Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 14, 2013

CLAIM NO. 201179673

SUPPLY CHAIN SOLUTIONS OF KENTUCKY PETITIONER

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

CARMEN M. POTTS
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

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

STIVERS, Member. Supply Chain Solutions of Kentucky ("Supply Chain") appeals from the May 1, 2013, opinion and award and the June 17, 2013, order denying both parties' petitions for reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the May 1, 2013, opinion and award, the ALJ awarded Carmen M. Potts ("Potts") temporary total disability ("TTD") benefits,

permanent total disability ("PTD") benefits, and medical benefits.

The Form 101 alleges injuries on July 19, 2011, and January 2, 2012, while Potts was employed by Supply Chain. Potts alleged injuries to the following body parts: "Left Upper Extremity/Left Truck [sic]/pelvis as well as Upper Extremities/Back." The Form 101 alleges Potts sustained those injuries in the following manner:

> Plaintiff suffered [sic] work-related injury to her Left Upper Extremity/Left Truck [sic]/Pelvis on July 19, 2011 when she was packing brake rotors into boxes and tripped and fell onto the corner of a skid causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides. Plaintiff suffered cumulative trauma to her Upper Extremities and Back performing repetitive heavy work activities causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides culminating 1/2/12.

In the April 11, 2013, benefit review conference ("BRC") memorandum and order, the following contested issues are listed: benefits per KRS 342.730, work-relatedness/causation, average weekly wage ("AWW"), unpaid or contested medical expenses, injury as defined by the ACT, exclusion for pre-existing disability/impairment, and TTD.

In its first argument, Supply Chain asserts the ALJ erred by awarding PTD benefits when substantial evidence does not support this determination and Potts did not seek an award of PTD benefits.

Concerning the issue of permanent total disability, the ALJ made the following findings in the May 1, 2013, opinion and award:

> 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 opinions of Dr. Rouben, the treating physician, and Dr. Bilkey, the examining physician, and based upon the comprehensive medical report from Dr. Bilkey, I make the factual determination that the plaintiff will sustain a 17% whole person permanent impairment under the AMA Guides, Fifth Edition.
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> "'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, her age, her work history, her education, her sworn testimony and the specific medical opinions from Dr. Rouben and Dr. Bilkey regarding the plaintiff's permanent impairment and occupational disability. Based on all of those factors, I make the factual determination that the plaintiff Ms. Potts cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that she is permanently and totally disabled.

Supply Chain's petition for reconsideration did not request additional findings of fact relative to the ALJ's award of PTD benefits. However, the ALJ's deficient findings did not go unchallenged by Supply Chain, as Supply Chain asserted as follows in its petition for reconsideration:

The Administrative Law Judge made a finding that claimant is entitled to permanent total disability benefits. The record in the claim reveals, however, as demonstrated by the Position Paper filed on behalf of the claimant, that no allegation of permanent total disability was ever made. Claimant requested only that she be awarded permanent partial disability benefits based on the 17% rating assigned by her IME physician. Further, there is not sufficient evidence in the record to support a finding of permanent total disability. As such, the finding of permanent total disability is clearly a patent error and should be set aside.

On appeal, Supply Chain argues:

The factual findings laid out in the Opinion and Order are so glaringly insufficient that it was difficult to decide exactly what should be appealed. The ALJ did not even explain which conditions he actually relates to the respondent's injury. Obviously, that information is relevant not only for explaining an unexpected and unrequested PTD award, but it is also crucial information for the parties to determine what future medical treatment would be considered compensable.

...

For all of the foregoing reasons, the ALJ's decision should be set aside. The claim should be remanded to the ALJ with instructions to provide factual findings regarding the appropriate PPD award, the actual medical conditions that are to be considered work-related, and the correct average weekly wage.

In light of the inadequacy of the ALJ's findings, particularly in the context of the ALJ stepping outside of the requested relief and awarding PTD benefits, we find his findings to be deficient as a matter of law. Thus, this Board is not limited by Supply Chain's arguments.

First, as asserted by Supply Chain, Potts did not assert a claim for PTD benefits. A review of Potts' position statement to the ALJ clearly reveals Potts only requested a finding of permanent partial disability ("PPD") benefits. However, the ALJ is not bound by the arguments of the parties. It is well within the ALJ's discretion to infer permanent and total disability from the totality of the evidence. Such inferences are fundamental to the ALJ's role as fact-finder. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003); Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). That said, should the ALJ infer permanent total disability from the evidence when such an argument has not been put forward by the claimant, he is required to set forth, *with specificity*, the evidence which factored into his decision. Here, the ALJ has not met this burden.

In the May 1, 2013, opinion and award, the ALJ set forth a generic recitation of some of the factors which should be considered when analyzing the issue of permanent

and total disability. *See* Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The stated basis for the ALJ's finding and conclusion Potts is permanently totally disabled is as follows:

> In the present case, I considered the severity of the plaintiff's work injury, her age, her work history, her education, her sworn testimony and the specific medical opinions from Dr. Rouben and Dr. Bilkey regarding the plaintiff's permanent impairment and occupational disability. Based on all of those factors, I make the factual determination that the plaintiff Ms. Potts cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that she is permanently and totally disabled.

Because Potts did not request an award of PTD benefits but, rather, requested an award of PPD benefits, all parties are entitled to a thorough recitation of the specific evidence which factored into the ALJ's decision. For the ALJ to merely state he "considered the severity of the plaintiff's work injury, her age, her work history, her education, [and] her sworn testimony" is wholly insufficient. This is particularly true when a review of Potts' February 8, 2013, deposition and April 25, 2013, hearing testimony reveals, while testifying she is unable to return to her pre-injury employment, Potts did not once testify she is unable to return to any form of employment.

In fact, during her deposition, Potts testified that she is making strides to find employment:

> Q: Have you considered any vocational training or coursework, anything like that that you're interested in?
>
> A: Yes, sir. Actually currently I'm taking [sic] online class for typing.
>
> Q: Is there any particular field that you're interested in going into with that type of training?
>
> A: I guess I took it just to see if I could get anywhere, anything, any kind of position.
>
> Q: Are you still doing that right now?
>
> A: Yes, sir.
>
> Q: Is that something that-- okay.
>
> A: Still doing that. I'm not getting very far with it but I'm trying.

Additionally, regarding the medical opinions the ALJ allegedly relied upon, the ALJ is required to say more than he has simply relied upon "the specific medical opinions from Dr. Rouben and Dr. Bilkey regarding the plaintiff's permanent impairment and occupational disability." That statement alone without further explanation and a recitation of the specific opinions the ALJ relied on does not advise the Board or the parties of the basis for the ALJ's decision on this issue. *See*

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).

The parties and the Board 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, supra; Shields v. Pittsburgh and Midway Coal Mining Co., supra. No party in this case is required to locate evidence in the record the ALJ might have relied upon when awarding PTD benefits, an award not requested by Potts. The ALJ is required to identify this evidence in his findings. Here, we are unable to determine the evidence, medical and/or lay, which the ALJ relied upon in determining Potts is permanently totally disabled.

Further, our review of Potts' petition for reconsideration reflects even Potts knew the ALJ's findings were insufficient to support a determination Potts is permanently totally occupationally disabled as she suggested additional findings of fact which would support the ALJ's finding of permanent total occupational disability. Potts offered four specific findings the ALJ should make in support of his determination she is totally occupationally disabled. Significantly, in his June 17,

2013, order ruling on both petitions for reconsideration, the ALJ declined to adopt any of the findings suggested by Potts.

Additionally, we agree the ALJ has not sufficiently identified which injuries he deemed to be work-related. In the May 1, 2013, opinion and award, the ALJ stated Potts sustained permanent injuries to the body as a whole as a result of the work accident on July 19, 2011.[1] However, at no point in the May 1, 2013, opinion and award or the June 17, 2013, order on reconsideration did the ALJ identify which of the alleged injuries he found to be work-related and compensable.

The ALJ has not put forth sufficient findings regarding the basis for his decision Potts is permanently totally disabled. Similarly, the ALJ has failed to identify the nature of Potts' work-related injuries. Consequently, this claim must be remanded to the ALJ for additional findings regarding the extent of Potts' occupational disability. The ALJ must also determine which of the injuries alleged by Potts are compensable.

Supply Chain's second argument, as also argued in its petition for reconsideration, is the ALJ erred in

[1] The ALJ found Potts did not sustain any injuries as a result of the January 2, 2012, incident.

determining Potts' AWW is the figure listed in its Form 111. Supply Chain argues, in part, as follows:

> In addition to the unilateral decision to award PTD benefits, the ALJ found an AWW of $602.15, based on the totality of the evidence and the Form 111. Subsequent to the filing of the Form 111, however, the parties both obtained and filed wage records with more accurate calculations of the AWW. At the BRC, the parties specifically noted that AWW was at issue and they did not reach a stipulation in that regard. Both parties argued the AWW issue in their briefs. Even the respondent acknowledged that the AWW was less than the figure stated in the Form 111, contending that the proper figure should have been $597.66 per week. The petitioner contended that the proper figure was $588.26 per week.
>
> The ALJ concluded that the respondent's average weekly wage was $602.15.

On the issue of AWW, the ALJ determined as follows in the May 1, 2013, opinion and award:

> Based on the provisions of KRS 342.140 and the plaintiff's wage records filed in the case file, I make the factual determination that at the time of Ms. Potts' work injuries on July 19, 2011 her average weekly wage was $602.15. I base this on the totality of the evidence in the record, including the sworn Form 111 filed by the defendant on January 9, 2013.

The ALJ relied upon the AWW figure set forth in the Form 111. However, in the record are wage records submitted by both Potts and Supply Chain. Notably, neither

parties' AWW calculations for the July 19, 2011, injury match the $602.15 AWW set forth on the Form 111 which was ultimately accepted by the ALJ. Indeed, Potts' own calculations derive an AWW for the July 19, 2011, injury of $597.66 which is less than the $602.15 chosen by the ALJ. In fact, in her April 29, 2013, position statement, Potts asserts that she was overpaid voluntary TTD benefits, an argument made on appeal by Supply Chain but not in its petition for reconsideration. Potts asserted as follows in her position statement:

> Temporary total disability benefits were paid to Ms. Potts during the period she was restricted from work by Dr. Rouben and had not reached maximum medical improvement from August 16, 2011 through October 24, 2011 at a rate of $401.45. (BRC Order 4/11/13) Ms. Potts' pre-injury average weekly wage was only $597.66. (*See above*; Pre-injury AWW filed 4/12/13) Accordingly, Ms. Potts' temporary total disability rate should be $398.44 per week with an overpayment of past TTD benefits at a rate of $3.01 per week for 10 weeks, a total of $20.01 overpayment. Pursuant to Triangle Insulation and Sheet Metal Co. v. Stratemeyer, 782 S.W.2d 628, 630 (Ky. 1990), the $30.01 TTD overpayment is a credit against past-due benefits.

We vacate the ALJ's determination of AWW and remand for a determination of AWW based on either Potts' calculations or Supply Chain's. It is interesting to note that Supply Chain, in its appeal brief, alleges the only

disagreement between Potts' calculation of AWW and Supply Chain's is the allocation of a $200 bonus. Supply Chain asserts as follows:

> The parties actually concurred in the calculation of the AWW with the exception of the manner in which the respondent's bonus should be allocated. The purpose of the AWW calculation is to achieve a fair result for all parties. C & D Bulldozing v. Brock, 820 S.W.2d 482 (Ky. 1991); Cantrell v. Stambaugh, 420 S.W.2d 677 (Ky. 1967). Applying an annual bonus to only one quarter artificially inflates the reasonable expectation of what an injured worker would expect to earn in a normal work week. The petitioner submits that combining annual bonuses, dividing that sum by fifty-two, and then adding the quotient to the highest earning quarter provides the most accurate AWW. This is consistent with how the Board handled an annual reimbursement in Clifton Brooks v. Tri-State Industrial Services, Inc., Claim No. 2006-97477.

On remand, the ALJ must set forth his rationale for choosing either Potts' or Supply Chain's AWW calculations, including *fully* addressing the issue of Potts' bonus consistent with applicable law and whether Potts was ultimately overpaid TTD benefits. *See* KRS 342.140(6).

Accordingly, the ALJ's determination of Potts' AWW and his calculation of TTD benefits as set forth in the May 1, 2013, opinion and award and as affirmed by the June

17, 2013, order ruling on the petition for reconsideration are **VACATED**. Those portions of the May 1, 2013, opinion and award and the June 17, 2013, order finding Potts to be permanently totally disabled and the award of PTD benefits are also **VACATED**. This claim is **REMANDED** to the ALJ for entry of an amended opinion and award containing additional findings of fact and conclusions of law in accordance with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON DOUGLAS A USELLIS
600 E MAIN ST STE 100
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

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

ADMINISTRATIVE LAW JUDGE:

HON WILLIAM J RUDLOFF
400 E MAIN ST STE 300
BOWLING GREEN KY 42101