

OPINION ENTERED: June 13, 2012

CLAIM NO. 201100757

TRI-TECH PRESSURE WASHING

PETITIONER

VS.

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

JOHN RIDGEWAY, JR.
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING**

* * * * *

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

STIVERS, Member. Tri-Tech Pressure Washing ("Tri-Tech") appeals the January 3, 2012, opinion, order, and award by Hon. Chris Davis, Administrative Law Judge ("ALJ") in which the ALJ awarded John Ridgeway, Jr. ("Ridgeway") permanent total disability ("PTD") benefits of \$287.67 per week and medical benefits. Tri-Tech filed a petition for

reconsideration which was denied by order dated February 6, 2012. Tri-Tech also appeals from the February 6, 2012, order.

The Form 101 alleges Ridgeway was injured on April 14, 2010, in the following manner: "Claimant was climbing a ladder that was attached to a building when the ladder came loose, causing Claimant to fall to the ground." The Form 101 alleges Ridgeway injured both lower extremities and his low back.

The October 7, 2011, benefit review conference ("BRC") order lists the following contested issues: benefits per KRS 342.730 and unpaid or contested medical expenses.

Ridgeway was deposed on August 19, 2011. Ridgeway testified he is forty-three years old and a high school graduate. At one time Ridgeway had a commercial driver's license. Ridgeway stated his title at Tri-Tech was "laborer," and he described his duties as follows:

A: I was an employee. I drove from job to job in a work van, used a pressure washer to clean exhaust systems out of restaurants.

Q: Was there a lot of lifting with that job?

A: No.

Q: What about pulling any type of heavy machinery?

A: No. We did have a wet vac--

Q: Okay.

A: --that would get full and it was heavy, but other than that there's no heavy lifting.

Q: Was that on your back, the wet vac?

A: No.

Q: Okay.

A: Wheels.

Q: Wheels? Did you just pull it around with you?

A: Yes.

Q: Okay. Was there a lot of bending over with that job?

A: Yes.

Q: Okay. You're cleaning the units I guess with the pressure washer?

A: Cleaning the units, cleaning the floors, the walls.

Q: Okay. All right. And what was your job title there?

A: I was just a laborer.

Prior to Ridgeway's job at Tri-Tech, Ridgeway worked for Qualicon between 2008 and 2009 during which he cleaned a restaurant at night. The job for Qualicon required a lot of bending. Between 2006 and 2007, Ridgeway

worked at Rooter Express where he did anything from "cleaning a commode, flushing out a drain, cleaning a drain, [and] fixing a pipe." During this time he also occasionally worked for Reliable Rooters. His job for Rooter Express and Reliable Rooters required a lot of digging. Between 2002 and 2005, Ridgeway worked at Quantrell Cadillac as a "laborer" and a "prepper." Ridgeway testified that "[a] prepper is someone that prepares the car to be painted." Ridgeway was also responsible for keeping the shop clean. His job at Quantrell required heavy lifting and bending. Prior to working at Quantrell, between the years 2001 and 2005, Ridgeway worked odd jobs through a "temp agency" such as making car parts at a factory. Ridgeway testified as follows:

Q: Okay. What would you do during those temp jobs?

A: Just anything they wanted me to do. I mean, we checked parts, we worked on the machines, swept floors, cleaned.

Q: So there was a lot of bending over involved?

A: Yes.

Q: Lifting?

A: Yes.

Ridgeway also worked at Sylvania where he was a utility operator from 1998 to 2001. This job required lifting, bending over, and manipulating heavy machinery. Ridgeway worked at Sunoco Products from 1993 to 1997 where he "[r]an a Deets spiral machine and also a 3-inch spiral machine" which makes "paper cores." This job also required lifting and bending over.

Ridgeway testified that during the April 14, 2010, incident at Tri-Tech, both of his ankles were "crushed like a bag of potato chips." Dr. Raymond Wright performed two surgeries following the incident. Ridgeway testified he isn't currently working because of the injury. He testified Dr. Wright gave Ridgeway permission to return to light-duty, "sit-down" work. "He recommended that I didn't stand on my feet."

Ridgeway also testified at the November 9, 2011, hearing. He testified to the pain he is currently experiencing from his injury:

Q: Has the crush injury healed now or are you still having problems from it?

A: I'm having problems.

Q: What problems are you experiencing?

A: Pain when I have to walk.

Q: All right. Now, where is the pain principally located, John?

A: On my right foot, it's in the heel of the foot. On my left foot, it's around the ankle.

Q: Is the pain there at all times or is it just when you're experiencing weight bearing on the feet?

A: Mainly weight bearing.

Q: Does the pain get sharp when you try to utilize it?

A: Yes.

Q: If you was [sic] going to put the pain on a scale of 1 to 10, 10 being like putting your hand in a boiling pot of water and 0 being no pain, when it's at [sic] worst, where would it be on that pain scale?

A: I would say about an eight.

Q: Does it get into the rest of the foot when it gets up-- elevated to that level?

A: Well, the right foot, only the back heel hurts. On the left foot, it tends to be the whole foot.

Q: Does the pain come up the leg any? Does it radiate up the leg any? Can you tell that?

A: When my feet begin to hurt, my knees tend to start to weaken.

Ridgeway testified he also experiences intermittent low back pain. Regarding his ability to return to his job at Tri-tech, Ridgeway testified as follows:

Q: Now, not as some doctor has told you, John, but as you know your body,

could you go back and do the job at Tri Tech the way you were doing it before?

A: No.

Q: What would keep you from it?

A: The fact I wouldn't be able to climb a ladder. I have trouble going up and down steps. I have trouble walking on elevations, things to [sic] that nature.

Ridgeway continued testifying about his work capabilities as follows:

Q: All right. Knowing, again, your body as you know it, not as some doctor has told you or any restrictions, is there any job that you have performed in the past that you could believe you could go back and do right now?

A: Not without pain. I mean, no.

Q: Now, does the pain reach a level with your feet that you absolutely have to get off of those feet?

A: Yes.

Q: How often in a day's time would that occur if you was [sic] trying to use your feet a lot, John?

A: Usually, if I'm on my feet for more than two hours, they tend to become excruciating to where I have to sit down.

Q: Okay. So any job that there would be out there that would require you to stand more than two hours, you just couldn't do it--

A: (Interrupting) Right.

Q: -- in your opinion?

A: Yes.

Q: If you had to walk in a position of employment, could you walk for two hours on them without extreme difficulty?

A: No.

Q: With your low back, if you had to sit for long periods of time with the back pain that you experienced from sitting, could you sit an hour or two without having to get up and get away from the position you were in?

A: I don't think so, no.

Ridgeway testified that he has never worked a sit-down job.

Records by Dr. Wright contain a return-to-work slip dated May 10, 2011. This slip indicates that Ridgeway is able to return to light-duty work, "weightbearing as tolerate." In terms of restrictions, "must have seated job" is indicated. Dr. Wright stated the restrictions will remain in place until Ridgeway's follow-up appointment on November 9, 2011.

On appeal, Tri-Tech asserts Ridgeway fails to meet the definition of permanent total disability. Tri-Tech argues as follows:

The Administrative Law Judge failed to consider the evidence of record when determining the Respondent is permanently, totally disabled as a result of his injuries. In the

Administrative Law Judge's Opinion, Order and Award entered January 3, 2012 the Judge expressly states and recognizes that the Respondent has suffered only a 10% occupational disability as a result of the work injury. The Judge then also recognizes that the Respondent is only 43 years of age and that he has a high school education. He further recognizes Doctor Johnson's opinion that Mr. Ridgeway could work at a sedentary job. The Judge then recognizes that there are restrictions which were assigned by his treating surgeon, Doctor Wright restricting Respondent to light duty work or seated work as the Judge well notes in his decision. Finally, the Judge notes that the Respondent mentions job retraining to open up opportunities for the Respondent.

However, despite his recognitions based on the evidence in this case, the Judge has determined that the Respondent is permanently and totally disabled. The Judge found that only a small portion of the job market is 'theoretically' open to Respondent and that no employer would hire Respondent given that he will need job re-training, and that he has no 'realistic' hope of reentering the work force. (ALJ Opinion and Award pgs. 11-10). In doing so, the Administrative Law Judge completely ignores the evidence of record and the definition of permanent disability set forth in KRS 342.730. Instead of considering the evidence which clearly demonstrates Respondent's ability to return to gainful employment, the Administrative Law Judge has based his decision on what he alone believes the prevailing qualifications of employment to be throughout the entire labor industry.

Concerning whether Ridgeway is permanently and totally disabled, in the January 3, 2012, opinion, order, and award, the ALJ concluded as follows:

Having reviewed this claim in its entirety the undersigned is aware of the requirement that he select an impairment rating for the Plaintiff. Therefore, with due deliberation, I select the rating assigned by Dr. Ballard the 10%.

However, this claim is clearly about more than the impairment rating assigned. It is true that the Plaintiff is only forty-three years of age. It is also true that he is a high school graduate.

However, for over twenty years his work history has consisted of manual labor, much of it done on his feet. The restrictions he now has from his treating surgeon preclude him from performing any of this work. In fact these restrictions, to seating work only, precludes [sic] a large segment of the labor market and certainly most, if not all, work that would be considered manual labor.

The Plaintiff himself alleges that he has regular pain in his feet and lower extremities. This pain is severe and disabling. He is required to frequently use a cane to aide with ambulation. I believe him.

The above makes it clear that at best only a small portion of the labor market is even theoretically open to him. When that is combined with the fact that he would need serious job re-training to even open up those small opportunities, and then find an

employer willing to hire a man with no experience, in his forties, who walks with a cane, it is clear to the undersigned he has no realistic hope of reentering the work force.

Based on the above I find the Plaintiff permanently, totally disabled as a result of his bilateral lower extremity injuries. He will also be awarded medical benefits for them.

KRS 342.0011(11)(c) defines "permanent total disability" as follows: "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...." In the case of Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the Supreme Court of Kentucky made clear that in determining the extent of a claimant's occupational disability, an ALJ is not required to rely upon the vocational opinions from medical or vocational experts. The Court stated as follows:

It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. See, Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985);

Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976). 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. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979).

Ira A. Watson Dept. Store at 52.

The Court then articulated several factors the ALJ may consider when determining a claimant's level of disability by instructing as follows:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See, Osborne v. Johnson, supra, at 803.

Id. at 51.

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 Ridgeway was the party with the burden of proof on the issue of permanent and total disability and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). Although a party may note evidence that would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. See McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

It is clear from the January 3, 2012, opinion, order, and award that the ALJ carried out an analysis consistent with Ira A. Watson Department Store v. Hamilton, supra, and relied upon Ridgeway's testimony and restrictions imposed by Ridgeway's treating surgeon, Dr. Wright, to determine Ridgeway is permanently and totally

disabled. While the ALJ did not specifically cite the applicable case law in his January 3, 2012, opinion, order, and award- i.e. Ira A. Watson Department Store v. Hamilton, supra, etc. - the ALJ, nevertheless, carried out the appropriate analysis and considered the pertinent factors. The ALJ considered that Ridgeway is forty-three years old and a high school graduate. The ALJ considered Ridgeway's testimony about the pain he is currently experiencing in his feet and lower extremities, and the fact Ridgeway often uses a cane. The ALJ considered the fact that Ridgeway's work history consists only of manual labor, and Dr. Wright's work restrictions preclude Ridgeway from continuing in this line of work. Based on these considerations, the ALJ determined Ridgeway is permanently and totally disabled. As the ALJ's determination is supported by substantial evidence, his determination that Ridgeway is permanently and totally disabled will not be disturbed. However, we must remand the case to the ALJ.

In the ALJ's January 3, 2012, opinion, order, and award, the ALJ states he relied on Dr. Ballard's 10% impairment rating. However, this Board has been unable to locate in the record a report by Dr. Ballard that contains an impairment rating. Dr. Ballard's March 29, 2011, independent medical examination ("IME") report indicates

Ridgeway needed to "have bilateral ankle and heel radiographs performed" and Dr. Ballard needed to review his "previous radiographic file" before assessing an impairment rating. Tri-Tech's witness list, dated October 5, 2011, indicates that as of September 30, 2011, Ridgeway "had not obtained his previous radiographs nor had he appeared with his prescription at a place of his choosing to have additional x-rays performed." Tri-Tech further stated as follows:

Defense counsel contacted counsel for Plaintiff and discussed the matter with him. It was clear that Plaintiff's counsel's office had made every effort to obtain the requested x-rays however had been unable to do so due to the Plaintiff's lack of effort. As a result Mr. Morgan graciously agreed to permit Defendant additional proof time to the Final Hearing in order to obtain this information and therefore obtain a completed report from Doctor Ballard.

In Tri-Tech's brief to the ALJ, it summarizes an alleged supplemental report by Dr. Ballard dated October 26, 2011, asserting that Dr. Ballard assessed a 10% impairment rating. Ridgeway's brief to the ALJ states as follows: "Dr. Ballard was provided the x-rays requested, but a supplemental report has not been filed into evidence (or if it was, Plaintiff's counsel didn't receive a copy, as it is not in his file)."

As stated, it is clear in the January 3, 2012, opinion, order, and award that the ALJ relied upon a 10% impairment rating allegedly contained in Dr. Ballard's October 26, 2011, supplemental report; however, this Board is unable to locate Dr. Ballard's supplemental report in the record. We acknowledge that the issue in this appeal does not center on an impairment rating. Nevertheless, we must vacate the ALJ's language regarding the 10% impairment rating and remand the case to the ALJ for entry of an amended opinion, order, and award in which the ALJ determines an impairment rating based on the evidence and impairment ratings in the record.

Accordingly, the January 3, 2012, opinion, order, and award and the February 6, 2012, order on reconsideration are hereby **AFFIRMED** on the issue of permanent and total disability. We **VACATE** the ALJ's determination of a 10% impairment rating and **REMAND** the claim to the ALJ for entry of an amended opinion, order, and award in which the ALJ determines an impairment rating based on the evidence in the record.

ALL CONCUR.

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