OPINION ENTERED: July 5, 2012

CLAIM NO. 201071693

WAL-MART STORES, INC. PETITIONER

VS. **APPEAL FROM HON. ALLISON EMERSON JONES, ADMINISTRATIVE LAW JUDGE**

AGIM ALIJA
and HON. ALLISON EMERSON JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Wal-Mart Stores, Inc. ("Wal-Mart") seeks review of the January 31, 2012, opinion, order, and award of Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ Jones") finding Agim Alija ("Alija") sustained a compensable work-related low back injury and awarding permanent total disability ("PTD") benefits and medical

benefits. Wal-Mart also appeals from the February 24, 2012, order overruling its petition for reconsideration.

There was no dispute Alija sustained a work-related injury on October 14, 2010. The September 6, 2011, benefit review conference ("BRC") order reflects the following contested issues:

> Capacity to return to former work; Extent and duration; Multipliers pursuant to KRS 342.730(1)(c); Vocational rehabilitation; TTD

With the aid of an interpreter, Alija testified at his June 22, 2011, deposition and at the October 20, 2011, hearing. He testified he graduated from high school in Kosovo in 1982. He served in the military in 1985 and 1996. Alija has no vocational training. Alija immigrated from Kosovo in 1999. Alija first worked as an electrical helper while employed by Amtek. His job entailed providing any tools an electrician needed. Alija testified this job did not involve physical labor. His next employment was with Hospital Specialty Company as an inventory clerk, and this involved packing diapers in a box. He was hired by Wal-Mart on October 15, 2001. Alija testified he worked two years on the "GM side" and then moved to the "grocery" section. His job in the grocery section involved stocking shelves. He testified the heaviest item he lifted was a

pallet which weighed approximately thirty to forty pounds. Alija testified on the date of the injury, the manager told him to move a pallet approximately seven feet tall and still encased in “shrink wrap” from the floor to the receiving area. Nothing had been unloaded from the pallet. Alija explained he used a hand pallet jack to lift the pallet onto the jack. When he pulled the pallet Alija felt something pop. Because Alija felt better after resting approximately three to five minutes, he again tried to pull on the pallet which caused more back pain. Alija managed to pull the loaded pallet to the receiving area. He then told Nora, the assistant manager, he hurt his back. As a result, another assistant manager took him to the Urgent Treatment Center. Alija indicated the Urgent Treatment Center returned him to work with restrictions of “no lifting, no pushing, no heavy stuff, change position.”

Alija testified the medications initially prescribed made him dizzy. He worked as a door greeter for three days which caused his back and legs to “hurt more.” On all three days he did not work a full day. The Urgent Treatment Center referred Alija to Dr. Phillip Tibbs who ordered an MRI. After reviewing the MRI, Dr. Tibbs told Alija he had a herniated disc and needed physical therapy. Dr. Tibbs also administered epidural injections. Alija

testified Dr. Tibbs told him he needed surgery which he declined. Alija explained he could handle the pain and is scared to have the surgery because he has seen people in wheelchairs after surgery. Alija testified he has been unable to work since the injury. He testified every ten to fifteen minutes he experiences sharp pain in his low back which extends into his right leg down to his ankle. He also experiences numbness and tingling in his right leg. Alija testified he can only stand for ten minutes. Alija acknowledged he had previously worked in Kosovo as a security guard and night watchman for approximately sixteen years. He denied that he would be able to perform that job because it required him to "walk around and around." Alija does not believe he can perform his previous jobs at Amtek and Hospital Specialty Company because of his leg and back pain.

Alija was originally prescribed pain relievers and muscle relaxers which he no longer takes. He still takes Tylenol. Although he has a driver's license, he does not drive much because he does not trust his right leg. His wife drives him to the doctor. The furthest he has driven since the injury is to Lexington. Alija walks with a "crutch," because when he walks he "can fall anywhere." Alija has fallen three different times because his right

leg gave out. Alija characterized his pain as seven on a scale of one to ten. He does not believe he is able to go back to work at Wal-Mart, even as a greeter, because of his back pain. He does no yard work or house work. Alija testified he returned to work because he did not want to lose his job. He explained he is a good worker, and for two months in a row was the associate of the month. Concerning his current daily activities and work at Wal-Mart prior to the injury, Alija testified as follows:

> Q: Okay. What do you do now in terms of daily life? Do you -– is [sic] there any activities that you can –-
>
> A: No. No. My activity is gone. I work hard at Wal-Mart. This is my house, Wal-Mart.
>
> [text omitted]
>
> A: Ask anybody in Wal-Mart. I work all job [sic]. I work like associates, but I think I work more than assistant manager.
>
> Q: Okay. So, you say you put a lot of time in.
>
> A: I make everything at Wal-Mart looks [sic] better, sell better, make money, make profit.

Alija submitted Dr. Tibbs' Form 107 dated September 20, 2011, and his "Document Review Report" dated August 12, 2011. Wal-Mart submitted the August 29, 2011, report of Dr. Timothy Kriss, generated after conducting an

independent medical evaluation ("IME"). After the hearing, Wal-Mart also submitted the November 8, 2011, functional capacity evaluation report of Rick Pounds. The parties then submitted briefs to Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ Smith"). On December 29, 2011, ALJ Smith entered an order reassigning the claim to ALJ Jones. On January 31, 2012, ALJ Jones entered an opinion, order, and award. After summarizing the lay and medical evidence and setting forth the stipulated facts and contested issues, ALJ Jones determined Alija had a 12% whole body impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides") and set forth the following findings in support of her determination:

A. Extent And Duration

. . .

> The undersigned ALJ finds Dr. Tibbs's [sic] assessment of 12% to be more credible in this instance. Dr. Tibbs has treated Alija throughout the course of his injury, seeing him several different times. Dr. Kriss, however, only saw Alija once. This is significant since the divergence in ratings appears to result primarily from a disagreement in opinion over whether Alija has radiculopathy. Dr. Kriss did not positively rule out radiculopathy, but found it highly unlikely because Alija's pain did not present in a typical fashion. He also

> seemed overly focused on symptom magnification. The undersigned ALJ believes that Dr. Tibbs, who saw Alija on several different occasions and at different points in time, is in a better position than Dr. Kriss to evaluate Alija's symptoms and his responses to various treatments.
>
> Accordingly, the undersigned ALJ finds that Alija suffered a 12% whole body impairment under the AMA Guidelines 5th Edition as a result of the October 14, 2010 injury.

In determining Alija was permanently and totally occupationally disabled, ALJ Jones found as follows:

> **D. <u>Ability to work</u>**
>
> The crux of this case is really whether Alija has the ability to return to any type of work. KRS 342.0011(11)(c) defines "permanent total disability" 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 …." KRS 342.0011(34) defines "work" as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." The determination of a total disability award remains within the broad authority of the ALJ. *Ira A. Watson Department Store v. Hamilton,* 34 S.W.3d 48 (Ky. 2000). To determine the likelihood that a worker can resume some type of work under normal employment conditions, the ALJ should consider the worker's age, education level, vocational skills, medical restrictions, emotional state and how those factors interact. *Id.* "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." *Id*. at 52 (citing *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979)).

i. <u>Age</u>

Alija will be fifty years old in less than two months. While fifty is far from retirement age, the harsh reality is that workers fifty and over face added challenges when trying to find employment, especially in a new field where the worker has no prior experience. [footnote omitted] On the balance, the undersigned ALJ finds that the age factor weighs slightly in Alija's favor.

ii. <u>Education and Vocational Skills</u>.

Alija received a high school diploma in his native county of Kosovo. He did not complete any specialized or vocational program in Kosovo. After arriving in the United States, he completed only a basic skills English class. He has not taken any other classes or received any formal vocational training in the United States.

Alija has worked in manual labor of one kind or another for his entire working career. He does appear to have any transferable vocational skills that are compatible with his current medical restrictions.

Alija's understanding of English appears to be excellent. He is also able to communicate effectively in English most of the time. However, he has not completely mastered the English language. His English is quite broken

and at times he is unable to express abstract concepts with complete clarity. [footnote omitted] He relied at least partially on a translator to assist him at his deposition, IME, and at the hearing.

While Alija's language skills may not have posed a significant barrier during his past manual-labor-related employment, his current mobility and lifting restrictions would require him to work in a field that is much more communication focused. This would require him to improve his English and general communication skills. Additionally, Alija would have to learn a whole new set of job skills. On the balance, these factors also favor Alija.

iii. <u>Restrictions</u>

Dr. Tibbs has restricted Alija from lifting over 25 pound maximally and 15 pounds on a repetitive basis. He cannot stand, walk or sit for long periods. He must be able to change positions frequently. He stands in a stooped/bent position and walks with a cane.

These restrictions are significant. They preclude Alija from doing the type of work he has been doing for his entire working career. Additionally, because Alija cannot sit for long periods, even sedentary, non-labor intensive positions will be difficult for him to perform.

iii. <u>Emotional state</u>

While Alija does not appear to be undergoing treatment for depression or anxiety, he seems deeply afraid that he will further injure himself if he

> exerts himself in any significant manner. He believes himself to be severely limited and unable to perform a number of the tasks associated with daily living.
>
> Alija appears to be a credible and trustworthy person that is not prone to making excuses to avoid work. This injury was the first time Alija had seen a doctor since his arrival in the United States a decade earlier. By all accounts, prior to this injury, Alija was considered motivated, well-liked, and a hard worker. While Alija may be magnifying his symptoms and limitations to some degree, this ALJ finds that his beliefs are sincere and that he is not malingering. Based on his past work and medical history (or lack thereof), this ALJ believes that Alija would be working if he believed himself physically able to do so. Alija's subjective, but sincere, beliefs regarding his physical limitations impose a significant and likely insurmountable barrier preventing him from returning to the work force.
>
> Considering Alija's testimony, educational background, limited English skills, absence of special training, medical restrictions, and present emotional state, the undersigned ALJ finds that Alija suffered a permanent total occupational disability.

Finding Alija was not a good candidate for vocational rehabilitation, ALJ Jones declined to refer him for an evaluation. ALJ Jones awarded TTD and PTD benefits in the amount of $285.64.

Wal-Mart filed a verified petition for reconsideration pointing out 803 KAR 25:010 Section 18(5) requires a decision to be rendered no later than sixty days following the final hearing and since the final hearing took place on October 28, 2011, ALJ Jones' decision was outside the sixty day period. Wal-Mart's counsel asserted he was informed ALJ Smith had written an opinion, award, and order prior to December 27, 2011, which did not find Alija to be permanently and totally disabled. Wal-Mart's counsel stated the opinion, award, and order was "never recorded" by the Department for Workers' Claims; therefore, the decision was not rendered as required by the regulation. Further, five days after the decision should have been rendered as required by regulation, the claim was transferred to ALJ Jones. Wal-Mart asserted ALJ Jones had no involvement in the claim prior to a teleconference initiated by her in mid-January 2012.

Wal-Mart maintained that during the teleconference, ALJ Jones noted ALJ Smith's opinion, award, and order had been lost by the Department of Workers' Claims and she would be rendering her own decision. Wal-Mart asserted it expressed concern that ALJ Jones' decision "might not be consistent" with the opinion, order, and award of ALJ Smith and "issues of *res judicata* were

relevant, if not ultimately paramount, in such a situation." Wal-Mart argued ALJ Jones issued her decision in "contravention of the principle of *res judicata*, was indeed inconsistent with the lost Opinion, Award, and Order of ALJ Smith." Wal-Mart asserted the fact no decision was rendered within sixty days is an "'irregularity in the proceedings of the court...'" which prevented it "from having a fair trial" which is an appropriate reason for granting a new trial under CR 59.01. Wal-Mart again asserted the irregularity was magnified because ALJ Jones determined Alija was permanently and totally disabled which was inconsistent with ALJ Smith's decision. Wal-Mart complained ALJ Jones relied upon Alija's age, English deficiency, foreign education, and emotional state to find he was totally disabled. Wal-Mart posited as follows: "The way in which the ALJ considers these factors was an error of law on her part by not considering these factors in the context of the injury."

Since Alija had never appeared in front of her and her "only window into his testimony" was a transcript translated from Albanian to English, Wal-Mart also took issue with ALJ Jones' statement Alija appeared to be credible and trustworthy. Wal-Mart also complained ALJ Jones made a finding Alija was credible and trustworthy

notwithstanding objective medical evidence of record which would seem to indicate otherwise. Wal-Mart cited to the findings of Dr. Kriss which indicated Alija was guilty of symptom magnification. Wal-Mart argued it was error for ALJ Jones to find Alija had a complete and permanent inability to perform any type of work not because of the injury but because of other attributes Alija "does or does not possess." Wal-Mart requested ALJ Jones to set aside her opinion, order, and award and conduct a new hearing and make findings consistent with its argument.

On February 25, 2012, ALJ Jones entered the following order overruling Wal-Mart's petition for reconsideration:

I.

> This matter is before the undersigned Administrative Law Judge (ALJ) on Defendant's petition for reconsideration of the ALJ's January 31, 2012, Opinion, Order & Award ("the 1/31/12 Opinion"). Defendant seeks reconsideration of the 1/31/12 Opinion on the following grounds:
>
> 1) it allegedly differs from an opinion that former ALJ Smith allegedly wrote but never filed or mailed to the parties and that no one has been able to locate;
>
> 2) the undersigned ALJ was not the same ALJ that presided over the benefit review conference and hearing;

3) the 60-day period ran while the case was still assigned to former ALJ Smith without a decision being entered into the record;

4) the undersigned ALJ committed a patent error of law by allegedly making a total disability finding "independent of the injury"; and

5) the undersigned ALJ should not have made a credibility assessment solely on the written record.
Plaintiff has responded to Defendant's petition. As such, it is ripe for consideration.

Upon review of the petition, the 1/31/12 Opinion, the record, relevant statutes, regulations, and case law, the undersigned ALJ finds no error, patent or otherwise. Accordingly, for the reasons more fully set forth below, **Defendant's petition for reconsideration is DENIED. The ALJ's January 31, 2012, Opinion, Order & Award stands as entered.**

II.

When presented with a petition for reconsideration, an ALJ should correct only "errors patently appearing on the face of the award." *Bullock v. Goodwill Coal Co.*, 214 S.W.2d 890, 893 (Ky. 2007) (quoting KRS 342.281). The statute "expresses a legislative policy to prohibit the fact-finder from reconsidering the merits." *Id.* (citing *Beth–Elkhorn Corp. v. Nash*, 470 S.W.2d 329, 330 (Ky.1971)).

A. Pre-transfer proceedings

The events surrounding this matter are both unusual and regrettable. Certainly, it would have been

preferable if the prior ALJ had issued a ruling (that was filed and mailed to the parties) before this case was transferred. [footnote omitted] The fact is, however, that the case was transferred to this ALJ before a final opinion, order and award was entered into the record. [footnote omitted] As such, the matter stood submitted for decision when the case was transferred. The undersigned had no choice but to rule on the submitted issues. In so doing, the ALJ did not violate any principles of *res judicata*.

The foremost principle of *res judicata* is that there must have been a final decision rendered on the merits of a case by a court of competent jurisdiction. *BTC Leasing, Inc. v. Martin,* 685 S.W.2d 191, 197 (Ky. App. 1984) (citing 46 Am.Jur.2d Judgments § 394 (1969)). "The successful invocation of this doctrine is clearly [] dependent upon the demonstration of each of the elements . . ., *including the existence of a final judgment rendered upon the merits*." *Id.* (emphasis added) (citing *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970)).

In this case, Judge Smith did not render a final decision on the merits that was entered into the record. [footnote omitted] As such, there was no final adjudication by Judge Smith prior to the case being transferred making it impossible for the 1/31/12 Opinion to have run afoul of any principles of *res judicata*. The undersigned ALJ did not make legally patent error in this regard.

B. The fact that this ALJ did not preside over the hearing or BRC does

not present a valid basis for a new hearing.

There is no statutory or due process requirement that the ALJ who presided over the hearing must be the same ALJ who decides the case. "A decision by an ALJ other than the one who personally received the evidence [will] not be deemed invalid." *Bentley v. Aero Energy, Inc.*, 903 S.W.2d 912, 914 (Ky. App. 1995). "It is therefore evident that the requisites of due process focus upon the appraisal and evaluation of evidence supplied the decision-maker, not upon the opportunity to personally observe the claimant." *Id.* As such, the undersigned was correct in ruling on the submitted issues even though she was not the ALJ that presided over the BRC or the hearing. [footnote omitted] There was no patent error in this regard.

C. The fact that the 60-day period ran before this case was transferred did not present a valid basis for a new hearing.

Judge Smith's failure to render a timely decision is not a valid basis for granting new hearing. "At best, where an ALJ fails to timely render a decision in accordance with KRS 342.275(2), until such time as a decision is issued, the parties to the claim simply become empowered to seek a writ of mandamus from the Franklin Circuit Court compelling the performance by the ALJ of his statutory duties." *Hutchins v. Summa Technology/Ken-Mar*, No. 2005-CA-000127-WC, 2005 WL 1993439, at *2 (Ky. App. Aug. 19, 2005). However, holding a new hearing is not a remedy. *Id.* There was no patent error in this regard.

D. <u>The total disability finding was made in the context of the injury</u>.

Defendant asserts that "the way in which the ALJ consider[ed] these factors [Plaintiff's age, education, English deficiency and his emotional state] was an error of law on her part by not considering the factors in the context of the injury." Defendant goes on to assert that "according to this logic, the Plaintiff would likely have been unable to perform any type of work before the injury."

"*Ira A. Watson Department Store v. Hamilton*, [34 S.W.3d 48 (Ky. 2000)], and *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky. 2001), explains that a permanent impairment rating is prerequisite to a finding of permanent total disability under KRS 342.0011(11)(c) but that other factors also are relevant. Among them are a worker's post-injury physical, emotional, intellectual, and vocational status; how those factors interact; and the likelihood that the worker will be able to find work consistently under normal employment conditions." *Colwell v. Dresser Instrument Div*. 217 S.W.3d 213, 217-18 (Ky. 2006).

The ALJ found that Plaintiff suffered a permanent impairment rating of 12%. *See* 1/31/2012 Opinion 12. Thus, the first requirement of a physical injury was met. The ALJ then went on to analyze the *Ira A. Watson Dep't Store* factors in the context of Plaintiff's injury and its restrictions. *See* 1/31/2012 Opinion at p. 14-17.

The ALJ determined that Plaintiff's injuries prevent him from

doing manual labor—the only type of work he has ever done and the only type of work his education, age, vocational skills, and language abilities allow him to practically perform. As stated in the 1/31/12 Opinion:

Alija has worked in manual labor of one kind or another for his entire working career. ***He does not appear to have any transferable vocational skills that are compatible with his current medical restrictions.***

. . .

Dr. Tibbs has restricted Alija from lifting over 25 pound maximally and 15 pounds on a repetitive basis. ***He cannot stand, walk or sit for long periods. He must be able to change positions frequently. He stands in a stooped/bent position and walks with a cane.***

. . .

While Alija's language skills may not have posed a significant barrier during his past manual-labor-related employment, ***his current mobility and lifting restrictions would require him to work in a field that is much more communication focused***.

In sum, the ALJ's analysis of total disability was not patent error.

E. fact-finder may assess credibility on the written record alone.

Finally, Defendant asserts that this ALJ committed patent error by assessing Plaintiff's credibility where "her only window into his testimony was a written transcript." Fact-finders regularly make credibility

> determinations based solely on written transcripts. Even a defendant accused of a crime does not have an absolute right to insist that the fact-finder view all evidence live. *See Com. v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986).
>
> Furthermore, the ALJ's assessment of Plaintiff as a trustworthy person was made in the context of the uncontradicted testimony in the record that he had never had a work-related injury in his entire work history in the United States or even seen a doctor in the elven years preceding the injury. *See* 1/31/2012 Opinion at p.17 ("Alija appears to be a credible and trustworthy person who is not prone to making excuses to avoid work. The injury was the first time Alija had seen a doctor since his arrival in the United States a decade earlier.").
>
> The ALJ did not commit any patent error by assessing Plaintiff's credibility based solely on the written record.

Footnote one of ALJ Jones' order contains the following:

> Contrary to counsel's statements in paragraph 6, page 2 of its petition, the undersigned ALJ did not definitively state that "Smith's Opinion . . . had been lost by the Department of Workers Claims." What the undersigned stated was that if Judge Smith drafted an opinion, it was lost, misplaced, or destroyed before it was mailed to the parties or filed with the Department of Workers' Claims.

Footnote two of the order states as follows:

> The undersigned ALJ spoke with former ALJ Smith about this matter on two separate occasions before entering the 1/31/12 Opinion. During those conversations, Judge Smith did not definitively state that he had signed an opinion. He stated that he *thought he recalled doing so, but could not be certain*. He also indicated that neither he nor his paralegal were able to locate either a hard or electronic copy of any final or draft version of it. Additionally, the undersigned ALJ's staff searched all the files transferred from Judge Smith to this office in the event a signed opinion had been misfiled and/or inadvertently sent to the wrong parties. Personnel at the Department of Workers' Claims in Frankfort also searched for any final opinion. No one was ever able to locate a copy of the alleged opinion in any form (electronic or paper).

Footnote three of the order ruling on the petition for reconsideration states the following:

> Any suggestion by either party of how Judge Smith would have ruled is pure speculation and conjecture at this point as no such opinion has ever been found. The undersigned ALJ did not discuss the merits of this matter with Judge Smith, and he never indicated to the undersigned how he ruled or would have ruled in this matter.

On appeal, citing Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968) and Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), Wal-Mart insists Alija does not qualify for an award of permanent and total

disability benefits since none of the experts in the claim stated Alija "'is so physically impaired that [he] is not capable of performing any kind of work of regular employment.'"

Wal-Mart complains ALJ Jones found Alija to be credible without observing him. Wal-Mart also takes issue with the criteria relied upon by ALJ Jones in determining Alija was permanently and totally disabled. Wal-Mart maintains Alija's Kosovo education and "English skills" have no bearing on his injury. Wal-Mart also takes issues with ALJ Jones' findings Alija's lifting restrictions are "'significant.'" Wal-Mart points out that Dr. Tibbs did not state or imply that Alija was not capable of performing some kind of work. Wal-Mart cites to Dr. Kriss' opinion that it was difficult to determine work restrictions due to the following:

> 'subjective factors (symptom magnification, motivation, and potential overt secondary gain) that clearly dominate both his clinical presentation as well as his own perception of his true physical capabilities.'

In support of its argument, Wal-Mart cites to the results of the FCE performed by Rick Pounds which is inconsistent with Alija's testimony. Wal-Mart asserts ALJ Jones did not address the conflict between Alija's beliefs and the

objective medical evidence in the record. It points out Dr. Tibbs recommended surgery which Alija has refused. In what can only be characterized as an inappropriate attack on the ALJ, Wal-Mart states as follows:

> He has effectively perm totaled himself notwithstanding any objective medical evidence to the contrary; and, ALJ Jones has agreed with the Respondent's personal (and un-scientific) assessment. ALJ Jones might well have written a much shorter opinion that simply states, 'He thinks he is perm totaled, so he is.'[1]

Wal-Mart insists ALJ Jones found Alija has a complete and permanent inability to perform any type of work, not because of the injury but because of other attributes Alija does or does not possess. It argues that according to this logic, Alija would have been unable to perform any type of work before the injury due to his language skills, educational background, age, and vocational skills. Wal-Mart points out that prior to Alija's injury, he was gainfully employed for ten years. Therefore, ALJ Jones' decision was based upon factors which were in contravention of Ira A. Watson Department Store v. Hamilton, supra.

Next, Wal-Mart makes the same argument it made in its petition for reconsideration as follows:

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[1] Counsel for Wal-Mart is cautioned to refrain from making disparaging remarks about an ALJ in the future.

> The regulatory mandate on the issuance of an opinion within sixty days of a hearing was violated and the claim should be remanded for a new hearing.

Wal-Mart complains that this matter was transferred to ALJ Jones outside the mandated time limits for an opinion to be written. It also complains a previous opinion may have been written by ALJ Smith who presided over the hearing, and ALJ Jones based her findings on the credibility of Alija whom she never saw. Wal-Mart again cites to the fact Alija's testimony was "translated from a unique an unusual language." Wal-Mart asserts as follows:

> Any one of these circumstances alone may not be enough to allow for a new Hearing, but surely in this instance a new Hearing would be the only fair way to resolve the 'unusual and regrettable' series of events.

Wal-Mart posits the only fair and accurate manner to judge whether someone is sincere and believable is to see the testifying individual in person; thus, and the claim should be remanded for a new hearing. Wal-Mart requests the final opinion and award issued by ALJ Jones be reversed or in the alternative to be remanded for a new hearing.

Concerning the first issue raised by Wal-Mart, Alija as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. *See*

KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Alija was successful in that burden, the question on appeal is whether there was substantial evidence of record to support ALJ Jones' decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, an ALJ is vested

with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra. The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Dr. Tibbs' Form 107 dated September 20, 2011, reflects the following:

> Mr. Alija presented as a 48 year-old male who noted onset of severe back pain radiating into his legs after an injury at work where he was moving a

> load of 700-800 pounds of freight on a pallet using the pallet jack.

Dr. Tibbs noted findings of a bulging disc at L3-L4 and L4-L5 with a pars interarticularis defect at L5-S1. Alija underwent "physical therapy and continued work restriction." He was given Lortab and Diclofenac. Alija did not improve with treatment and had increasing leg pain. A February 11, 2011, lumbar myelogram revealed disc degeneration at L4-L5 and herniation at L3-L4 on the left. Dr. Tibbs discussed an option of surgery with Alija, which he declined. Two epidural blocks were performed without improvement. Dr. Tibbs ultimately determined Alija had a "far lateral disc herniation at L4-L5 on the right." He noted Alija wanted to avoid surgery. In explaining how the work-related injury caused the harmful change in the human organism, Dr. Tibbs stated as follows: "mechanical stress is placed from the spine and the work place produced disc herniation compressing the right L4 nerve root." Dr. Tibbs assessed a 12% impairment pursuant to the AMA Guides and found Alija attained MMI on August 12, 2011. Dr. Tibbs stated Alija did not have the physical capacity to return to the type of work performed at the time of the injury. Dr. Tibbs imposed physical restrictions of "lifting no more than twenty-five pounds maximally or fifteen pounds

repetitively." Further, there should be no repetitive bending or twisting at the waist. Dr. Tibbs stated Alija must be able to change positions frequently.

The August 12, 2011, "Documents Review Report" reflects that in addition to the far lateral disc herniation at L4-L5 on the right that might impact the right L4 nerve root, Dr. Tibbs also noted Alija has "a degree of spondylolisthesis at L5-S1 with some focal protrusion at L5-S1 on the left." Dr. Tibbs indicated he would address the far lateral disc herniation with a minimally invasive far lateral microdisckectomy. He indicated Alija did not want to consider surgery. Dr. Tibbs stated Alija had 12% permanent partial impairment based on the AMA Guides and is clearly unable to return to his original work activities.

The medical testimony of Dr. Tibbs and Alija's testimony constitute substantial evidence supporting ALJ Jones' determination Alija is permanently totally disabled. We find no merit in Wal-Mart's assertion the finding of permanent total disability is unsupported by the record. Authority has long acknowledged that in making a determination granting or denying an award of permanent total disability, an ALJ has wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219

(Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968). Although an ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability, the ALJ is not required to solely rely upon the opinions of the medical experts in making her determination. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

It is also well-settled that a claimant's own testimony as to his capabilities and limitations may be relied upon by the fact-finder in making a determination as to his physical capacity to return to work following an injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Ruby Construction Company v. Curling, 451 S.W.2d 610 (Ky. 1970). So long as permanent impairment results from a work-related traumatic event, a claimant's testimony alone concerning his inability to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy qualifies as substantial evidence sufficient to support a finding by an ALJ of permanent total disability. *See* KRS 342.0011(11)(c) *and* (34); Transportation Cabinet v. Poe, 69 S.W.3d 60 (Ky. 2001); Commonwealth of Kentucky, Transportation Cabinet v. Guffey, 42 S.W.3d 618 (Ky. 2001).

In the case *sub judice*, as authority mandated, ALJ Jones weighed the fact that Alija, at the time the claim was assigned to her, was almost fifty years old and had a Kosovo education and no vocational training either in Kosovo or the United States. Ira A. Watson Department Store v. Hamilton, supra. ALJ Jones' findings regarding Alija's age, education, vocational skills, and restrictions are supported by the evidence in the record. ALJ Jones stated she considered Alija's testimony, educational background, limited skills, absence of special training, physical restrictions, and present emotional state in finding he is permanently totally occupationally disabled. By law, the ALJ must consider these factors in determining a claimant's occupational disability.

Wal-Mart's assertion Alija is not totally occupationally disabled because the medical evidence does not establish Alija is incapable of performing any type of work or regular employment has no merit. As previously noted, ALJ Jones does not have to rely solely upon the medical evidence in determining whether Alija is totally occupational disabled. She is permitted to rely upon the medical evidence in conjunction with the claimant's own testimony. Contrary to Wal-Mart's assertion we believe ALJ

Jones' decision is consistent with the mandates of Ira A. Watson Department Store v. Hamilton, supra.

Further, ALJ Jones is permitted to reject the opinions of Dr. Kriss and the conclusions of Rick Pounds after performing a functional capacity examination. Contrary to Wal-Mart's assertion there is nothing magical about the opinions of Dr. Kriss and the conclusions of Rick Pounds. ALJ Jones was placed in a difficult position because she did not have the opportunity to observe Alija testify. However, it is apparent ALJ Jones closely reviewed his testimony and the medical testimony and ultimately determined Alija's testimony was credible and consistent with the opinions of Dr. Tibbs. Succinctly put, ALJ Jones had to believe someone and in this case, and she chose to believe Dr. Tibbs and Alija. This Board cannot usurp this authority granted solely to the ALJ. Consequently, because the outcome selected by ALJ Jones is supported by substantial evidence, we find no error. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

Finally, we find no merit in Wal-Mart's argument a new hearing should be held because this case was assigned to the ALJ who did not conduct any proceedings, and the case was assigned to ALJ Jones more than sixty days

following the hearing held on October 28, 2011. As pointed out in footnote four of ALJ Jones' February 24, 2012, order, after she conducted the teleconference which Wal-Mart maintains occurred in mid-January, 2012, Wal-Mart did not request a new hearing or object to her deciding the claim. After receiving an unfavorable decision, Wal-Mart first raised this issue in a petition for reconsideration. That is not the function of a petition for reconsideration. See KRS 342.281. Any objection to ALJ Jones deciding this claim should have been made at or after the teleconference.

We believe this issue is controlled by Bentley v. Aero Energy, Inc., 903 S.W.2d 912 (Ky. App. 1995) and Hutchins v. Summa Technology/Ken-Mar, 2005-CA-000127-WC, WL 1993439, rendered August 19, 2005, Designated Not To Be Published. In Bentley v. Aero Energy, Inc., supra, the Court of Appeals identified the issue and held as follows:

> The question presented by this petition for review is whether the failure of the administrative law judge (ALJ) to render a decision within the 90–day time frame prescribed in 803 KAR 25:011 § 10(6)(a) renders that decision a nullity, entitling the claimant to a new hearing and decision within the required time limit. The Workers' Compensation Board perceived no due process deprivation in the failure to adhere to the time requirements of the regulation and concluded that a new hearing was not warranted. We agree and affirm.

Id. at 912.

The Court of Appeals characterized Bentley's position on appeal as follows:

> Claimant Bentley asserts that the failure to adhere to the dictates of this regulation resulted in an inadequate award. It is his position that the passage of time denied the ALJ benefit of having personally observed the claimant at the formal hearing and diminished the ALJ's ability to judge his credibility based upon demeanor, as well as the spoken word. We disagree.

Id. at 913.

In affirming the ALJ and this Board, the Court of Appeals concluded as follows:

> We are thus convinced that under a pure procedural due process analysis, the mere passage of a few months, the time period established in the regulation, did not deprive Bentley of a meaningful opportunity to be heard on his claim. Indeed, a decision by an ALJ other than the one who personally received the evidence would not be deemed invalid.
>
> . . .
>
> Obviously, the purpose of the time limit is to speed resolution of compensation cases for the benefit of all parties, not to give claimants an additional bite at the apple should the ALJ's decision prove unsatisfactory.

Id. at 914.

In Hutchins v. Summa Technology/Ken-Mar, supra, the Court of Appeals stated as follows:

> Moreover, the Board's jurisdiction cannot be invoked until entry of a final order by the ALJ. [footnote omitted] While the ALJ must enter a decision within sixty days from the final hearing, KRS 342.275(2) does not deprive the ALJ of the authority to enter an order after that time. [footnote omitted] "At best, where an ALJ fails to timely render a decision in accordance with KRS 342.275(2), until such time as a decision is issued, the parties to the claim simply become empowered to seek a writ of mandamus from the Franklin Circuit Court compelling the performance by the ALJ of her statutory duties." [footnote omitted] Consequently, the ALJ's delay in rendering the order does not affect its finality.

Slip op. at 2.

Based on the above language, we believe ALJ Jones was not prohibited from deciding the claim without holding an additional hearing.

Accordingly, since the decision of Hon. Allison Emerson Jones, Administrative Law Judge, is supported by substantial evidence and she is not prohibited from deciding this claim without holding a new hearing, the January 31, 2012, opinion, order, and award, and the February 24, 2012, order ruling on the petition for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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