Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 9, 2015

CLAIM NO. 201092997

SHERREE KEENE PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

UNITED PARCEL SERVICE
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Sheree Keene ("Keene") appeals from the July 7, 2014 Opinion, Award and Order and the August 12, 2014 Order on Reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ awarded Keene temporary total disability benefits, permanent partial disability benefits, and medical benefits. Keene appeals,

challenging the method by which the ALJ calculated her average weekly wage and the denial of permanent total disability benefits. For the reasons set forth herein, we affirm.

Keene began working for United Parcel Service ("UPS") in 1985, as a part time employee. She later became a full time employee. At various times during her lengthy employment with UPS, she worked as a housekeeper, a package service clerk, and a utility worker. Prior to her full time employment with UPS, Keene performed a variety of jobs. She was the managing editor of a local magazine, an assistant at a law office, an account executive for advertising and marketing companies, and operated her own graphic design studio. She holds a bachelor's degree in marketing and an associate's degree in fashion merchandising.

On March 10, 2010, she was working as a mechanic's assistant at UPS. Keene was lifting the lid off a crate when she experienced low back and left side pain, which radiated down her left leg. She immediately reported the injury and remained on modified duty until May 19, 2010.

From January 23, 2011 through January 29, 2012, Keene took an extended leave of absence from her employment for reasons unrelated to the March 10, 2010 injury. She received short and long term disability for anxiety and

depression during this time. Keene returned to work on January 30, 2012, earning her same hourly wage.

Shortly thereafter, on February 17, 2012, Keene was loading a twenty-pound panel onto a cart. She felt back pain and reported the injury, but did not immediately seek medical attention. A few weeks later, on March 11, 2012, Keene was lifting a large package with a co-worker when she again experienced pain in her back, neck and shoulder. She also felt numbness in her left finger and burning in her left foot. The pain worsened overnight, and she sought treatment at Baptistworx.

Baptistworx records indicate Keene was diagnosed with neck and low back pain, sciatic strain. She was restricted from lifting greater than ten pounds. Keene returned on March 26, 2012, with continued complaints of pain. She was referred to Dr. Ellen Ballard.

Dr. Ballard noted pain to palpation in Keene's cervical spine and pain over her lumbar spine. She diagnosed left arm dysesthesias and low back pain with left leg dysesthesias. Dr. Ballard ordered a lumbar MRI which revealed bilateral pars articularis fractures with subluxation. On November 27, 2012, Dr. Ballard placed Keene at maximum medical improvement ("MMI") and assessed a permanent partial impairment rating of 23% pursuant to the

American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). She recommended permanent restrictions of no repetitive bending/stopping, to sit and stand as needed, and no lifting greater than twenty pounds.

Dr. Joseph Zerga conducted an independent medical evaluation on June 19, 2013. He diagnosed low back pain secondary to spondylolisthesis as a result of her work-related injury. He assessed a 20% whole person impairment pursuant to the AMA Guides. Dr. Zerga apportioned 5% of this impairment to her work-related injury, and the remaining 15% to pre-existing active spondylolisthesis.

Robert Tiell performed a vocational evaluation on November 17, 2013. Tiell noted Keene had trouble focusing and concentrating, possibly due to her pain. She scored in the fourth percentile in manual dexterity and general clerical aptitude tests. Upon review of Dr. Ballard's medical records, he opined Keene could not return to her prior work. He concluded she is totally occupationally disabled.

Dr. Luca E. Conte conducted a vocational evaluation on February 19, 2014. Keene was administered a Wide Range Achievement Test and scored above high school level in reading and mathematics. Taking into consideration

her prior experience and education, as well as the physical restrictions recommended by Dr. Ballard, Dr. Conte concluded Keene could perform sedentary, light and some medium work. He further opined she could return to most of her prior jobs.

At the final hearing, Keene testified she continues to experience significant pain on a daily basis. The pain disturbs her sleep, and affects her ability to perform daily tasks around her home. She maintains an internet business constructing doll furniture, which provides a modest income. However, she does this only when she is able, and takes frequent breaks due to pain and drowsiness.

The ALJ calculated Keene's average weekly wage ("AWW") pursuant to KRS 342.140(d). He rejected Keene's assertion she is permanently totally disabled and awarded her temporary total disability benefits and permanent partial disability ("PPD") benefits. The ALJ adopted the 23% impairment rating assigned by Dr. Ballard and, concluding Keene could not return to her prior employment, enhanced the award of PPD benefits pursuant to KRS 342.730(1)(c)1. Keene's petition for reconsideration, raising the same arguments she now makes on appeal, was denied.

Keene first challenges the ALJ's method of computing her AWW. KRS 342.140(d) is the method of AWW calculation to be used when "the wages were fixed by the day, hour or by the output of the employee". There is no dispute Keene was paid by the hour. However, Keene emphasizes that she took an extended leave of absence from January, 2011 to January, 2012. Because she had only returned to work at UPS for about three weeks when she sustained the February 17, 2012 injury, Keene argues her AWW should be calculated pursuant to KRS 342.140(e). Subsection (e) is the method of calculation used when "the employee had been in the employ of the employer less than thirteen calendar weeks immediate preceding the injury". Calculation pursuant to KRS 342.140(e) produces a much more favorable AWW for Keene.

Keene's argument hinges on the conclusion that she was not an employee of UPS from January, 2011 to January, 2012. However, the evidence on the record indicates otherwise. Although Keene did not log any actual hours worked during her absence, UPS maintained wage records during this period. She returned to work in January, 2012 at her prior hourly rate. During her leave time, she collected $176.36 per week, presumably based on accrued leave time being used. There is no evidence to indicate

Keene's employment was terminated in January, 2011 and she was rehired in January, 2012.

These circumstances support the factual conclusion Keene remained an employee of UPS during her extended leave of absence, and had been an employee of UPS since 1985. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Furthermore, it is undisputed Keene was paid by the hour. As these factual findings are well supported by the record, KRS 342.140(d) controls the calculation of Keene's AWW. Nesco v. Haddix, 339 S.W.3d 465 (Ky. 2011).

Keene next argues the evidence compels a finding she is permanently totally disabled, and that the ALJ failed to provide sufficient analysis of this issue. Permanent total disability is 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." KRS 342.0011(11)(c). In considering whether a worker is permanently totally disabled, the ALJ must conduct an individualized determination of the worker's post-injury physical, emotional, intellectual and vocational status and how those factors interact. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000).

Here, the ALJ summarized Keene's testimony as to her current pain levels and her ability to perform daily tasks. He also noted Keene's post-secondary education, and extensive work history in various industries and positions, many of which are sedentary positions. The ALJ also summarized the opinions of Dr. Ballard, Dr. Conte, and Mr. Tiell concerning Keene's ability to work. He then reasoned:

> The fact that the Plaintiff manufactures doll furniture is certainly an unusual avocation. She may not earn a large sum of money from this. However, by her own testimony she is a skilled craftsperson in this area, has regular and patient customers, utilizes the internet to assist in marketing, sales and shipments, and handles the entire process from start to finish on her own. She retains and has sufficient skills to be an entrepreneur and whatever limitations she has are not work-related. She is not totally disabled.

When the opinion is read in its entirety, we believe the ALJ has articulated a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). He noted Keene's age, education level and prior work history, and summarized the opinions of the vocational evaluators. While acknowledging Keene's testimony concerning her pain level and inability to concentrate, the ALJ was clearly more persuaded by her hobby, which requires varied skills and abilities. Though

brief, we believe this explanation demonstrates the ALJ exercised his discretion, and satisfactorily apprises the parties of the basis of the 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).

Furthermore, the evidence does not compel a contrary result. Conflicting evidence was presented as to the extent of Keene's disability. The ALJ relied upon Dr. Ballard's opinion as to impairment rating and restrictions, and concluded Keene could not return to her prior employment at UPS. However, Keene's education level and prior employment history, as well as Dr. Conte's vocational evaluation, indicate she will be able to sustain work for which she has training and experience. When the evidence is conflicting, it is within the ALJ's discretion to select which evidence upon which to rely. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). There was substantial evidence in the record from which to conclude Keene is not permanently totally disabled and, as such, this Board may not usurp the ALJ's role by superimposing our own appraisals as to the weight and credibility to be afforded the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

Accordingly, the July 7, 2014 Opinion, Award and Order and the August 12, 2014 Order on Reconsideration of Hon. Chris Davis, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON ALLISON A ZOELLER
429 W MUHAMMAD ALI BLVD #1102
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON CHRISTOPHER G NEWELL
10503 TIMBERWOOD CIR #112
LOUISVILLE, KY 40223

ADMINISTRATIVE LAW JUDGE:

HON. CHRIS DAVIS
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601