hands. Hale also alleged Patti's committed a safety violation pursuant to KRS 342.165.

Hale testified by deposition on January 9, 2013, and at the final hearing held February 27, 2013. Hale was born on October 13, 1976 and resides in Grand Rivers, Kentucky. Hale completed the tenth grade and earned his

GED. He has no other specialized or vocational training. Hale's work history consists of working as a farm equipment operator, construction framer and brick mason. Hale testified he has always engaged in construction work which began with his uncle during the summers throughout high school.

Hale began working for Patti's in 2005, which is a large restaurant and retail complex, with a garden area. He initially worked in the kitchen, and later worked outside as a groundskeeper. Hale testified he built water towers, laid brick, remodeled and built structures, and performed maintenance work. He operated a dump truck, tractors and a man lift. Hale testified the man lift is a 30,000 pound machine with a 70 foot boom which he operated by standing in a three foot by four foot bucket containing a control panel. The man lift is primarily used to trim trees and hang Christmas lighting. Prior to November 1, 2011, Hale testified he had never experienced or been treated for right knee problems.

Hale testified he operated the man lift on November 1, 2011. He stated as follows regarding how he injured his right knee:

The -- when you let off of the controls moving, like I said, the bucket slings you around. As I was turned, I wear

work boots when I'm at work, it got my laces hooked in the steel mesh that's jugged [sic] up into the bucket. And when it done the jerk thing, it jerked me one way as my foot was hooked in that steel mesh, and it just destroyed my knee. It tore -- it just ravaged the cartilage in my knee. It broke some of it completely off and then it cracked the rest of it all to pieces and left some of it in there.

Hale testified at the time of the accident, he experienced a ripping sensation and pain throughout his kneecap. He notified his supervisor and treated at Grand Lakes Clinic the same day. Hale was then referred to Dr. Brian Kern, an orthopedic surgeon, who ordered an MRI and subsequently performed two surgical procedures. The first surgery was performed on December 27, 2011, which Hale testified worsened his knee condition. Dr. Kern requested another MRI and eventually performed a second surgery on May 4, 2012. Hale testified his right knee condition continued to worsen following the second procedure. Hale currently treats with the Grand Lakes Clinic on a monthly basis where his prescriptions are refilled. He is prescribed pain medication, as well as medication for anxiety and difficulty sleeping. He also indicated he takes over the counter Ibuprofen, uses ice on his knee on a daily basis, and wears a knee brace.

Following his accident, Hale states he was off work on numerous occasions and then released with restrictions. Hale testified he performed light duty work for Patti's until December 22, 2012. The light duty consisted of testing strands of Christmas lights and separating them into boxes. Hale stated he stopped working for Patti's, when no work was available within his restrictions. Hale testified he was "laid off," but was unaware of whether he had been formally terminated. He is receiving unemployment benefits.

At his deposition, Hale testified he did not look for work after December 22, 2012 because "I can't work until the workmen's [sic] comp stuff is taken care of . . . ." He also indicated he is interested in vocational rehabilitation to become a marine or motorcycle mechanic. At the hearing, he testified as follows regarding his ability to work:

Q: And then what happened to your job on December 22<sup>nd</sup> of 2012?

A: They just run out of stuff for me to do, so I was laid off.

Q: Have you worked anywhere since then?

A: No sir.

Q: Is there any of your past work that you believe you could do?

A: No sir, I've always done labor.  
I've always used my body to make money.

. . . .

Q: Now the [FCE] that's been filed in the record says that you can sit up to one-third of a workday and you can stand or walk up to one-third of a workday. Is there any job that you can think of that you're qualified to perform where you would not be required to either stand or walk more than a third of the day?

A: No sir. I've never really done anything to where I could sit down more than twice a day.

At his deposition, Hale testified he experiences constant pain, cannot completely bend or straighten his right knee, and has difficulty with stability. His right kneecap grinds, rattles and clicks. Hale states there is a two inch difference in the size of his legs and he has lost approximately twenty pounds of overall muscle. He can stand for prolonged periods as long as he remains weight-bearing on his left leg, and he is able to walk despite his knee getting agitated. Hale stated he cannot lift more than twenty to twenty-five pounds, has difficulty driving and is careful performing daily activities. At the hearing, Hale confirmed he had lost weight due to inactivity and has a two inch difference in the size of his legs. He also testified as follows regarding his current condition:

A: I'm constantly, constantly in pain. I don't sleep at night. Like I said, I continue to lose mass in that leg because I can't use it. Anything with stairs, it hurts me to ride in a car for more than 30, 45 minutes. There's not a whole lot that I can do. I can't do squatting. I can't remember the last time I even tried to squat for the simple fact that it's excruciating to do. I've had no physical therapy since my second surgery, so I'm really weak compared to what I normally am. And you add that with no sleep and not eating good, you know the whole body has kind of suffered over this injury.

Q: In your deposition, you demonstrated for us how you have a click in your knee.

A: Yes sir.

Q: Do you still have that?

A: Yes sir. . . . My kneecap, yeah. And that's why I think I have most of my pain in my knee is because my knee rattles all the time with every step. And it doesn't feel solid, it feels really, really weak. And if I'm not careful and I transition my body weight to that side, that leg's not strong enough to hold my body weight.

Both Hale and Patti's submitted treatment records of Dr. Kern. On November 28, 2011, Dr. Kern noted the work injury to Hale's right knee and diagnosed a cartilage injury to the medial facet of the patella and a medial plica band causing mechanical-type symptoms. He recommended arthroscopic surgery with debridement and a chondroplasty of the

medial facet of the patella. He also noted the probability of additional procedures in light of a full-thickness cartilage defect of the medial facet of the patella. On December 27, 2011, Dr. Kern performed a right knee arthroplasty with chondroplasty, medial femoral condyle, chondroplasty of medial facet of patella, and removed loose bodies. Hale's right knee condition did not improve following the surgery and physical therapy. On April 5, 2012, following a right knee MRI, Dr. Kern diagnosed a high grade cartilage lesion on the medial side of the patella with bone marrow edema, a cyst and an asymptomatic, stable tear of the medial meniscus with chondral thinning on the medial femoral condyle. The May 4, 2012 operative report indicates Dr. Kern performed a right patellofemoral replacement procedure.

In the follow-up notes subsequent to the second procedure, Dr. Kern noted Hale reports he is doing well and is overall much better than he was preoperatively. Dr. Kern also noted continued complaints of pain, swelling and joint effusion. Dr. Kern aspirated Hale's right knee on two occasions. He restricted Hale from standing for extended periods of time, squatting or kneeling, working on uneven or sloping terrain, and lifting greater than twenty pounds. In a note dated December 7, 2012, Dr. Kern noted Hale had

diminished right quad and hamstring strength, and an antalgic gait with decreased weight-bearing and stance time on the right. Hale had a right knee extension of negative two degrees and flexion of one hundred and twenty degrees, and atrophy was also present. Dr. Kern assigned a 10% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition.

Patti's filed the November 13, 2012 functional capacity evaluation ("FCE") report prepared by Lois Dolan, P.T., of Hampton Physical Therapy. Ms. Dolan noted Hale was a groundskeeper for Patti's at the time he injured his right knee and estimated the physical demand level was "very heavy." She also reviewed the restrictions imposed by Dr. Kern and administered several tests. Ms. Dolan concluded the following:

Based on his abilities that he exhibited here on the test date, he does not fit the category of worker of his position of groundskeeper. That position requires that he would be in the very heavy category. His current abilities place him in the medium category. He is currently working in that job under restrictions. Although he is working full time, he is limited in his squatting, kneeling, crawling, and climbing abilities due to pain and decreased strength of his R knee. Based on the FCE results, it does not appear

that he meets the qualifications to work at a very heavy level.

Ms. Dolan noted Hale is able to sit, stand, walk, bend, reach and climb occasionally, up to thirty-three percent of a day. She noted Hale could occasionally torso lift up to fifty-five pounds, leg lift up to fifteen pounds, 12" lift up to twenty-five pounds, shoulder and overhead lift up to thirty pounds and carry up to twenty-five pounds. She restricted Hale from squatting, kneeling, crawling and very minimal climbing.

Patti's filed the August 8, 2012 Kentucky OSHA report. Its investigation of the man lift upon which Hale injured his right knee resulted in no citations.

Rick Hamilton ("Hamilton") testified by deposition on February 15, 2013. Hamilton has been employed by Patti's as a garden manager for thirteen years and he testified Hale worked on his crew for approximately three years. Hamilton confirmed a man lift is primarily used to maintain tree limbs and install Christmas lights. The majority of Hamilton's testimony pertains to an alleged safety violation in using the man lift, which is not relevant to this appeal.

Hamilton testified he was not physically present at the time of the November 1, 2011 incident. However, he noticed Hale was limping. He reassigned Hale to keep him

from using the man lift a couple of days after he was informed Hale's knee was bothering him. Hamilton subsequently allowed Hale to return to the man lift. Hamilton testified Hale later approached him and told him his knee was hurting and needed to have it checked out. The "Employee Accident Information" was introduced as an exhibit to Hamilton's testimony which indicated Hale was injured on November 1, 2011 in the following manner:

Works in lift- knee hurting- lift  
jostles knee joint sent to clinic. He  
wants x-ray to find problem with knee  
Felt like tear under kneecap

The February 13, 2013 Benefit Review Conference order and memorandum noted the parties stipulated TTD benefits were paid at a rate of 248.46 per week from November 11, 2011 through November 30, 2011; December 27, 2011 through January 10, 2012; and May 4, 2012 through September 9, 2012. Medical benefits totaling \$40,422.87 were also paid. The parties also stipulated Hale sustained a work-related injury on November 1, 2011 of which Patti's received due and timely notice, and he last worked on December 22, 2012. Benefits per KRS 342.730, KRS 342.165 violation, vocational rehabilitation and permanent total disability were identified as contested issues.

The ALJ found as follows in his March 1, 2013 opinion and order:

**A. Benefits per KRS 342.730 and permanent total disability.**

I saw and heard the plaintiff Mr. Hale testify at the hearing. He was a credible and convincing witness. Based upon the totality of the evidence in the record, including the plaintiff's testimony and the persuasive medical reports from Dr. Kern, I make the factual determination that Mr. Hale will sustain a 10% permanent whole person impairment under the AMA Guides, Fifth Edition, as a result of his work injury on November 1, 2011.

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).

"'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).

In the present case, I considered the severity of the plaintiff's work injury, his age, his work history and the specific medical evidence from Dr. Kern regarding the plaintiff's permanent impairment and occupational disability. Based on all of those factors, I make the factual determination that Mr. Hale cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

The ALJ also referred Hale for a vocational evaluation in accordance with KRS 342.710 and declined to assess a penalty against Patti's for a safety violation pursuant to KRS 342.165(1). The ALJ awarded TTD benefits for the stipulated

periods already paid, PTD benefits, and medical benefits, and referred him for a vocational evaluation.

Patti's filed a petition for reconsideration requesting the ALJ "to identify those specific factual findings and determinations which he believes warrant a finding of permanent total disability." It also requested the ALJ reconsider his finding of permanent total disability since the record demonstrates Hale remains capable of returning to work under normal employment conditions. Therefore, Hale should be limited to a permanent partial disability award as a matter of law. The ALJ stated as follows in the March 22, 2013 opinion and order on reconsideration overruling and denying Patti's petition:

2. In Ford Furniture Company v. Claywell, 473 S.W.2d 821 (Ky.1971), Kentucky's highest court held that KRS 342.281 limits the reviewing court to the correction of errors patently appearing on the face of the award, order or decision. The defendant's Petition for Reconsideration is an improper attempt to reargue the case.

3. In rendering a decision, KRS 342.285 grants the ALJ 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). 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, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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 or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, whether on reopening or at the time of an original proceeding, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976).

4. As the Supreme Court of the United States stated in Watts v. Indiana, 338 U.S. 49 (1949), there comes a point where a Court should not be ignorant as judges of what we know as men. That principle certainly applies in the case at bar.

5. The Opinion and Order rendered on March 1, 2013 in this case covers the pertinent parts of the evidence from Dr. Kern, the treating orthopedic surgeon. The plaintiff testified that he has an atrophy in his right lower extremity, that he is in constant pain and has difficulty sleeping at night, that he has difficulty climbing stairs, and that he has difficulty sitting in a car for more than 30-45 minutes. His work

history consists entirely of manual labor. I saw and heard the plaintiff testify at the hearing and found him to be a very credible and convincing witness. His testimony was completely consistent with the evidence from his treating orthopedic surgeon, Dr. Kern. Based on the totality of the evidence in this case, and specifically relying upon the persuasive and credible evidence from the plaintiff and from Dr. Kern, I made the factual determination that Mr. Hale is permanently and totally disabled. In so doing, I relied upon the legal authorities cited in the Opinion and Order dated March 1, 2013. That Opinion and Order is hereby reaffirmed.

On appeal, Patti's argues the ALJ erred in finding Hale permanently totally disabled because this finding is not supported by the totality of the evidence. Patti's points to the fact Hale is only thirty-six years of age and his testimony reflects his interest in vocational training as a marine or motorcycle mechanic, both physically demanding jobs. It also asserts at the time of the opinion, Hale was still employed by Patti's, although temporarily on leave, and was receiving unemployment benefits, which are only payable to those capable of working in some capacity. It notes Hale has not applied for Social Security disability benefits.

Patti's also asserts following the May 2012 procedure, Dr. Kern's medical records indicate gradual

improvement in Hale's right knee condition. It asserts Dr. Kern assigned minimal restrictions and did not state Hale's ability to return to gainful employment had been seriously compromised. Patti's also points to the FCE test results and the conclusion Hale retains the ability to work at the medium physical demand level.

Patti's requests the Board reverse the ALJ's award of PTD benefits and direct him to limit Hale's recovery to a permanent partial disability award since the totality of the evidence "overwhelming[sic] demonstrated that Hale's right knee injury condition has not left Hale physical incapable of any gainful employment whatsoever."

Hale, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including the extent of his occupational disability. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Hale was successful, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "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).

The crux of this appeal concerns whether the ALJ's determination of PTD 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).

The function of the Board in reviewing an ALJ's decision is limited to determining 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, supra. 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 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).

In support of its argument the ALJ erred by awarding PTD benefits, Patti's merely points to evidence which could have produced a contrary result. This is an insufficient basis for setting aside the ALJ's determination. After reviewing the evidence of record, the ALJ's determination Hale 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 Hale's age, education and past work experience, in conjunction with his post-injury physical status, along with Dr. Kern's treatment records,

the ALJ was persuaded due to the effects of the work-related injury, he is totally disabled. While Patti's points to conflicting evidence, the ALJ's determination is sufficiently supported by the record. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb his decision on appeal. See KRS 342.285; Special Fund v. Francis, supra. For that reason, we cannot say the outcome arrived at by the ALJ finding Hale entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed.

We emphasize Hale's testimony regarding his post-injury ability to work and his level of pain is substantial evidence, as an injured worker's credible testimony is probative of his ability to labor post-injury. See Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); See also Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). Hale testified extensively regarding the residual effects of his right knee condition. He also testified regarding the physical requirements of his previous employment. He stated he could not perform any of his prior jobs and is not qualified for positions requiring him to either stand or walk more than a third of a day. This testimony, standing alone or in concert with Dr. Kern's restrictions,

constitutes substantial evidence supporting the ALJ's determination Hale is permanently totally disabled.

Hale filed a "Renewed Motion to Continue Award Pending Appeal" on May 1, 2013, to which Patti's responded on May 9, 2013. Although this argument would be moot absent further appeal, we determine Hale has satisfied the requirements of the statute and the applicable administrative regulation. Accordingly, having reviewed Hale's renewed motion and Patti's response and taking into account our holding in this opinion, **IT IS HEREBY ORDERED** Hale's Renewed Motion to Continue Award Pending Appeal" is **GRANTED**. Patti's is directed to commence payment of PTD benefits and medical benefits until it has executed a *supersedeas* bond for appeal to the Court of Appeals.

Accordingly, the decision rendered March 1, 2013 and the order on reconsideration issued March 22, 2013 by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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MICHAEL W. ALVEY, CHAIRMAN  
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