

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 18, 2019

CLAIM NO. 201569370

ARMSTRONG COAL CO., INC.

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

JOHN DOWNING and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Armstrong Coal Co., Inc. ("Armstrong") appeals from the May 28, 2019 Opinion, Order and Award rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The ALJ found John Downing ("Downing") sustained a work-related lumbar injury on September 2, 2015, for which he awarded permanent total disability ("PTD") benefits and medical benefits. Armstrong also appeals from the July 1, 2019 Order overruling its petition for reconsideration.

On appeal, Armstrong argues Downing committed a safety violation pursuant to KRS 342.165, and he is not permanently totally disabled. Armstrong also argues the evidence demonstrates Downing had a pre-existing, active impairment rating and disability. Because substantial evidence supports the ALJ's determination regarding all three issues, and a contrary result is not compelled regarding the alleged safety violation and pre-existing active disability, we affirm.

Downing filed a Form 101 alleging he injured multiple body parts while working as a dozer operator for Armstrong. Downing alleged that on September 2, 2015, he was "riding in a pick-up truck with his boss and driving past wash plant to gob pit, ran into a ditch and threw Plaintiff around in the pick-up truck." The Form 104 indicates Downing has worked for various coal companies since 1977. Downing began working for Armstrong above ground in the wash plant as a dozer operator in 2008.

Armstrong filed a Form 111 denying Downing's claim and asserting a KRS 342.165 safety violation. Similarly, Armstrong filed two special answers asserting a voluntary intoxication defense and an employee safety violation. Armstrong also filed a Form SVE. When instructed to state the safety rule/regulation/statute/order the employee allegedly failed to obey, Armstrong stated Downing was intoxicated on the date of the alleged injury, which violated its company's policy. It also stated Downing's failure to obey Armstrong's policy of not being intoxicated caused and/or contributed to his alleged injury. Armstrong did not attach any supporting documentation to the Form SVE.

Armstrong subsequently filed documentation from the Mine Data Retrieval System. In an accident report, it was noted Downing was being transported for a random drug test on September 2, 2015. After completing the test, Downing's foreman transported him back to his equipment in a Ford F150 truck. The foreman drove around a parking ditch and hit a hole causing Downing to bounce. The accident report noted Armstrong terminated Downing on September 11, 2015 for failing the random drug test. A Controlled Substance Test Report by First Advantage indicated a sample was taken from Downing on September 2, 2015 and reported on September 10, 2015. Downing tested positive for Oxycodone. A Violation of Drug and Alcohol Free Condition of Mining Certificate, dated September 14, 2015, indicated Armstrong discharged Downing for violating its substance abuse policies.

Downing testified by deposition on December 20, 2018, and at the final hearing held March 28, 2019. Downing was born in October 1953 and resides in Greenville, Kentucky. Downing completed the seventh grade, and received an auto mechanic certificate in the 1960s or 1970s. He testified he has no computer skills, and has difficulty reading and writing. Downing testified that prior to his coalmine employment, he mowed grass, delivered newspapers, worked as a carhop, and washed dishes. He also worked as a machine operator at a tire shop, on oil rigs, and as an automobile mechanic at a service station. He worked mostly underground in coalmines beginning in March 1977, primarily operating pinners and roof bolters, but he also worked as a belt walker/examiner. He continued to work underground

until he moved to wash plants in approximately 2006. Since then, Downing has mainly driven gob trucks and back dumps.

Downing testified he began working for Armstrong in 2008 in the wash plants. He drove a gob truck and water truck and worked as a mechanic before he was moved to dozer operator. He operated a 775 Komatsu dozer, which was over six feet tall and required him to climb in and out of a closed cab using a ladder. He also operated a front-end loader and fed the hopper. He regularly worked twelve-hour shifts, four days a week, without restriction, prior to the September 2, 2015 accident.

Downing testified that on September 2, 2015, his section boss, Mike Tigg (“Tigg”) picked him up during his shift in a company owned Ford F150 truck to take him in for a random drug test. After completing the test, Tigg drove Downing back around 2:00 p.m. Downing testified Tigg cut across the parking lot and drove over a ditch used to park loaders. Downing alleged he was injured when Tigg drove over the ditch because it threw and bounced him around. He experienced back, hip, right leg and right foot symptoms, but was able to finish his shift and work two more days before having four scheduled days off. His symptoms progressively worsened to the point he sought treatment. He was ultimately referred to Dr. S. Periyamayagam, who performed lumbar surgery on August 10, 2016.

Downing testified the surgery improved his condition to the extent he is now able to walk, but he continues to experience low back and right leg pain, as well as numbness in his right lower extremity. He continues to treat with Dr. Periyamayagam who prescribes Norco, Soma and Lyrica, and administers injections.

Downing continues to experience constant pain from his low back into his right leg, which sometimes causes him to fall. He also has right leg numbness. Downing does not believe he is capable of returning to his former job as a dozer operator due to his pain, inability to stay still, and safety concerns. He would have difficulty entering and exiting the cab, and operating the foot pedals of the dozer with his right foot. He does not believe he is capable of returning to any of his previous jobs, underground or aboveground, due to his limitations and symptoms. Downing has not returned to any work since a couple of days after the September 2, 2015 accident.

Downing testified he experienced low back problems in 1985 or 1986 due to a fall while working underground for South Hopkins Coal. Within several weeks, Dr. Ann Babbit performed low back surgery. Downing testified he missed approximately five weeks of work before returning to his regular job without restrictions. Downing testified that after he recovered from the 1985 surgery, he experienced no symptoms and did not seek any treatment for his low back until after the September 2, 2015 work incident. Downing continued to work in the coal mining industry for another thirty years on a regular basis until the September 2, 2015 work incident. The majority of his work was underground. Downing denied experiencing any low back or right leg problems prior to September 2, 2015. Downing acknowledged he sought treatment at a walk-in clinic on January 22, 2014, but denied specifically complaining of low back and right leg symptoms.

At his deposition, Downing acknowledged he was not wearing a seatbelt at the time of the work accident. However, Downing testified as follows:

A: And I'm pretty sure the seat belts didn't work because I wore seat belts since the 70's. It's mandatory

to wear them. The truck we was driving, it was a foreman truck. Just hadn't been there a couple of months. It was probably out of the junkyard from another wash plant. They brought us a new truck. When it got delivered to our plant they kind of loaded it up and took it to another plant and brought a junked-out truck over there to us. And I don't think the seat belts worked on it. The windows wasn't working. The brakes wouldn't work. We had to start patching it up for the foreman so he could have transportation around location.

Downing admitted he did not know for a fact his seatbelt did not work, however, he did not believe it was operational "[b]ecause it come out of the junkyard. I didn't see anybody ever use it. And I grewed up using a seat belt and I didn't use it in there. It was covered up in grease and the latch didn't work. You'd pull on it and couldn't pull it out. I just don't know." At the hearing, Downing testified he was not wearing a seatbelt because, "[y]ou reach up and pull it and you can't pull it down. It's not working." Later, Downing again testified he tried to put his seatbelt on, but "I couldn't pull it down."

Downing acknowledged he took a random drug screen immediately prior to the accident. Downing alleged he never received a copy of the report, and that his boss informed him the test was positive. Armstrong fired him due to the positive drug screen. Downing denied taking any pain medication, including Oxycodone, immediately prior to September 2, 2015. He testified could not remember the last time he had taken any pain medication. No physician had prescribed him pain medication at the time of the accident. On the day of the accident, Downing took Ibuprofen, blood pressure medication, and vitamins. He disputed taking Oxycodone at any time around the accident. Downing notified

Armstrong of his work injury prior to being terminated for the positive drug screen. Downing had previously taken several random drug screens for Armstrong, all of which he passed.

Downing filed the September 8, 2015 record from the emergency department of Owensboro Health where he presented for low back and right leg pain. He was diagnosed with sciatica, prescribed medication and restricted from work until September 11, 2015. Downing also treated at Baptist Health Occupational Medicine on September 10, 2015. The record reflects the September 2, 2015 accident and right hip complaints.

Downing filed the records of Dr. Paresh Sheth reflecting treatment for low back and right leg symptoms from December 31, 2015 to April 7, 2016. A January 13, 2016 lumbar MRI report revealed degenerative changes significantly at L5-S1 where there is a residual or recurrent disc protrusion in the right paracentral region causing mass effect on the right lateral recess. The MRI also showed surgical changes from the previous laminectomy, as well as moderate central canal stenosis, moderate left foraminal narrowing and severe right foramen narrowing. Dr. Sheth diagnosed persistent low back pain with right lower extremity lumbosacral radiculopathy and an abnormal MRI. Dr. Sheth prescribed medication, restricted Downing from work, and referred him to a neurosurgeon. An April 7, 2016 EMG/NCV study report was consistent with “almost symmetrical right lower extremity L5-S1 level lumbosacral radiculopathy.”

Downing filed the records of Dr. Periyamayagam, who began treating him on March 31, 2016. Dr. Periyamayagam noted the September 2, 2015 work

incident and the 1985 L5-S1 laminectomy. After performing an examination and reviewing the January 2016 MRI, Dr. Periyamayagam diagnosed a ruptured disc at L5-S1, right lumbar radiculopathy, and status-post lumbar laminectomy thirty years ago. Dr. Periyamayagam opined Downing, “has a ruptured lumbar disc at L5-S1 level on the right and is caused by the work related injury he had on 9/2/2015. Bouncing around in the truck and hitting his right hip caused the ruptured disc.” He prescribed medication and recommended surgery. The August 10, 2016 operative report reflects Dr. Periyamayagam performed a L5 laminectomy, foraminotomy, right S1 nerve root and L5-S1 discectomy, right. The post-operative records reflect Downing continued to experience low back pain, and right leg and foot numbness despite surgery. Downing continues to treat with Dr. Periyamayagam every three months and is prescribed Norco, Soma, Lyrica, and Decadron.

Dr. Periyamayagam prepared a letter dated February 2, 2018, outlining the September 2, 2015 accident and subsequent treatment. He noted Downing continues to have low back and right leg pain, and numbness in his right leg and foot. He opined Downing reached maximum medical improvement on September 28, 2017. Dr. Periyamayagam restricted Downing from lifting over ten pounds, repetitive bending and working at heights. Dr. Periyamayagam opined Downing is unable to return to his full range of job duties at Armstrong and he is unable to perform any type of comparable work. He opined Downing’s low back condition and surgery are related to the effects of his September 2, 2015 work-related injury. He noted Downing continues to take Norco, Lyrica, and Soma, all of which are reasonable and necessary treatment for his back condition. Dr. Periyamayagam

assessed a 36% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). He determined Downing is unable to return to work in the coalmines due to his pain and continuing need for medication. Downing also filed the November 11, 2016 Impairment Rating Evaluation prepared by Ben Waide, PT, OCS, CHT, who assessed a 35% impairment rating pursuant to the AMA Guides for Downing’s lumbar condition.

Armstrong filed Dr. Thomas O’Brien’s November 26, 2018 report. Dr. O’Brien also testified by deposition on January 7, 2019. He noted the prior 1980s low back surgery, the September 2, 2015 work incident, and Downing’s subsequent treatment. He reviewed the medical records, including treatment notes from May 20, 2013, May 29, 2013 and January 22, 2014. After performing an examination, Dr. O’Brien diagnosed chronic back pain and right lower extremity radiculopathy secondary to multilevel lumbar degenerative disc disease, degenerative spinal stenosis, and a previous lumbar discectomy in 1986 with residual, chronic back pain and right leg symptoms. He opined Downing’s multilevel pre-existing, active conditions and co-morbidities caused his current back and right leg pain. He opined the January 2016 MRI demonstrates only chronic longstanding degenerative arthritic changes that had been progressing for years prior to the alleged work accident.

Dr. O’Brien opined Downing did not sustain a work-related injury on September 2, 2015, since it neither caused structural changes nor anatomic breakages to his longstanding, pre-existing, multilevel low back condition, nor did it aggravate

his pre-existing condition into disabling reality. He found no acute objective findings on imaging studies supporting the occurrence of an injury. He opined the August 2016 surgery is unrelated to the September 2, 2015 event, and that regardless of causation, was ill advised. Dr. O'Brien assessed a 12% impairment rating pursuant to the AMA Guides, attributing 10% to a pre-existing active condition, and the remainder to the unrelated 2016 surgery. Regardless of causation, Dr. O'Brien found Downing does not require further treatment or permanent restrictions.

Dr. O'Brien's deposition testimony is consistent with his report. Dr. O'Brien testified as follows regarding use of a seat belt:

Q: Do you believe that the lack of a seat belt could have contributed at all to his subjective complaints that he alleged after?

A: Even the fact he wasn't wearing a seat belt, I still don't believe he sustained any type of musculoskeletal injury. But in a general sense, patients who are unrestrained, involved in motor vehicle incidents are exposed to more trauma than those who are restrained.

Dr. O'Brien testified Downing did not report that he was taking any kind of medication, including narcotic pain medication, at the time of the injury. He explained Oxycodone is a potent narcotic used to treat severe pain. He also testified as follows regarding Oxycodone:

Q: And in terms of oxycodone, if it is prescribed, can individuals operate heavy machinery while taking oxycodone?

A: No. Oxycodone is a narcotic. It's an opioid. It affects cognition, ability to think and your physical capabilities. So patients should not operate machinery when taking narcotics such as oxycodone. Or in Mr. Downing's case, he was taking not oxycodone; I saw him taking hydrocodone, which is another narcotic . . .

which Mr. Downing had been taking for two and a half years when I took his history in November 2018. Oxycodone is a more potent, more addictive narcotic.

Armstrong filed previous medical records from the Muhlenberg Medical Center dated June 7, 2011, May 20, 2013, May 29, 2013 and January 22, 2014. In June 2011, Downing was treated for a cyst on his back. On May 20, 2013, he presented with multiple complaints, including low back and shoulder pain. A lumbar x-ray was performed. Downing's diagnoses included back pain. On May 29, 2013, Downing again presented with multiple complaints, including back pain, and he was prescribed Ibuprofen 600.

On January 22, 2014, over nineteen months prior to the work accident, Randa Brumfield, a nurse practitioner, noted Downing complained of low back pain radiating into his right leg extending to the top of his foot that is progressively worsening. She noted his symptoms started in 1985, and that he takes Ibuprofen and Tylenol. She noted a May 20, 2013 x-ray demonstrated degenerative disc changes and bilateral facet arthritic changes at L5-S1; mild retrolisthesis L5 on S1 present on an old 2008 x-ray report; and mild diffuse hypertrophic spurring. She diagnosed backache and lumbar radiculopathy, chronic and uncontrolled. She prescribed Ibuprofen 800 mg and Depo-Medrol.

In the May 2019 Opinion, the ALJ determined Downing had proven his current lumbar condition and need for surgery are causally related to the effects of the September 2, 2015 work incident, relying upon Dr. Periyanyagam's opinion. The ALJ adopted the 12% impairment rating assessed by Dr. O'Brien. The ALJ

stated as follows in finding Downing permanently and totally disabled, and in finding a carve-out for a pre-existing, active disability unwarranted:

Having concluded plaintiff has a permanent impairment rating causally related to his work injury, the next issue to be determined is whether plaintiff retains the ability to return to any gainful employment on a regular and sustained basis considering his injury and restrictions within the context of his age, education, and work experience. *City of Ashland v. Stumbo*, 461 S.W.3d 392, 396–97 (Ky. 2015). On this issue, the ALJ is first persuaded by the restrictions from the treating surgeon, Dr. Peri. Again, as the surgeon who actually treated plaintiff and is charged with his care, his opinions on restrictions are considered better informed and more persuasive than those of Dr. O'Brien. Dr. Peri indicated plaintiff should not lift more than 10 pounds and should not perform repetitive bending or working at heights. Given these restrictions, the fact that plaintiff has worked exclusively in the coal mining industry in heavy labor for the last almost 40 years and did not complete high school and testified he is almost illiterate, the ALJ does not believe plaintiff is unlikely[sic] to be able to return to any gainful employment on a regular and sustained basis. As such, it is determined plaintiff is permanently and totally disabled.

Because it has been determined plaintiff is totally disabled, in the analysis of a carveout for a prior active condition must be based on pre-existing active disability rather than impairment. In *Roberts Brothers Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003), the Kentucky Supreme Court instructed under KRS 342.730(1)(a), the provision governing awards for permanent total disability, that an exclusion from a permanent total disability award based on pre-existing active disability must be determined under the same standard for disability established in *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968). The Court also held in *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000), it is among the functions of the ALJ, as fact finder, to translate the lay and medical evidence when determining the extent of an employee's occupational disability at a particular point in time.

In this case, the ALJ finds it likely that plaintiff had a permanent impairment rating after his 1985 injury and surgery. However, nothing in the record indicates plaintiff was working under any restrictions, was receiving any medication or treatment for his lumbar condition, or was otherwise not able to perform the full functions of his heavy, manual labor and dozer operating activities at any time in the reasonably recent period of years prior to this work injury. As such, the ALJ finds no basis to conclude plaintiff had any pre-existing occupational disability immediately prior to September 2, 2015. Accordingly, there is no basis for carving out any portion of his award

He also determined Downing's award should not be reduced by 15% due to his alleged violation of KRS 342.165, stating as follows:

The defendant also maintains any award of benefits should be reduced by 15% due to plaintiff's violation of KRS 342.165 because he was not wearing a seatbelt at the time of his accident and because he failed a drug test immediately before the accident. However, there is a lack of any substantial evidence of record establishing whether, and to what degree, any of plaintiff's injuries or restrictions were caused by either of these alleged violations. Plaintiff was not driving the vehicle at the time of his injury, so there is no evidence establishing he would not have suffered the same injury had he been wearing a seatbelt, assuming an operational one was provided, or had he not had oxycodone in his system at the time of the injury. For these reasons, there is no basis to reduce plaintiff's award under KRS 342.165.

Armstrong filed a petition for reconsideration making the same arguments it now raises on appeal. The ALJ overruled the petition, making the following additional findings and analysis:

. . . . Primarily, the defendant's petition is nothing more than a re-argument of the merits of the case, which have already been decided. However, to the extent defendant argues it was error not to exclude any portion of plaintiff's award due to a pre-existing, active impairment, the ALJ again points out that a carve-out

from an award of total disability is analyzed differently from an award of PPD. Any exclusion from a total disability award continues to be based upon pre-existing occupational disability. *Roberts Brothers Coal v. Robinson*, Ky., 113 S.W.3d 181 (2003). Although the degree of impairment that results from an injury affects the extent of the injured worker's disability, the words "impairment" and "disability" are not synonymous. As pointed out in the opinion, the ALJ was not persuaded the evidence established any occupational disability immediately before plaintiff's work injury. As such, there is no basis for any carve-out and the defendant's petition is overruled.

The defendant's petition otherwise points out no patent errors to justify the remedies it seeks and the remainder of its petition is, therefore, also overruled.

On appeal, Armstrong argues Downing committed a safety violation pursuant to KRS 342.165(1) warranting a 15% decrease in his award of benefits. It points to Downing's positive drug test taken the same day of the accident and his admission he was not wearing seatbelt at the time of the accident, which was mandatory. Armstrong also points to Dr. O'Brien's testimony that Oxycodone is a potent narcotic that "affects cognition, ability to think, and your physical capabilities" and that "patients who are unrestrained, involved in motor vehicle accidents are exposed to more trauma than those who are unrestrained." Therefore, Armstrong argues Downing's narcotic drug use resulted in a failure to use his seatbelt as mandated, which resulted in his exposure to his alleged injury.

Armstrong argues Downing had a pre-existing and active impairment rating and disability. It points to the 1980s surgery and the prior medical records reflecting Downing's bouts with low back pain in 2011, 2013 and 2014. It relies upon Dr. O'Brien's report and testimony, as well as the 10% impairment rating he

assessed for a pre-existing, active lumbar condition. It asserts the ALJ ignored the prior medical records demonstrating Downing had subjective complaints of similar symptoms and that they were active leading up to the September 2, 2015 incident.

Armstrong argues Downing is not permanently and totally disabled, and the ALJ did not accurately characterize his physical capabilities, vocational abilities, employment history or his specific pre-injury position. Armstrong argues Dr. O'Brien's opinion regarding restrictions and Downing's ability to return to work is more accurate. Armstrong summarized Downing's testimony regarding his work history. Armstrong argues that the dozer operator position was not physically demanding, and Downing retains the physical capacity to return to the coalmining industry. Armstrong argues there is no medical or vocational evidence supporting the ALJ's determination that Downing is permanently and totally disabled.

As the claimant in a workers' compensation proceeding, Downing had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snowder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Downing was successful in his burden, we must determine whether substantial evidence of record supports his 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). Although a party may note evidence supporting a different outcome than 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, 34 S.W.3d 48 (Ky. 2000). 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).

Permanent total disability is defined 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(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining Downing is permanently totally disabled, the ALJ was

required to perform an analysis pursuant to the City of Ashland v. Taylor Stumbo, 461 S.W.3d 392 (Ky. 2015) and Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

We determine the ALJ performed the appropriate analysis and took into consideration the correct factors in determining Downing was permanently totally disabled. The ALJ first determined Downing sustained a work-related lumbar injury on September 2, 2015, warranting a 12% impairment rating, findings not challenged on appeal. The ALJ found persuasive the restrictions imposed by Downing's treating physician, Dr. Periyamayagam, consisting of no lifting over ten pounds, no repetitive bending, and no working at heights. The ALJ noted Downing has worked exclusively as a heavy laborer in the coal mining industry for nearly forty years. He also took into consideration Downing's limited education and the testimony regarding his ability read. We also note Dr. Periyamayagam opined Downing is unable to return to his full range of job duties at Armstrong or any type of comparable work. He further opined Downing is unable to return to work in the coalmines due to his pain and continuing need for medication. Similarly, Downing does not believe he is able to return to his previous position with Armstrong or any of his prior jobs in the coalmining industry due to his symptoms, limitations, and safety concerns regarding himself and others. The ALJ took into account Downing's age, education, and past work experience, along with his post-injury physical status. The ALJ performed the appropriate analysis in accordance with the direction of the Kentucky Supreme Court in City of Ashland v. Stumbo, supra, and Ira A. Watson

Department Store v. Hamilton, *supra*. The ALJ's determination is supported by Downing's testimony, along with the medical evidence, and will remain undisturbed.

We likewise find the ALJ did not err by refusing to carve out a percentage of the award of PTD benefits due to Downing's previous lumbar condition. In Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), the Kentucky Supreme Court distinguished between pre-existing impairment and pre-existing disability. As noted by the ALJ, the Court held a finding a claimant had a pre-existing impairment was not synonymous with a finding of a pre-existing disability. *Id.* at 183. The Court explained an exclusion for pre-existing disability from a total disability award must be based upon a finding of occupational disability rather than existence of an impairment rating. *Id.*

It is undisputed Downing underwent lumbar surgery in the 1980s at the same level. Downing testified that after approximately five weeks of recovery, he returned to work in the coalmining industry unrestricted, and he continued to work until after the September 2, 2015 work accident. The ALJ acknowledged the medical records indicate Downing complained of back pain on at least four occasions in 2011, 2013 and 2014. However, he relied upon the fact Downing was neither working under any restrictions, nor receiving any medication or treatment for his lumbar condition at any time in the reasonably recent period of years prior to this work injury. He also emphasized there was no evidence indicating Downing was unable to perform the full functions of his work activities in the years prior to his work injury. The previous medical records relied upon by Armstrong do not mandate a finding of a pre-existing, active disability in accordance with Roberts Brothers Coal Co. v. Robinson, *supra*. The ALJ could

reasonably conclude Downing did not have prior disability and his decision will not be disturbed.

The ALJ outlined the evidence he reviewed, and provided the basis for his determination that Downing is permanently totally disabled due to the lumbar injury. The ALJ properly analyzed the claim, and his decision falls squarely within his discretion. Downing's testimony and the medical evidence support the ALJ's determinations.

Finally, we find substantial evidence supports the ALJ's determination that Downing's award should not be reduced by 15% pursuant to KRS 342.165, and again, a contrary result is not compelled. The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally fail to comply with known safety regulations. See Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The burden is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulations, and conversely, the burden is upon the employer to establish an employee's intentional violation. See Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997). KRS 342.165(1) provides:

. . . . If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment.

The application of the safety penalty requires proof of a violation of a specific safety provision, whether state or federal. Second, evidence of “intent” to violate a specific safety provision must also be present. Finally, the violation must be a cause of the accident. Application of KRS 342.165 does not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002).

Armstrong submitted little evidence on this issue. Armstrong did not cite to or provide the specific safety provision it alleged Downing violated regarding the seatbelt. Although Downing testified it was mandatory to wear seatbelts, he also believed the passenger’s seatbelt was not functioning properly at the time of the accident. When asked if he believed that the lack of a seatbelt could have contributed to Downing’s complaints, Dr. O’Brien testified, “Even the fact he wasn’t wearing a seat belt, I still don’t believe he sustained any type of musculoskeletal injury. But in a general sense, patients who are unrestrained, involved in motor vehicle incidents are exposed to more trauma than those who are restrained.”

We acknowledge the positive drug screen for Oxycodone filed into the record. However, Dr. O’Brien did not provide any opinion addressing whether Downing’s alleged drug use resulted in his failure to wear his seatbelt. Rather, he was only asked whether individuals should operate heavy machinery while taking Oxycodone. He replied no since the medication affects cognition, ability to think and your physical capabilities. In addition, Dr. O’Brien answered this question in the context of Downing being prescribed Hydrocodone for two and half years after the work injury, not in the context of the positive drug screen for Oxycodone

immediately before work accident. Therefore, we find the evidence relied upon by Armstrong neither establishes nor compels a finding of a safety violation committed by Downing pursuant to KRS 342.165(1).

Accordingly, the May 28, 2019 Opinion, Order and Award and the July 1, 2019 Order on petition for reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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