OPINION ENTERED: July 3, 2013

CLAIM NO. 201088979

PHOENIX TRANSPORTATION PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

AARON HINTON
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Phoenix Transportation ("Phoenix") appeals from the December 18, 2012, opinion, award, and order in favor of Aaron Hinton (“Hinton”), and the January 17, 2013, "Order on Reconsideration Referral for Vocational Rehabilitation" of Hon. Douglas Gott, Administrative Law Judge ("ALJ"). Phoenix also appeals from the February 21, 2013, order ruling on its petition for reconsideration.

In the December 18, 2012, opinion, award, and order, the ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. Hinton filed a petition for reconsideration asserting the ALJ erred by denying his request for vocational rehabilitation benefits "on the grounds that no request for the same had been made." Hinton pointed out the issue of vocational rehabilitation benefits was added as a contested issue to the September 6, 2012, benefit review conference ("BRC") order by order entered October 17, 2012.

In the January 17, 2013, "Order on Reconsideration Referral for Vocational Rehabilitation," the ALJ acknowledged the error in the December 18, 2012, opinion, award, and order in which he stated entitlement to vocational rehabilitation had not been preserved as an issue. The ALJ then determined as follows:

> The ALJ finds that the loss of function, strength, and dexterity in Plaintiff's left hand leaves him unable to perform full-time mechanic's work, which is the only type of work he did before his work injury. He shall be awarded vocational rehabilitation.

On February 4, 2013, Phoenix filed a petition for reconsideration, asserting as follows:

> The Plaintiff has a high school education along with a [sic] an ASE certification, training in automatic transmissions and axles, OBD-2 electronics and wiring training, and a Class A Commercial Driver's License which lapsed in this past year. Prior to his injury, he was employed as a shift supervisor and a diesel mechanic. Following his injury, he was employed as a service advisor, however, he quit because he wanted to move higher up in the company. When determining whether the Plaintiff is entitled to vocational rehabilitation, the ALJ must look at prior education, training and experience to perform suitable employment, earning similar wages.
>
> Based on the above, the Defendant asserts that the Plaintiff is currently able to perform work for which he has the education, previous training and previous experience. This is evidenced by his high school education, multiple certifications and post-injury employment. For these reasons, the Defendant respectfully requests that the ALJ reconsider his prior finding in light of this evidence, and reconsider his conclusion concerning the award of vocational rehabilitation. Failing this, Defendant requests that the ALJ issue additional findings of fact regarding his award of vocational rehabilitation. The Defendant further requests that the ALJ indicate whether any inferences were drawn from the facts, or whether his decision was based on the evidence in the record.

Phoenix's petition for reconsideration was overruled by order dated February 21, 2013.

On appeal, Phoenix makes the same arguments it made in its petition for reconsideration.

The Form 101, filed May 3, 2012, indicates Hinton injured his left forearm and left hand on May 11, 2010, in the following manner:

> Plaintiff was using a ball peen hammer to loosen a universal joint when the head of the hammer shattered and a large metal chip entered Plaintiff's left forearm, severing muscles and tendons which operate the left hand.

The Form 101 further indicates Hinton underwent surgery to remove a metal chip from his left forearm, and another surgery in an attempt to “restore function to the left arm and hand."

The Form 104, attached to the Form 101, indicates at the time he filed the Form 101, Hinton was employed by Bluegrass International as a service advisor. At Phoenix and at every job preceding Phoenix, Hinton lists "mechanic" as his occupation.

The entitlement to vocational rehabilitation benefits is governed by KRS 342.710(3) which states, in relevant part, as follows:

> When as a result of the injury he is unable to perform work for which he has previous training and experience, he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be

> reasonably necessary to restore him to suitable employment. In all such instances, the administrative law judge shall inquire whether such services have been voluntarily offered and accepted. The administrative law judge on his own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, **may** refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him fit for a remunerative occupation. Upon receipt of such report, the administrative law judge **may** order that the services and treatment recommended in the report, or such other rehabilitation treatment or service likely to return the employee to suitable, gainful employment, be provided at the expense of the employer or his insurance carrier. Vocational rehabilitation training, treatment, or service shall not extend for a period of more than fifty-two (52) weeks….

(emphasis added.)

Use of the word "may" in KRS 342.710(3) indicates the issue of vocational rehabilitation benefits is entirely within the discretion of the ALJ. Alexander v. S & M Motors, Inc., 28 S.W.3d 303 (Ky. 2000).

As articulated by the Court of Appeals in Wilson v. SKW Alloys, Inc., 893 S.W.2d 800, 802 (Ky. App. 1995), "workers' compensation statutes will be liberally construed to effect their humane and beneficent purposes." The Court of Appeals continued by stating the following:

> KRS 342.710(1) states that "[o]ne of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment." Further, KRS 342.710(3) provides that the gainful employment to which the injured employee that is eligible for rehabilitation is to be restored must be **suitable employment**. Clearly, a purpose of workers' compensation legislation is to restore the injured worker as soon as possible and as near as possible to a condition of self-support as an able-bodied worker.
>
> Workers' Compensation was developed not just to compensate a worker who has been injured on the job, but also to enable the worker to reenter the job market and become employed again in a position as near as possible in pay and status to the one the claimant has been forced by injury to leave. [citations omitted.]

Id. (emphasis added.)

The Court of Appeals provided insight into what comprises "suitable employment," stating as follows:

> In light of the spirit and purpose of the workers' compensation statutes, we hold that "work for which an [employee] has previous training or experience" must be suitable employment. By "suitable employment" we mean work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors both at the time of the injury and

> after reaching his post-injury maximum level of medical improvement.

Id.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). As Hinton was the party with the burden of proof and was successful before the ALJ, the sole issue on appeal is whether the ALJ's decision to award vocational rehabilitation benefits is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974).

Hinton’s July 9, 2012, deposition was introduced. He testified he has a GED and "various ASE training certifications" through his work as a mechanic. These include automatic transmission certification, trans-axle

certification, Cummins certification, OBDB electronics and wiring certification, and Bendix and Meritor brake and suspension certifications. Hinton previously had a CDL but let it lapse. His dominant hand is his left hand.

At the time of his deposition, Hinton was working at Bluegrass International in a "service advisory" position in which he teaches and assists instead of performing hands-on work.

At the time of the injury, Hinton had been promoted to a supervisory position at Phoenix supervising the work of five mechanics. He also performed mechanic work on trucks. Hinton described the physical work he was performing at Phoenix at the time of the injury:

> Q: In terms of physically, were you on your feet the majority of the time?
>
> A: Yes.
>
> Q: And then what about your lifting, was there lots of, I guess, forklifts and lifts for these trucks when you're working on the engines?
>
> A: A lot of it is manual. There is some- there are parts of the engines that weigh well in excess of a thousand pounds that have to- things have to be operated by a lift, but other things are, you know, considerable lighter.
> Q: I guess on a daily basis, what are some of the lighters things that you would lift manually rather than using machinery?

> A: Oh, you'd lift wheels and tires, brake drums, brake shoes, drive shafts.
>
> Q: So I guess if you had to estimate it, how much do you think wheels weighed?
>
> A: A wheel and tire will weigh- what did I say earlier, 240-ish? They're pretty heavy, 200 pounds.
>
> Q: And would it be mostly, I guess, like rolling the wheel or would you have to-
>
> A: You have to lift them to actually get them up on the studs, get them on and off. You mount and dismount tires by hand, which is no easy task. Brake drums, you take them on and off by hand. Somewhere between 75 and 100 pounds, depending on which drum, off which position in the truck.
>
> Q: About how much would you say?
>
> A: 75 to 100.

After the injury and surgery to remove the chip, Hinton was off work for approximately a month. When he returned to Phoenix, he "sat in the office without any kind of task at all."

Hinton characterized his job at Bluegrass International as follows:

> A: I have a desk job, basically. I write up all of the vehicles as they come into our shop, determine what's wrong with them, hand out the work as needed to the technicians.

> Q: Do you run diagnostics and just go through-
>
> A: Yeah. Mostly computers. It's all computer related.
>
> Q: And are you doing any kind of actual physical work on any of the cars?
>
> A: No, sir.

Hinton testified he has pain when he performs a lot of "personal life things," such as operating a weed-eater in his yard. Regarding the pain he currently experiences, Hinton testified:

> A: The more use of my left hand, the more pain that I will go through.
>
> Q: So I guess it's not really constant. It comes on with overuse maybe?
>
> A: It comes on with about [sic] any use, really. I wouldn't use the word 'over.'
>
> Q: Now, specifically, where is it you feel pain?
>
> A: From the top of my hand, if you were to draw a circle from my middle finger down to my thumb, and the top of my forearm.

Hinton testified he experiences other sensory deficits in his left arm:

> A: Numbness, tingling. With us, you can- I can even cut myself and not even know that I cut myself with it's in its prime.

> Q: And just state specifically what areas of the left upper extremity are numb or tingling from time to time.
>
> A: My- from the thumb to the elbow, down the forearm, top of the hand from the middle finger down to the thumb.
>
> Q: And you're indicating kind of a crescent from your middle finger down to the bottom of the thumb?
>
> A: Yes. That whole area in there is iffy.
>
> Q: How often do you have pain or numbness or tingling in the portions of your left arm that you just described?
>
> A: Daily.
>
> Q: Then does the level of pain or numbness or tingling depend upon the level of activity?
>
> A: Yes, directly.

Concerning how the loss of dexterity in his left hand affects his ability to perform mechanical work, Hinton testified:

> A: The loss of the dexterity of my fingers, of course, for small minor movements of, you know, putting things together and taking them apart; the use of my left-hand in general for pushing and pulling on wrenches, using a screwdriver to grip and turn, which is next to impossible; the hammer, use of a hammer in my left hand. The vibration is what causes the majority of the problem from it. Sure it's the impact to do with the grip, too.

> Q: Do you have loss of sensation or loss of grip in your left hand, meaning, you know, when you drop something, you find it hard to do a task by feel?
>
> A: Yes.
>
> Q: Okay. Explain that.
>
> A: There's [sic] times that I'll think I'll have a good grip on something and holding on to it and actually drop it on the floor.

Hinton did not believe he retained the ability to return to the type of work he was performing at the time of the injury testifying as follows:

> Q: I want to talk about whether you've lost the physical abilities to do the work that you did at the time of the injury. And in your own personal assessment of yourself, do you believe you retain the physical ability to do the work at the time of the injury?
>
> A: No.
>
> Q: I want you to be as specific as you can about why you give that answer.
>
> A: Lifting, pulling, I've lost the ability to do that multiple times in a row. With use, the longer I use my hand to do all of the things that I used to do, tightening, loosening bolts, using wrenches, screwdrivers, things as before, I've lost the ability to do that multiple times in a row. By the third time, I may not even be able to do it again. The pain that's associated with it when I try to work, you know, for myself alone is so bad I couldn't imagine doing it for production.

Q: All right. I want you to talk about using power tools and whether you have problems using power tools, and then we'll talk about hand tools.

A: I do have problems using power tools. The tools that vibrate more than others cause me a lot more pain, and I can only use them for shorter amounts of time than like hand tools that don't vibrate much. Hand tools, according to- I mean, it's just how much you use them. You know, there's- semis are large. There's lots of really heavy torques and bolts, things that are extremely tight, you have to break loose by hand, and I just don't have the grip or the ability to really do that any more.

Q: So what amount of strength would you be exerting to break loose a really tough bolt using a hand tool?

A: Using a hand tool on a semi?

Q: Uh-huh.

A: 90 percent of the time it's about everything you've got, both hands and your entire body against it. I mean, some of the bots [sic] are well over an inch.

Q: Inch in diameter?

A: Yes.

Q: So in the hand tool area, what- how do you get leverage on these larger parts to use them?

A: By getting them out in your fingers. You know, and getting your whole body against it, where you pivot at the wrist and pull at the same time.

Q: You mentioned to me using a socket wrench that might be as long as three feet in length?

A: I mean, you can use a torque wrench- torque wrenches on some of your engine stuff and drive train stuff, I mean, they can be a couple of feet long. The wrench itself can weigh 30 to 40 pounds.

Q: Now, I think some of the questions asked on direct, you talked about lifting tires and wheels that might weigh up to a couple hundred pounds?

A: Yes.

Q: What about brake drums?

A: Brake drums, same thing, up to a hundred pounds.

Q: What about all of the heavy parts?

A: All the other heavy parts, if you're to do a transmission job, transmission would weigh- you know, you're a jack, but you're in really confined spaces, all upper body strength, you know, for pulling a transmission that would probably weigh somewhere in the vicinity of 1,000 pounds.

Q: Obviously you're not lifting that by yourself?

A: No, but the clutch- it's on a jack and it's hard enough to handle on the jack by yourself. Then the clutch and pressure plate, you know, probably 150 pounds, and they are lifted in manually.

Q: So you don't have the strength in your left arm to do that kind of manual work anymore?

> A: No. Nor do I have the grip to be able to hold onto things.

In the September 6, 2012, BRC order, “hearing” is struck out and a notation reflects Hinton’s deposition would be taken on September 25, 2012.

Hinton was deposed again on September 25, 2012. He reiterated that he was working as a diesel mechanic at the time of the May 11, 2010, injury. Regarding the tasks of a diesel mechanic he testified as follows:

> ...Everything that you do is with your hands, use all types of wrenches, sockets, rachets, air tools- a lot of air tools, pry bars, all that sort of thing. It is the heaviest end of probably the mechanical field that you can do as far as strength and body.

Regarding his ability to perform the type of work he was performing at the time of the injury, Hinton testified:

> Q: So with- with regard to this particular job, do you feel like you have lost the physical ability to do the work that you did at the time you were injured?
>
> A: Yes.
>
> Q: And I want you to explain why you feel that way, illustrating the very thing you were doing at the time you got hurt. Do you feel like you have the physical ability to go back and take a hammer and- and beat-
>
> A: No.

Q: -on auto parts that's-

A: No. No, it's-

Q: -stubbornly-

A: -my grip- my grip strength and the- the confidence in my grip of what I have to do something like that would either get myself or somebody else hurt because I- I wouldn't be able to hold onto a tool unless it was in my right hand. You know, constant use of hand tools- you know, mechanics is [sic] all about you do use your head, but you can use your head all day long and if you can't use your hands to complete the job you- you- you can't be a mechanic at- so that's basically about it. No, I- I probably can't do that at all now.

Q: How long do you think you could physically tolerate doing exactly what you were doing on the day you got hurt?

A: I can- I can make it about- I have attempted it. I can make it about an hour to two.

Q: Can you do it eight hours a day, five days a week as we sit here?

A: No, sir.

At the time of the September 25, 2012, deposition, Hinton was no longer employed at Bluegrass International. He explained as follows:

Q: Where did you go to work after-

A: Blue- Bluegrass International.

Q: And what were you attempting to do there?

> A: Well, the service advisor position-
>
> Q: -to do the duration?
>
> A: down there that's- it just- it didn't work out. It just wasn't- it's the whole- it's just the whole just didn't work out for me all the way around the block.
>
> Q: Did- did it require- did that job require certain skills that you did not have?
>
> A: Some of the computer skills and stuff that was required, yes, I- I did not- some of the stuff I had never really done before for what they that would require some more extensive training, I guess, to be into, you know, and then to go into the field that I'd actually want to go and be hired up the scale and then wouldn't even know- you know, that was- and- and, you know, it takes a degree pretty much to get any farther than just being at the parts counter or somewhere else.

Hinton reiterated his only training involves certifications as a mechanic. However, after his injury, when he returned to Phoenix, Hinton was trained to input numbers in an Excel spreadsheet and to take calls from truck drivers who were broken down.

Dr. Timothy C. Wilson’s September 7, 2012, medical report was introduced in which he assessed a 7% whole person impairment rating, and the following restrictions:

> I would agree that Mr. Hinton gave a consistent and [sic] effort on his FCE. He should be able to do a heavy physical demand category, occasionally lift 100 pounds, frequent 50 pounds, constant 20 pounds. However, I would agree with the findings of the FCE that he should have no constant gripping with his left hand, no constant fine manipulation with the left hand, no high-speed assembly with the left hand, no constant or frequent hammering with the left hand, and no heavy laboratory or heavy torque-power tools with the left hand. Therefore, he would most likely not be able to return to the position of diesel service technician because of his inability to manipulate small objects with the left hand and his inability to grip using his left hand. These were the findings of the functional capacity evaluation performed at [illegible] Works, and I agree with these findings based on my exam.

David Kazee's, P.T., CHT ("Kazee") May 1, 2012, functional capacity examination ("FCE") report was introduced in which he opined as follows:

> He [Hinton] most likely can not return to the position of a diesel service technician on a constant basis. This is due to inability to manipulate small objects with right hand [sic] hand and his inability to grip in a frequent manner.

The above-cited evidence comprises substantial evidence in support of the ALJ's determination to award vocational rehabilitation benefits. The issue of vocational rehabilitation benefits is entirely within the discretion

of the ALJ. Alexander v. S & M Motors, Inc., supra. The ALJ determined Hinton's "loss of function, strength, and dexterity" in his left hand has caused him to be unable to perform full-time mechanic's work, *the work Hinton was performing at the time of the injury* and, as the ALJ has stated, "the only type of work he did before his work injury." Despite Phoenix's arguments regarding Hinton's post-injury employment at Bluegrass International negating any entitlement to vocational rehabilitation benefits, the ALJ has the discretion to make a determination as to Hinton's entitlement to vocational rehabilitation benefits based solely on his current ability to perform work as a mechanic. The ALJ determined Hinton is unable to work as a mechanic which is consistent with Hinton's testimony. The ALJ may solely rely upon Hinton’s testimony in determining whether he is entitled to vocational rehabilitation. In addition, Dr. Wilson's opinions, and Kazee’s FCE report support the ALJ’s decision on this issue. The ALJ's determination is consistent with tenets of Wilson v. SKW Alloys, supra, set out above, and it will not be disturbed.

Accordingly, the December 18, 2012, opinion, award, and order, the January 17, 2013, "Order on Reconsideration Referral for Vocational Rehabilitation,"

and the February 21, 2013, order ruling on the petition for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

COUNSEL FOR PETITIONER:

HON WHITNEY L MOBLEY
HON KAMP T PURDY
300 EAST MAIN ST STE 400
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON NEIL E DUNCLIFFE
107 N HAMILTON ST
GEORGETOWN KY 40324

ADMINISTRATIVE LAW JUDGE:

HON DOUGLAS W GOTT
400 E MAIN ST STE 300
BOWLING GREEN KY 42101