OPINION ENTERED: DECEMBER 7, 2012

CLAIM NO. 201186391

VINCENT LOZANO PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

GUESS, INC.
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

SMITH, Member. Vincent Valdemar Lozano ("Lozano") appeals from the June 4, 2012 Opinion, Award & Order rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), who awarded permanent partial disability ("PPD") benefits based upon a 5% impairment rating assessed by Dr. Christopher Stephens. Lozano also appeals from the July 2, 2012 order overruling his petition for reconsideration. On appeal, Lozano argues the ALJ erred in relying upon the

opinion of Dr. Stephens and failing to consider the 7% impairment rating assessed by Dr. David Rouben. We disagree and therefore affirm.

Lozano, now age 37, resides in Louisville, Kentucky. He was employed by Guess, Inc. in January 2010 as a shipping associate. On November 18, 2011, Lozano filed a Form 101, Application for Resolution of Injury Claim, asserting the following claims:

> On January 7, 2011, Plaintiff was lifting pallets in the course of his employment and experienced Back symptoms. On January 10, 2011, Plaintiff bent over to pick up a piece of card board in the course of his employment and experienced a pop and increased Low Back pain. On April 10, 2011, Plaintiff lifted a box and experienced increased Low Back symptoms. (Errors in original.)

Lozano testified by deposition on December 20, 2011 and at the hearing conducted on April 25, 2012. There he explained his job duties as a shipping associate:

> I had to load, unload truck – tractor-trailers, 53-foot tractor-trailers, UPS trailers, and boxes came in, and each separate box I had to physically pick up and stack from floor to ceiling, from front to back of the trailer, which required a lot of lifting. I had to unload boxes out of the racks and get shipments ready, stock pallets, take other materials from other departments to get ready -- get ready for shipments. A whole lot of lifting, stacking pallets, and putting away

> pallets once we emptied them. (Errors in original.)

Lozano then explained how the January 7, 2011 injury occurred. He stated:

> Q. What happened -- you were injured January 7th, 2011.
>
> A. Yes.
>
> Q. What happened? How did that happen?
>
> A. They were getting ready to bring in new machinery this year, and they had all of these oversized pallets that we stacked on the floor and we kept stock on the floor, and they wanted me to go around and replenish the product from the pallets, put them in racks, and then go and clear the floor of pallets so that day, not only did I lift a lot of boxes, I had to pick up two hundred and eighty-three pallets, I believe it was, and stack them then [sic] high and then move them to a floor location.
>
> Q. What -- was there a specific point where you were injured or did it come on gradually? What happened?
>
> A. It came on gradually. Somewhere around two hours into picking up the pallets, after I had already picked up -- got the merchandise off of the pallets, I was lifting the pallets and I noticed that my back started hurting and straining. So, I ask [sic] my floor lead for help because I told her my back was getting sore, and, you know, I still had all kinds of pallets left, and she said no, that everyone was busy; there was no way that they could help me…

Lozano testified that he sought help from the department supervisor who also declined. He recalls it was a Friday and he was able to complete his shift and spent the next day in bed. He was able to go to church that Sunday, but experienced continuing pain in his lower back.

Lozano returned to work on Monday, January 10, 2011. He explained:

> Q. And, then you went back to work on Monday on January 10th?
>
> A. Correct.
>
> Q. What happened that day?
>
> A. Well, that day I went in as normal, and we did our morning stretches. Each department is required to do morning stretches every day, and I was fine. I was stiff, and I was still in pain, but I was able to do my stretches. And, then we started our workday, and I was going to clear out the rest that was left of like cardboard and miscellaneous items that were left on the floor. When I went to go pick up this piece of cardboard, and I kneeled down like -- and then I felt this pop in my back, and I'm in the most painful pain I've ever had in my life. I about went down to my knees. I lost my vision for a split second, and then I could not hardly move. I was stuck in the middle of the floor by myself, and I made my way back up to my feet, but I couldn't move an inch of my body. I couldn't move my hand. It was like the worst pain ever, so I yelled for help. And, Eva, which is the floor lead, came over and she got Jerry Mitchell, which is the supervisor, and he came. And, then Kenny Smothers,

> the safety guy came with the golfcart [sic] and helped me.

Lozano was treated at BaptistWorx and released to return to light duty. He continued to have pain symptoms. Although he complained that he was in severe pain, medical personnel would not excuse him from work. Lozano was given pain medication and muscle relaxers instead. He continued to work at light to modified duty while experiencing low back pain symptoms.

Lozano explained the circumstances that caused his third injury on April 20, 2011:

> That day I was doing normal stuff -- doing my normal work, and I went to go -- it was probably lunchtime, I believe. I went to go pick up a box off the floor and stack it on a pallet that I was getting -- I was getting a shipment ready, and when I went to lift that box, the exact same thing happened as it did on Friday the 7th. My back popped -- the same symptoms. Pain went through my whole body, and I was stuck again. I couldn't move. I couldn't hardly walk. It was the exact same pain.

Lozano continued treatment at BaptistWorx. He repeatedly complained the medical care was not effective. He was required to undergo physical therapy which did not help. He also underwent an epidural injection, the effects of which lasted only a few days.

Lozano testified that in his quest for relief, he has seen several physicians, including Dr. Lawrence H. Peters, Dr. G. Christopher Stephens and Dr. David P. Rouben. Dr. Peters recommended he undergo epidural injections. In September 2011, Dr. Rouben, at Lozano's request, released him to return to work with restrictions. On September 30, 2011, Guess, Inc. advised Lozano it could no longer accommodate his work restrictions and his employment was terminated.

Lozano submitted records and reports from Dr. Rouben. On September 14, 2011, Dr. Rouben completed a partially legible, handwritten medical form, taking Lozano off work until September 19, 2011 and imposing a restriction of no lifting greater than 15 pounds. The report reflects Lozano had been seen by Dr. Stephens, who diagnosed degenerative disc disease and an annular tear. Dr. Stephens did not recommend surgery and assessed a 5% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, ("AMA Guides"), based upon DRE Category II.

Dr. Rouben noted a CT scan showed recess stenosis on the right L3-L4 level, chronic degenerative disc disease at L4-L5, and possible compromise of the L4 root on the right

side. He also noted annular disruption at L4-L5 and L3-L4 more on the right than the left.

Dr. Rouben determined Lozano was not at maximum medical improvement ("MMI"). Dr. Rouben also stated he could return to work as directed and suggested by an orthopedic consultant. Dr. Rouben opined Lozano should have a sit-down job with a cushion or pillow, and assessed restrictions against any repetitive bending, twisting, lifting or carrying.

Dr. Rouben recorded in a January 19, 2012 office note that Guess, Inc. could not accommodate Lozano's restrictions and had terminated Lozano's employment. Dr. Rouben observed Lozano had become "aggressively depressed" and needed formal treatment.

In a detailed letter dated March 7, 2012, Dr. Rouben reviewed the history of Lozano's January 7, 2011 injury, noting that "he had to move 200 empty pallets at work and restack them and in doing so, the repetitive bending, lifting, turning, and twisting" caused low back pain. Lozano further reported that on January 10, 2011, while doing his morning stretches, his back popped and he experienced excruciating pain once more.

On examination, Dr. Rouben noted Lozano had "structural anomalies that exist of a general nature; however they were

non-symptomatic prior to this injury on the job." An April 28, 2011 MRI scan identified disruption of the annulus posteriorly “at the 2nd and 3rd from the bottom disks.” Dr. Rouben noted once again Lozano was taking medication for pain and to sleep.

Dr. Rouben determined Lozano had reached MMI as of January 19, 2012, and placed him in DRE category III, consistent with a 7% impairment rating pursuant to the AMA Guides. Dr. Rouben assigned restrictions of no repetitive being, twisting, lifting or carrying of any type. He noted Lozano would have no restrictions as to standing or walking. He addressed Lozano's future prognosis, stating:

> It is my opinion that he had a nonsymptomatic [sic] nondisabling [sic] preexistent morphologic abnormality that as a result of his activities and injury on the job was brought into disabling reality and for which now he is unable to be placated in any way, form, or fashion by our directed treatments to date, and for that reason we sent him on to a chronic pain specialist as noted above. We believe that his condition will be ongoing and consistent with discomfort and pain, and that his activities will be permanently restricted therein, and quite frankly there is a great chance that he may come to surgical intervention as the degeneration and the previously acknowledged neural compression becomes more significant over time as it certainly will.

Dr. Rouben concluded, based upon the existence of the documented and significant neural compression and the likelihood of progressive ongoing desiccation and deterioration, it was more likely than not Lozano would be profoundly limited with respect to his activities. Dr. Rouben believed Lozano would continue to need chronic pain medications and would need surgery in the future.

Guess, Inc. submitted the medical report of Dr. Stephens, who examined Lozano on August 25, 2011. Dr. Stephens noted Lozano reported back pain while lifting multiple pallets on January 7, 2011. Over the weekend his pain increased and he sought medical treatment at BaptistWorx. He was sent to physical therapy and given medication and a corticosteroid injection. Lozano returned to work, continuing until May 2011, when he was referred to Dr. Rouben, who took him off work indefinitely.

Dr. Stephens reviewed medical records from BaptistWorx, Dr. Rouben, and an MRI scan from Stonestreet Imaging. The MRI revealed degenerative disc disease at L3-4 and L4-5 segments, an annular tear at L3-4 and bulging at both levels. His impression was "primarily back pain secondary to degenerative disc disease and likely annular tear at L3-4." In the "discussion" section of his report, Dr. Stephens stated:

> Based upon the history I obtained from the patient, as well as my review of the records, it is my opinion that the work incident he described in January of 2011 was the cause of his current symptoms. I think treatment for him has been appropriate. This has included medication, physical therapy, and an attempt at an epidural steroid injection. All are reasonable treatment modalities for his symptoms. There is no evidence by history of any pre-existing active condition of his back. I am puzzled as to why he was taken off work in May however. He worked consistently for 4 months after the injury and then was suddenly taken off work. I do not believe that it was medically necessary for him to be off work. In fact, I believe he could be working right now with restrictions. I believe appropriate restrictions for his level of symptoms would be no repetitive lifting to exceed 20 pounds, occasionally up to 35.

Dr. Stephens disagreed with Dr. Rouben's assessment that surgery would be necessary. Dr. Stephens also did not believe further attempts at injective therapy were indicated "given that he had no response from his initial injection." In addition, Dr. Stephens indicated weight loss would benefit Lozano's back pain. His reported weight of 250 pounds "is likely interfering somewhat at least with his recovery."

Dr. Stephens determined Lozano had reached MMI and concluded he qualified for a permanent impairment rating of 5% pursuant to DRE Lumbar Category II of the AMA Guides.

On June 4, 2012, the ALJ issued the following findings relevant to the issue on appeal:

> ...With respect to the issue of plaintiff's entitlement to benefits pursuant to KRS 342.730, the plaintiff contends that he is entitled to an award of permanent partial disability benefits based on the 7% impairment rating assigned by Dr. Rouben enhanced by the triple multiplier of KRS 342.730(1)(c)(1) in light of the permanent restrictions assigned to him and his ongoing symptoms as a result of which he does not retain the physical capacity to return to the type of work performed at the time of injury. The defendant, for its part, contends that while the plaintiff is entitled to an award of permanent partial disability benefits, that award should be predicated on the 5% impairment rating assigned by Dr. Stephens. In support of that argument the defendant submits that although Dr. Rouben assigned a 7% impairment rating, he referred to plaintiff as having a DRE Lumbar Category III impairment with that category allowing a 10 to 13% impairment range. In addition, the defendant describes the plaintiff's injury as simply a chronic back strain exacerbated by degenerative disc disease and a mild annular tear. The defendant does not address the issue of statutory multipliers.
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> Having carefully reviewed the evidence, the ALJ finds the 5% impairment rating assigned by Dr. Stephens to be more persuasive than the 7% impairment rating assigned by Dr. Rouben. Unfortunately for the plaintiff, Dr. Rouben's report is internally inconsistent and ambiguous in that he specifically noted that the

> plaintiff had a Lumbar Category III impairment but assigned only a 7% impairment rating, a rating permissible only under Category II. Dr. Rouben did not explain in any of his reports the basis or findings on which he assigned his impairment rating and it cannot be determined, therefore, whether he believes that the plaintiff has a Category II impairment of 7% or a Category III impairment which he incorrectly estimated at 7%. By default, therefore, the only impairment rating consistent with the AMA Guides is the 5% impairment rating of Dr. Stephens and the ALJ finds, in reliance upon the report of Dr. Stephens, that the plaintiff has sustained a 5% impairment as a result of the low back injury of January 7, 2011. Plaintiff, therefore, has a permanent disability rating of 3.25% (5% X .65).

Lozano filed a petition for reconsideration on June 18, 2011, arguing that, despite the ALJ's reservations about the correctness of Dr. Rouben's impairment rating it was within his authority to find Dr. Rouben's assessment of 7% constituted substantial evidence upon which to award benefits. The ALJ then issued his order overruling the petition for reconsideration on July 2, 2012, stating:

> This matter is before the Administrative Law Judge on the plaintiff's petition for reconsideration. Specifically, the plaintiff submits that it is within the ALJ's authority to find the 7% impairment rating assessed by Dr. Rouben to constitute substantial evidence on which to base an award of permanent disability benefits.

> Plaintiff requests additional findings of fact "regarding selection of an impairment rating upon which to base a partial disability award." The defendant has filed a response to the petition for reconsideration arguing that there is no error in the undersigned's selection of the 5% impairment rating assigned by Dr. Stephens as opposed to the 7% impairment rating assigned by Dr. Rouben, that it was not readily apparent to the defendant what further findings the plaintiff was requesting and that in essence the petition was simply an impermissible attempt to reargue the perceived substantive merits of the claim.
>
> Having reviewed the plaintiff's petition and the defendant's response the undersigned is not convinced that the petition for reconsideration points to any error patently appearing on the face of the Opinion & Award. The ALJ remains of the opinion that Dr. Rouben's 7% impairment rating attributable to what he considers a "Category III" lumbar impairment is inconsistent with the AMA Guides and, therefore, does not constitute substantial evidence. The ALJ declines to speculate as to the reason why Dr. Rouben's report is internally inconsistent. Moreover, the plaintiff is, in essence, requesting that the ALJ reweigh the evidence, an act which is impermissible in the context in deciding a petition for reconsideration pursuant to KRS 342.281. Accordingly, the plaintiff's petition for reconsideration is **OVERRULED**.

On appeal, Lozano argues Dr. Rouben's assessment of a 7% impairment constitutes substantial evidence despite

incorrectly citing the DRE category to which he referred. His counsel states:

> The evidence in Mr. Lozano's claim shows Mr. Lozano meets the AMA Guides definition of DRE Lumbar Category II and does not meet the AMA Guides definition for DRE Lumbar Category III. Although Dr. Rouben noted Mr. Lozano was placed in a Category III, Dr. Rouben specified Mr. Lozano has a 7% whole person impairment. On review of the totality of the evidence, Dr. Rouben's assessment of 7% whole person impairment is unambiguous and constitutes substantial evidence which is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. G.F. Goodwrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Lozano also argues the ALJ could have consulted the AMA Guides directly when determining the impairment rating. Accordingly, Lozano requests that the claim be remanded to the ALJ for additional findings of fact explaining why he chose Dr. Stephens' impairment rating over Dr. Rouben's rating.

Since Lozano, the party with the burden of proof, was unsuccessful in proving his work injury caused any greater impairment than that found by the ALJ, the question on appeal is whether the evidence is so compelling as to require reversal. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, 673 S.W.2d 735

(Ky. App. 1984). The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe parts of the evidence and disbelieve other parts, 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 (Ky. 1977). It is not enough for Lozano to show there is some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

After reviewing the ALJ's decision, and the record in this matter, we believe the ALJ thoroughly reviewed the relevant evidence and reached a conclusion supported by substantial evidence. Lozano's argument on appeal is simply a re-argument of the merits of his claim. We are without authority to re-weigh the evidence and reach a conclusion contrary to that reached by the ALJ.

The ALJ concluded there was ambiguity and inconsistency in the rating assigned by Dr. Rouben. The ALJ correctly observed Dr. Rouben stated Lozano was in DRE

Category III but assigned a 7% rating which is not consistent with the AMA Guides. The ALJ was not required to speculate as to the reason for Dr. Rouben's inconsistent findings. Further, the ALJ noted Dr. Rouben did not explain the basis or the findings which formed the basis for the rating he assigned. Contrary to Lozano's assertion, the ALJ considered Dr. Rouben's report. The ALJ simply found it was not persuasive. The ALJ was well within his role as fact-finder in rejecting Dr. Rouben's opinion.

The ALJ indicated he was most convinced by Dr. Stephens' opinion regarding Lozano's impairment rating. Dr. Stephens' rating constitutes substantial evidence supporting the ALJ's decision.

Accordingly, the June 4, 2012 Opinion, Award & Order rendered by Hon. Robert L. Swisher, Administrative Law Judge, and the July 2, 2012 order overruling Lozano's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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