OPINION ENTERED: April 26, 2013

CLAIM NO. 201200957

RUMPKE OF KENTUCKY, INC. PETITIONER

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

JEFF HENRY
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. Rumpke of Kentucky, Inc. ("Rumpke") seeks review of the opinion and order rendered December 17, 2012 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Jeff Henry ("Henry") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, medical benefits, and vocational

rehabilitation benefits. Rumpke also appeals from the January 18, 2013 order on remand.

On appeal, Rumpke argues the ALJ erred in awarding PTD benefits, and the claim should have been placed in abeyance pending Henry reaching maximum medical improvement ("MMI"). Rumpke also argues the ALJ erred in finding Henry sustained a work-related injury. Because the ALJ's determination is supported by substantial evidence, we affirm.

Rumpke filed a Form 101 on July 24, 2012 alleging injuries to his right hip and low back when he slipped and fell while climbing onto a garbage truck on September 26, 2011. He later amended the claim to allege the injury occurred on September 23, 2011.

Henry testified by deposition on September 10, 2012, and at the hearing held December 13, 2012. Henry was born on October 19, 1972, and is a resident of Stanton, Kentucky. He is a high school graduate, and has a commercial driver's license. His previous jobs include working as a machine operator, coal truck driver, and scrap truck driver. He has also worked on an assembly line and in a fast food restaurant.

Henry began working for Rumpke as a garbage truck driver in March 2011. He stated his job duties included

driving the truck, picking up garbage cans, and dumping them into the back of the truck. His route was primarily residential. On the day of the accident, it was raining. As he attempted to climb onto the truck, he lost his grip and fell backward into the street. He stated he immediately experienced pain from his low back to his toes. He completed his route and then reported his injury to his supervisor, Jeremy Adams ("Adams"). He denied advising Adams he fell in a ditch while mowing his yard at home.

Henry was taken off work on September 27, 2011, and was still limping when he returned on October 3, 2011. He was terminated on October 11, 2011 for a safety violation unrelated to the accident. Henry continues to complain of pain in the right side of his low back extending into his right hip and leg. He also complains of numbness. He stated he is unable to work, and uses a walker.

In support of the Form 101, Henry filed the February 7, 2012 record from the University of Kentucky Healthcare which includes comments from Randall Kindler, PA-C, and Dr. Phillip Tibbs, a neurosurgeon. X-rays were interpreted as demonstrating a mildly displaced comminuted fracture of the right femoral neck. The record also

reflects Henry would be evaluated for a right L4-L5 herniation after the hip issues have resolved.

Henry introduced Dr. Anthony McEldowney's August 23, 2012 report. Dr. McEldowney stated Henry reported he lost his grip on a garbage truck while it was raining, causing him to fall backward over four feet directly onto his back and buttocks. Dr. McEldowney diagnosed a right femoral neck fracture caused by the work-related fall. He assessed a 30% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. McEldowney opined Henry does not retain the physical capacity to return to the type of work performed at the time of the injury.

In a subsequent note dated December 11, 2012, Dr. McEldowney stated he agreed with Dr. Steven Shockey's diagnosis, but disagreed with the impairment rating assessed. He stated his original opinions remain unchanged after reviewing Dr. Shockey's report.

Henry also filed records from the Ertel Clinic dated May 15, 2012 and July 10, 2012 for treatment of complaints of right hip pain, degenerative disk disease and low back pain. He also filed the December 15, 2011 MRI report from the Clark Regional Medical Center which

revealed degenerative disk disease, along with annular bulging and disk protrusions, greatest at L4-L5. Henry also filed the September 26, 2011 record from St. Joseph Mt. Sterling, stating he complained of right hip pain after slipping out of a truck at work on Friday.

Rumpke introduced Dr. Shockey's November 16, 2012 report. Dr. Shockey noted Henry's allegation of falling from a truck, landing on his right hip and buttocks. He diagnosed a non-union of the femoral neck of the right hip, along with documentation of disk herniation to the left at L4-L5. He noted Henry was minimally symptomatic when evaluated. He stated it is medically probable Henry's conditions are due to his work-related fall. If no surgery is performed, he would assess a 26% impairment rating pursuant to the AMA Guides. Dr. Shockey recommended a total right hip reconstruction, after which the spinal issue should be evaluated.

Rumpke filed numerous records from Sarah Howell, APRN at the Ertel Clinic. Those records from July 15, 2010 through August 8, 2012 document treatment for various unrelated general health conditions. The records also reflect the September 29, 2011 treatment for right hip pain which began hurting a week prior. Henry was allowed to return to work on October 3, 2011. Subsequent records

reflect treatment for low back pain, and noted degenerative disk disease and bulging at L4-L5.

Henry's former sister-in-law, Cynthia Dawn Henry, resides with him, and testified at the hearing. She did not observe Henry fall in the yard. She introduced photographs demonstrating no ditch is present on their property. She stated she and the landlord mow the yard, and Henry does not assist. She also testified that on Friday evening (September 23, 2011), Henry complained of pain, but he was able to get out of the car when he got home from work. On Monday evening (September 26, 2011), she had to assist him with exiting his car.

Charles Pelfrey, Henry's landlord, testified by deposition on December 14, 2012. He stated there are no ditches on the property where Henry resides. He also stated either he or Henry's sister-in-law mow the yard.

Adams testified by deposition on November 29, 2012. Adams is the route foreman, and supervises Rumpke's drivers from the Mt. Sterling, Kentucky office. He stated Henry began working as a driver for Rumpke in March 2011, and last worked there in October 2011. He stated work injuries are supposed to be reported within twenty-four hours after the accident. This is explained in the employee handbook which Henry had been provided. He denied

Henry ever provided notice of a work accident occurring in September 2011. He stated the first notice he received of Henry's alleged work accident was after the filing of the Form 101. He stated on September 26, 2011, he noticed Henry was limping. He testified Henry advised he had injured himself when he fell in a ditch while mowing at home. He further stated an assistant was provided to help Henry with his route on Monday, but not afterward because a work injury was not alleged.

David Adkins, Rumpke's residential route manager, testified by deposition on October 26, 2012. He explained the process for reporting a work injury. He denied Henry provided notice of a work injury on September 26, 2011, and stated he first learned of the claim after the Form 101 had been filed. On September 27, 2011, he made a computer entry stating Henry had sustained an injury while mowing the lawn at home over the weekend. He further stated Henry was terminated on October 11, 2011 due to safety and productivity issues, as well as customer complaints.

Gary Lee Lederer, Jr., the operations manager at Rumpke's office in Mt. Sterling, testified by deposition on November 11, 2012. He was unaware Henry had claimed a work injury until after the Form 101 was filed. Lederer had not seen Henry since his termination.

William Lawrence Ritchie, a route driver for Rumpke, testified by deposition on November 20, 2012. He has not seen Henry since his termination. He testified Henry advised him he had injured his leg while mowing the yard at his home.

A benefit review conference ("BRC") was held on December 6, 2012. In the BRC order and memorandum, the parties agreed the contested issues were benefits per KRS 342.730; work-relatedness/causation; notice; injury as defined by the Act; TTD; vocational rehabilitation, and whether Henry was entitled to an award of PTD benefits.

In an opinion rendered December 17, 2012, the ALJ found, pertinent to this appeal, as follows:

> **A. Injury as defined by the Act; 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.
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> I saw and heard Mr. Henry testify at the hearing. He was a credible and convincing witness. Based upon the

totality of the evidence, including the testimony of plaintiff and the medical evidence, and specifically the persuasive medical report from Dr. McEldowney, I make the factual determination that as a result of the plaintiff's work accident on September 23, 2011, Mr. Henry sustained serious permanent injuries. I specifically rely on the very persuasive medical report from Dr. McEldowney.

B. Notice.

KRS 342.185(1) mandates that no proceeding for workers' compensation for an injury shall be maintained unless notice of the accident shall have been given to the employer as soon as practicable after the happening thereof.

Based on the plaintiff's sworn testimony, I make the factual determination that Mr. Henry gave due and timely notice of his work injuries to his employer.

C. Temporary total disability.

KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

Based on the plaintiff's sworn testimony and the persuasive medical report from Dr. McEldowney, I make the factual determination that Mr. Henry is entitled to recover temporary total disability benefits from the date of his work injuries, September 23, 2011, to and including August 23, 2012, when

Dr. McEldowney stated he reached maximum medical improvement.

D. Benefits per KRS 342.730; permanent and 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 most persuasive the opinion of Dr. McEldowney and find that the plaintiff has sustained a 30% whole person permanent impairment.

"'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).
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> 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. McEldowney 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.
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> **E. Vocational rehabilitation.**
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> KRS 342.710 provides that when as a result of a work injury the plaintiff is unable to perform work for which he has previous training or 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. The administrative law judge on his own motion, 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. After reviewing the record this Administrative Law Judge is persuaded the plaintiff should be afforded this opportunity, and finds accordingly.

Rumpke filed a petition for reconsideration asserting the evidence compelled a finding Henry failed to

provide due and timely notice. Rumpke also argued Henry had not reached MMI, and it was improper to award PTD benefits. Finally, Rumpke argued the ALJ erred in awarding TTD benefits commencing September 23, 2011 since Henry worked from October 3, 2011 through October 11, 2011. The ALJ entered an order on January 18, 2013 correcting the period of TTD benefits, but denying the petition for reconsideration in all other respects.

This appeal concerns whether the ALJ's award of PTD benefits is appropriate, and 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 Henry 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 Henry'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, Henry is totally disabled. We cannot say the outcome arrived at by the ALJ finding Henry 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, Rumpke argues Henry had not reached MMI. It is noted Dr. Shockey assessed an impairment rating assuming no surgery is performed. Since no surgery has been performed, the ALJ's determination is not in error.

Rumpke next argues the ALJ erred in finding Henry sustained a work-related injury. As the fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d (Ky. 1979). 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof 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 the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky.1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial

probative value to support the decision. Special Fund v. Francis, supra.

Despite conflicting evidence, the ALJ determined Henry sustained a work-related injury while employed by Rumpke. The ALJ's finding as to causation and work-relatedness is supported by substantial evidence and will not be disturbed on appeal.

Accordingly, the decision rendered December 17, 2012, and the order on reconsideration issued January 18, 2013, by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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