OPINION ENTERED: May 8, 2012

CLAIM NO. 200992020

USHER TRANSPORT PETITIONER

VS. **APPEAL FROM HON. CAROLINE PITT CLARK, ADMINISTRATIVE LAW JUDGE**

MITCHELL R. MINK,
HON. CAROLINE PITT CLARK,
ADMINISTRATIVE LAW JUDGE,
DR. MICHAEL KIRK,
and KENTUCKY SURGERY CENTER RESPONDENTS

OPINION AFFIRMING

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

ALVEY, Chairman. Usher Transport ("Usher") seeks review of a decision rendered December 13, 2011, by Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ"), awarding Mitchell R. Mink ("Mink") permanent total disability benefits. Usher also appeals from the order on reconsideration rendered by the ALJ on February 13, 2012.

The ALJ found Mink, a truck driver, to be permanently totally disabled as a result of injuries to the left knee and right ankle sustained on March 23, 2009 as he was exiting his truck. On appeal, Usher argues the ALJ's decision was not supported by substantial evidence. We disagree, and affirm.

Mink testified by deposition on February 11, 2010 and December 29, 2010, and at the hearing held October 14, 2011. Mink, a resident of Harrodsburg, is a high school graduate with limited training as a corrections officer. Mink's work history consists of working as a corrections officer, shift commander for a detention center, farmer, horse trainer and truck driver. Mink began working as a truck driver in August 2002, and was hired by Usher in October 2005. His work for Usher required him to climb on top of the truck and to crawl under it in performing pre-operational inspections. He was also required to climb onto the trailers when unloading product. His job with Usher also required him to drive throughout the United States and Canada.

On March 23, 2009, Mink stepped out of his truck to connect air-lines when his ankle turned and his left knee popped. He then fell onto his left knee. He first sought treatment with his family physician, Dr. Dartt who

referred him to Dr. Talwalker and later to Dr. Kirk. Usher then sent him to Ephraim McDowell clinic where he was also referred to Dr. Talwalker. Both Dr. Talwalker and Dr. Kirk performed surgery.

Mink testified he had no problem with either his left knee or right ankle prior to March 23, 2009. He continues to experience pain and weakness in both. His left knee also gives way and swells. He has undergone surgeries to his right ankle and left knee. He has also had an injection in his right ankle. He stated he can stand or sit for twenty minutes at a time without changing position. He uses a cane and has difficulty with climbing. He has to keep his leg extended.

Physical therapy did not help, and he stated it actually worsened his condition. He also uses a TENS unit for the right ankle and left knee. He also lacks full range of motion in the left knee. He further testified Usher's worker's compensation insurer denied any treatment for the right ankle. Mink keeps his knee elevated, takes Mobic, Lortab and aspirin. He performs home exercises. Mink does not believe he can return to work as a truck driver.

Mink filed the March 31, 2009 office note of Dr. Talwalker, an orthopedic surgeon, in support of his claim.

Dr. Talwalker noted the history of Mink's right ankle and left knee giving way as he was exiting a truck. Dr. Talwalker noted Mink had no previous knee problem, and he provided an initial diagnosis of possible multi-ligamentous injury to the left knee. Dr. Talwalker operated on the left knee on April 8, 2009.

Dr. Talwalker testified by deposition on March 19, 2010. He performed surgery on the left knee consisting of reconstruction of the anterior cruciate ligament ("ACL"). He noted Mink had atrophy of the thigh and calf due to the injury, and may require revision reconstructive surgery on the ligament to give more stability. He also recommended Synvisc injections. He noted Mink had limitations on lifting and climbing. He opined Mink had reached maximum medical improvement ("MMI") on December 10, 2009 and assessed an 8% impairment rating based upon the AMA American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He stated he did not believe Mink's complaints were out of proportion to his objective findings.

Mink submitted records from Dr. Michael Kirk, an orthopedic surgeon, dated March 6, 2010, March 26, 2010 and April 8, 2010. Dr. Kirk noted Mink had right ankle and left knee pain. He stated Mink was status post ACL

reconstruction of the left knee. He diagnosed Mink with a left medial meniscus tear and right ankle peroneous brevis tendon rupture. He then performed a debridement of the medial meniscus on April 8, 2010, and operated on the right ankle on April 29, 2010. Dr. Kirk stated all treatment for the right ankle and left knee was due to the work-related injury. On November 17, 2010, Dr. Kirk assessed an impairment rating based upon the AMA Guides. He stated if he utilized the gait derangement tables, the impairment would be a 15%. If he used the diagnosis based estimate, the impairment rating would be a 9%. On October 12, 2010, Dr. Kirk stated:

> It is my feeling that Mr. Mitchell Mink will not be able to return to manual labor in the future, given the pain he still experiences in both of these body parts, and I do not anticipate this will improve over time.

Dr. Kirk testified on two occasions - May 26, 2010 and again on December 1, 2010. He first saw Mink on March 16 2010. Mink provided a history of twisting his left knee and right ankle while exiting a truck. Dr. Kirk stated Mink sustained a meniscus tear to the left knee and a tendon rupture of the right ankle, both of which were due to the original injury. Dr. Kirk stated all surgeries to the right ankle and left knee were performed as a result of

the work-related accident. He further stated Mink may have had a pre-existing chondromalacia which was aroused into disabling reality by the injury. Dr. Kirk opined it is unlikely Mink will be able to return to his previous level of work.

Dr. Kirk testified again on December 1, 2010. He reiterated his opinion regarding the work-relatedness of the right ankle and left knee conditions. He stated Mink sustained medial and lateral meniscus tears of the left knee, and was status post ACL reconstruction. He also noted Mink had right ankle instability with a peroneous brevis tendon tear. He stated the 15% impairment rating assessed based upon gait derangement tables pursuant to the AMA Guides was the most accurate. He stated Mink will be unable to return to work as a truck driver or manual laborer. He stated Mink has pain, and his ability to walk, stoop, sit or stand is limited. He stated Mink's recovery has been fair to poor. Finally, Dr. Kirk stated it is appropriate for Mink to use a cane, knee brace, and ankle brace.

Dr. Corbett, an orthopedic surgeon, evaluated Mink on November 11, 2009. Dr. Corbett noted a history of inversion sprain to the left ankle while exiting a truck. Dr. Corbett noted Mink had completed a course of physical

therapy. He also noted Mink had significant atrophy of the left lower extremity. He recommended an MRI of the left knee and a functional capacity evaluation. He opined Mink had not reached MMI. In a subsequent report issued November 20, 2009, Dr. Corbett noted Mink reached MMI, and assessed a 4% impairment rating pursuant to the AMA Guides.

On February 1, 2011, Dr. Corbett again evaluated Mink. Dr. Corbett noted Mink continued to complain of pain at the ankle surgery site and the left knee. This time, he assessed a 10% impairment rating pursuant to the AMA Guides.

Usher submitted the report of Dr. Johnson, a neurologist, who performed a nerve conduction study and EMG on October 26, 2009. Dr. Johnson opined the examination was normal with no evidence of peripheral neuropath, radiculopathy or myelopathy.

Dr. Zerga performed an EMG of the right lower extremity on April 19, 2011 which he interpreted as normal.

Mr. Rick Pounds administered a functional capacity evaluation on November 19, 2009, and again on January 5, 2011. In his report dated January 7, 2011, he indicated Mink could return to work as a truck driver, but would initially be restricted to lifting forty pounds until he improved his strength and overall conditioning.

Concerning the extent of Mink's occupational disability, in the opinion, order and award rendered December 31, 2011, the ALJ found as follows:

> Next, the Administrative Law Judge must determine whether Plaintiff is permanently totally disabled. Permanent total disability is defined in KRS 342.0011(11)(c) as 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. *Hill v. Sextet Mining Corporation*, 65 SW3d 503 (Ky. 2001).
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> "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. *Ira A. Watson Department Store v. Hamilton*, 34 SW3d 48 (Ky. 2000). In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, educational level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. *Id*.
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> A review of the facts in this case reveals that Plaintiff is currently 51 years old, lives in Harrodsburg, Kentucky, and has a high school education. He attended additional schooling while employed as a corrections officer and later as a

> truck driver. Prior to working for Defendant Employer, Plaintiff worked as a farmer, a ferrier, a corrections officer and a truck driver. Prior to the March 23, 2009 work injury, Plaintiff had never suffered from left knee or right ankle pain. Yet now, post-injury, he has undergone two left knee surgeries and a right ankle surgery, and he does not believe that he is able to safely walk without an ankle brace, a knee brace, and a cane. He is untrained and unqualified for anything but manual labor, which I do not believe he is able to perform. Although Dr. Corbett, relying on the FCE performed by Rick Pounds, opined that Plaintiff could return to his pre-injury job or any other job within the medium demand level, I do not believe that is the case. Rather, I find that Dr. Kirk [sic] as provided the most accurate and authoritative opinions on Plaintiff's ability to return to work and on his permanent restrictions. Therefore, after reviewing all of the facts of this case, I find based on Plaintiff's age and work experience, coupled with his pain and work restrictions that limit his ability to sit, stand or walk for any significant period of time, that Plaintiff Mitchell Mink is permanently totally disabled.

Usher filed a petition for reconsideration asserting three errors should be corrected by the ALJ. First, Usher argued the ALJ erred in finding Mink sustained a compensable injury to his right ankle. Usher next argued the ALJ erred by finding Mink sustained a 15% impairment with the application of KRS 342.730(1)(c)1. Finally, Usher

argued the ALJ erred by finding Mink to be permanently totally disabled. In her order issued February 13, 2012, the ALJ denied Usher's petition for reconsideration stating it failed to demonstrate any patent errors.

On appeal, Usher argues the ALJ's assessment of permanent total disability is not supported by substantial evidence. Authority has long acknowledged in making a determination granting or denying an award of permanent total disability, 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). Likewise, 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. *See* 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).

Usher argues the ALJ erred in relying upon the opinions of the treating orthopedic surgeons, rather than the functional capacity evaluations performed by Mr. Rick Pounds in finding Mink to be permanently totally disabled. A functional capacity evaluation is not dispositive of the issue. It is merely a factor, such as other testing, to be considered as part of the totality of the evidence. As noted above, the ALJ may pick and choose from the evidence. We believe Mink's testimony, coupled with the medical testimony, including Dr. Talwalker and Dr. Kirk, constitute substantial evidence upon which the ALJ could and did rely. The outcome selected by the ALJ is supported by substantial evidence. Even if we were so inclined, we are without authority to disturb her decision on appeal. *See* KRS 342.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

After reviewing the evidence of record, the ALJ applied the appropriate legal standard for determining permanent total disability 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 Mink's age, education, and past work experience, in conjunction with his post-injury physical status due to the effects of the work-related injury and subsequent

surgeries, the ALJ was persuaded he was permanently totally disabled. Substantial evidence supports that conclusion. For that reason, we cannot say the ALJ's finding of Mink's entitlement to an award of permanent total disability benefits is so unreasonable under the evidence the decision must be reversed as a matter of law. We likewise find the ALJ adequately explained the basis and reasoning behind her award.

Accordingly, the decision rendered December 13, 2011, and the order ruling on the petition for reconsideration rendered February 13, 2012, by Hon. Caroline Pitt Clark, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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