OPINION ENTERED: April 19, 2013

CLAIM NO. 201098670

RENT-A-CENTER PETITIONER

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

RYAN T. MONTGOMERY
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. Rent-A-Center seeks review of the opinion, order and award rendered December 18, 2012 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Ryan T. Montgomery ("Montgomery") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits and medical benefits. Rent-A-Center also

appeals from the January 11, 2013 order denying its petition for reconsideration.

On appeal, Rent-A-Center argues the ALJ's orders do not set forth sufficient findings of fact supporting the award of PTD benefits, and must be remanded for further findings. Specifically, Rent-A-Center argues as follows:

> While it is true that the employer does not believe that Montgomery is permanently totally disabled as a result of the slip and fall and subsequent to a single level lumbar discectomy, this is a claim wherein the treating doctors' records were either not considered or completely overlooked. This is not a claim of competing IME reports; this is a claim where the claimant's subjective complaints are non-physiologic, not work-related and possibly fictitious as evidenced by the treatment records of a variety of specialists with the Lexington Clinic.

In his reply brief, Montgomery argues the ALJ noted he considered the Lexington Clinic records filed by both parties. He also argues the following:

> The Opinion does not summarize the Lexington Clinic records or recite in detail the other medical reports or Plaintiff's testimony. However, it does specify which evidence the ALJ found credible and persuasive: that of the plaintiff and that of Dr. Burke.

Because the ALJ provides a *de minimus* analysis for the basis of his opinion, we affirm.

Montgomery began working for Rent-A-Center on December 31, 2009. He filed a Form 101 on July 16, 2012 alleging he injured his back on January 12, 2010 when he slipped and fell on ice in the parking lot.

Montgomery testified by deposition on September 9, 2012, and at the hearing held December 12, 2012. Montgomery was born on December 4, 1987, and is a high school graduate with no vocational training. He is a resident of Nicholasville, Kentucky.

Montgomery had worked only a few weeks at Rent-A-Center as an account representative at the time of the accident. As an account representative, he arranged deliveries of furniture and appliances purchased from Rent-A-Center. Montgomery's past work included work as a telephone sales representative, server in a restaurant, machine operator, receiving clerk, pharmacy technician, and grocery bagger.

On January 12, 2010, Montgomery had loaded a truck for delivery, and as he attempted to obtain tools from the cab of a truck, he slipped and fell onto his back. Subsequent treatment included physical therapy, injections, medication, and surgery. Montgomery stated he continues to experience constant low back and leg pain. He indicated he lies down two to three times per day to relieve his pain.

He continues to take medication consisting of Gabapentin and Tylenol 3. Surgery was performed by Dr. Leon Ravvin, which Montgomery stated provided no relief. He has tremors in his right leg, uses a cane to assist with walking short distances, and a wheelchair when traveling any long distances. He indicated he has difficulty keeping his balance while walking, and finds it easier to walk backward. He stated he desires to have additional surgery proposed by Dr. Ravvin. Montgomery has not returned to work since the accident, and indicated he is unable to do so.

In support of the Form 101, Montgomery filed the February 22, 2010 record from the Lexington Clinic indicating increased low back and right leg pain due to the work injury. Montgomery was diagnosed with a herniated disk at L4-L5 with right foraminal narrowing, herniated disk at L5-S1, low back pain, and right leg pain.

Montgomery filed additional records from the Lexington Clinic, primarily from Dr. Ravvin, for treatment received from February 2, 2010 through September 21, 2011. Dr. Ravvin performed surgery on June 22, 2012 consisting of a laminotomy and discectomy at L4-5 for a herniated right and central disk. On September 21, 2011, Dr. Ravvin noted Montgomery was status post right L4-5 discectomy, and had

right lower extremity tremors, along with chronic low back and leg pain. He recommended no additional surgery, but noted the pain required use of a wheelchair. Additional records through July 12, 2012 noted Montgomery's inability to work, and complaints of constant, stabbing pain radiating into the right leg. Those records reflect Montgomery later developed pain into the left leg.

Montgomery filed MRI reports from Nicholasville Road MRI. The MRI dated November 26, 2010 of the thoracic spine stated Montgomery has a cyst in his right kidney, and noted anterior spurring in the thoracic region. The lumbar MRI dated August 3, 2012 revealed post-operative degenerative changes at L5-S1, with a broad-based disc bulge asymmetric to the right.

Dr. Frank Burke, an orthopedic surgeon, evaluated Montgomery on January 6, 2012. Dr. Burke noted Montgomery sustained a herniated disc with radiculopathy on the right at L4-5 due to the work accident resulting in failed back syndrome. Dr. Burke noted Montgomery had additionally developed a post-injury movement disorder resulting in gross station and gait abnormality. Dr. Burke assessed a 35% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He noted

Montgomery is incapable of working, and did not believe vocational rehabilitation would be beneficial. In a subsequent note dated August 16, 2012, Dr. Burke noted he had reviewed the August 3, 2012 lumbar MRI which confirmed degenerative changes at L4-5 and L5-S1. He opined Montgomery has a 13% impairment rating for the lumbar, not cervical spine, pursuant to the AMA Guides.

Montgomery also filed the August 15, 2012 note from Cardinal Hill Rehabilitation Hospital which included a request for a wheelchair.

Rent-A-Center filed records from the Lexington Clinic for treatment provided to Montgomery in 2000, 2001 and 2007. The records from February and March 2000 reflect treatment for left thigh muscle spasm and low back pain due to lifting weights. In April 2001, Montgomery treated for a lumbar strain. From April 6, 2007 through April 20, 2007, Montgomery treated for mid and low back pain due to lifting at work.

Dr. Robert Sexton, a neurosurgeon, testified by deposition on October 22, 2012. He evaluated Montgomery on June 5, 2012. He noted the history of the January 12, 2010 injury, and the surgery performed on June 22, 2012. He noted Montgomery advised he had received a “terrible” result from the surgery. Dr. Sexton noted Montgomery is

prevented from working due to an oscillating tremor in the right leg, interfering with standing, coordination, and balance, for which there is no physiologic basis.

Dr. Sexton diagnosed status post discectomy at L4-5 due to the herniated disk. He opined Montgomery does not require the use of a cane or wheelchair. He assessed a 10% impairment rating pursuant to the AMA Guides. Dr. Sexton recommended Montgomery lose 20% of his body weight, and avoid running, jumping, repetitive twisting at the waist, and lifting over fifty pounds. He noted the August 3, 2012 MRI demonstrated degenerative changes consistent with the surgery, but no herniated disk. He noted the degenerative changes at L5-S1 were not caused by the work injury. He disagreed with the 13% impairment rating assessed by Dr. Burke, and stated if Montgomery has deep vein thrombosis, it is not due to his work injury.

Montgomery also filed the October 24, 2012 vocational report prepared by Dr. Ralph Crystal. Dr. Crystal noted Montgomery is not permanently and completely unable to work due to the injury. He noted Montgomery has no loss of earning capacity.

A benefit review conference ("BRC") was held on December 5, 2012. In the BRC order and memorandum, the parties agreed the contested issues were benefits per KRS

342.730; work-relatedness/causation; unpaid/contested medical expenses; TTD; and the assessment of a safety penalty pursuant to KRS 342.165.

In an opinion rendered December 10, 2012, the ALJ found, pertinent to this appeal, as follows:

> The plaintiff testified by deposition and also at the final hearing. The plaintiff filed the following evidence: Reports of Dr. Frank Burke, Nicholasville Rd. MRI, Dr. Leon Ravvin/Lexington Clinic, ProScan Imaging and Cardinal Hill Rehabilitation Hospital. The defendant filed as evidence the following: Deposition of plaintiff, reports of Lexington Clinic, vocational report of Dr. Ralph Crystal and deposition of Dr. Robert Sexton, Jr.
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> The Administrative Law Judge has carefully reviewed and considered all of the above evidence.
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> . . .
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> **SECTION V – FINDINGS OF FACT AND CONCLUSIONS OF LAW**
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> **A. Work-relatedness/causation.**
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> KRS 342.0011(1) defines "injury" to mean any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient

applying objective or standardized methods.

I saw and heard the plaintiff testify at the hearing. He was a credible and convincing lay witness. Based upon the totality of the evidence in this case, including the plaintiff's testimony and the very persuasive medical reports from Dr. Burke, I make the factual determination that Mr. Montgomery did in fact sustain significant work-related injuries due to his fall on January 12, 2010.

B. Benefits per KRS 342.730; permanent total disability.

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). In this case I find very persuasive the medical opinions of Dr. Burke and find that the plaintiff has sustained as a result of his work-related injuries a permanent impairment to the body as a whole of 35%.

"'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."
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> 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, his education, the testimony of the plaintiff and the specific opinions of Dr. Burke regarding the plaintiff's occupational disability. Based on all of those factors, I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that he is permanently and totally disabled.

Rent-A-Center filed a petition for reconsideration asserting as it does on appeal, the ALJ failed to consider all relevant and material evidence regarding Montgomery's alleged altered gait and nerve injury. Specifically, Rent-A-Center argued the ALJ failed to consider any of the Lexington Clinic treatment records filed as evidence. Rent-A-Center also argued the ALJ erred

in disregarding Dr. Crystal's uncontroverted vocational opinion.

In the order issued January 11, 2013, denying the petition for reconsideration, the ALJ stated, in relevant part, as follows:

> 4. The Opinion and Order dated December 18, 2012 lists in the summary of evidence the evidence inserted in the Hearing Order by the attorneys for the plaintiff and the defendant. The Opinion and Order specifically states that the Judge has carefully reviewed and considered all of that evidence.
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> 5. The Opinion and Order dated December 18, 2012 discusses each of the contested issues raised by the parties in the Benefit Review Conference Order, including work-relatedness/causation, benefits per KRS 342.730 and permanent total disability, the KRS 342.165 alleged violation, temporary total disability benefits and unpaid or contested medical expenses and the Opinion and Order ruling on all of those issues is hereby reaffirmed.
>
> WHEREFORE, in light of the above findings of fact and conclusions of law, defendant's Petition for Reconsideration is hereby overruled and denied.

Despite Rent-A-Center's statement to the contrary, 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). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). 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, 708 S.W.2d 641 (Ky. 1986).

After reviewing the evidence of record, we believe the ALJ applied the appropriate legal standard for determining whether Montgomery is permanently totally disabled in accordance with the Supreme Court's holding in

Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Taking into account Montgomery's age, education and past work experience, in conjunction with his post-injury physical status, the ALJ was persuaded due to the effects of the work-related injury, he is totally disabled. We cannot say the outcome arrived at by the ALJ finding Montgomery entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed.

In support of its assertion the ALJ erred by awarding PTD benefits, Rent-A-Center argues the ALJ failed to consider records from the Lexington Clinic. In both the opinion, and the order on reconsideration, the ALJ stated he considered all of the evidence which specifically included the records from the Lexington Clinic that was listed as part of the evidence reviewed. This is an insufficient basis for setting aside the ALJ's determination.

The parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

We are cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusions were drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354 (Ky. 2004), to be instructive. There the Court remanded the claim to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review." Id. at 358.

In this instance, the ALJ acknowledged he had reviewed all of the evidence, including the records from the Lexington Clinic. He also stated he based his decision on Dr. Burke's opinion and Montgomery's testimony. It was within his discretion to do so, and his decision will not be disturbed.

Accordingly, the decision rendered December 18, 2012, and the order on reconsideration issued January 11,

2013, by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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