Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 28, 2018

CLAIM NO. 201698598

GENESIS HEALTHCARE, LLC PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

REGINA MORTON
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Genesis Healthcare, LLC ("Genesis") appeals from the July 23, 2018, Opinion, Award, and Order and the September 10, 2018, Order of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). In the July 23, 2018, Opinion, Award, and Order, the ALJ awarded Regina Morton ("Morton") temporary total disability ("TTD") benefits, permanent partial disability benefits, and medical benefits for work-related injuries to her cervical spine.

On appeal, Genesis asserts the ALJ abused his discretion by not allowing it to take the deposition of Morton's current supervisor, Jennifer Connell ("Connell").

The Form 101 asserts Morton sustained work-related injuries to "multiple body parts" on January 7, 2016, in the following manner: "She was walking near the freezer and slipped in water on the floor."

Morton's March 8, 2017, recorded statement was filed in the record. At the time of her injury, she was working as Director of Food Nutrition Services and executive chef at the Barkley Center. Regarding the January 7, 2016, incident, she stated:

> I was in the middle of prepping for our lunch meal, which was stuffed green peppers, I believe, and I was making my way to come around to the other side where the green peppers were where I was prepping, and as I was going around the curve – I was walking pretty fast, as I was trying to – we were getting close to a deadline to serve the – the residents, to get it in the oven, and the – the dietary aides had a stack – had the dome cart right there by the freezer door and as I was walking around really fast – those lids had drained water on the floor and I just did not connect with that and just went fast, I went forward, landed on the knees, and then abruptly flat down like a pancake onto my chest to the ground – I mean to the tile floor.

Morton stayed in her office the rest of the day, and she went to BaptistWorx the next day because of the pain she was experiencing. She also experienced breathing difficulties. She was diagnosed with a rib contusion and was informed she may also have cracked ribs.

Morton was deposed on March 28, 2018, and testified she currently rates her pain at eight out of ten.

At the May 22, 2018, Hearing, Morton testified regarding the specific duties of her job:

> A: Assisting the cooks, the staff, make sure the residents are fed, payroll, all that good stuff, and to include cooking.
>
> Q: Did that include some more physical responsibilities?
>
> A: Oh, yes.
>
> Q: Could you, please, describe those for the Judge?
>
> A: Cooking, lifting, putting away stock, managing the staff, a lot of physical demands with that particular job.
>
> Q: Okay. What was the heaviest thing that you had to lift as part of that job?
>
> A: Anywhere from 50 to 100 pounds depending on the type of meat and things that came in.
>
> Q: Can you give the Judge an example of something heavier that you would have to lift?
>
> A: I would say 80 pounds of hamburger meat that would come at a time, ten pounds.
>
> Q: So this could be a very sedentary job or a very physically demanding job?
>
> A: Very physical.

She experienced muscle spasms and shortness of breath after her slip and fall. Concerning the treatment she received, she testified:

> Q: Okay. Did you seek treatment after your fall?
>
> A: The next day, yes.
>
> Q: Okay. Have you ever had spasms in your neck before January 6th of 2016?
>
> A: No, never.

Q: Did you have some conservative treatment for a period of time?

A: I did.

Q: Okay. After about a month, did you have an MRI of your cervical spine?

A: I did.

Q: What did that MRI show?

A: It showed that I had some herniations in my neck.

Q: Now you've testified previously to working a little bit the first day after your fall.

A: Yes.

Q: And then you went to seek medical treatment?

A: I was advised by my supervisor to go because I was exhibiting pain.

Q: Okay. The defendant has indicated that you worked from January 7th of 2016 through February 12th of 2016.

A: That is incorrect.

Q: Okay. What were you doing during this time?

A: I was getting treatment.

Q: Were you using sick or vacation time?

A: Yes, I was.

Q: But no doctor had released you to go back to that job?

A: That's correct.

Q: Okay. Now after the period of conservative treatment, did any of that help?

A: No, it did not.

> Q: Okay. Did you ultimately come under Dr. Brandon Strenge's care?
>
> A: That is correct.
>
> Q: What did Dr. Strenge propose?
>
> A: He said that I had two herniations in my neck and required to have surgery.
>
> Q: Did you end up having that surgery?
>
> A: I did.
>
> Q: Was that on October 21st, 2016?
>
> A: That is correct.

Morton attempted to work at Blanchfield Army Hospital in January 2017, but, after some time, Dr. K. Brandon Strenge took her off of work until November 1, 2017.

At the time of the hearing, Morton was working as the director for nutrition services at Hickman County Intermediate Care Facility ("Hickman County"), a long-term care facility. She described her job duties as follows:

> A: Making sure that everybody is taken care of healthy wise, nutritional wise, weight management, clinicals, the whole nine yards, and then some aspects of making sure we're compliant with healthcare organizations.
>
> Q: What's the heaviest thing you have to lift as part of that job?
>
> A: I don't have to lift anything but a spoon or fork. I point a lot.
>
> Q: So you're not doing any of the lifting of meat or –
>
> A: No, no, no.

Q: Are you doing okay, currently, as far as your doing some supervising at Muddea's and maybe a little bit of work, and doing your supervising at your current job?

A: Correct. It can be a task because we're upstairs and downstairs. Having to do a lot [sic] excessive walking does play a fairly significant role. My neck, at times, I'm not feeling the greatest because it definitely causes headaches and then stiffness from turning so much, being on the computer so long. But I still continue to try to do my very best.

Morton testified that she would be unable to return to her pre-injury job at Genesis:

Q: Could you return to work at your job that you had for the defendant?

A: Actually, no. It's just too much lifting. The menus are totally way out there compared to what I'm doing now.

She again described the lifting requirements of her job with Genesis:

Q: Okay. And you said you had to lift up to 100 pounds at Genesis?

A: It depended on what cases that came in. Sometimes I had someone there to help put up stock and some days I didn't.

Q: Okay. How many times a week would you have to lift over 30 pounds?

A: It just depends. A case of number 5, it comes 30 pounds to a case. So say a case of green beans, it's number 10 cans, so that's 60 pounds in one case of green beans by itself.

Q: Okay. And you'd have to lift that yourself?

A: Yes, or you've got to get someone else to help me. It's just depending on how many I have to fix the food for based upon census.

> Q: Okay. And so you don't believe that you could do that today?
>
> A: I am not going to try to do that. I tried that once before and I don't want to do it again because it caused me to have residual pain.
>
> Q: The lifting does?
>
> A: Yes, it does.
>
> Q: Okay. How much do you think you can lift today?
>
> A: I really haven't tried to test myself like that because I don't want anything to aggravate anything in my neck because that causes me to be uncomfortable and not able to effectively do my job.

Morton filed the January 8, 2018, report of Dr. James Farrage. After performing a physical examination and a medical records review, Dr. Farrage set forth the following diagnosis:

> 47-year-old female status post anterior cervical discectomy and fusion from C4 through C6 with residual cervical vertebral fusion syndrome and myofascial pain symptoms who is having continued issues with pain, restricted range of motion, and decreased functional capacity but is otherwise neurologically stable without evidence of recurrent neural impingement or development of a pseudoarthrosis. The other associated musculoskeletal complaints involving the low back, right knee, and right ribs have resolved. There is an incidental finding of mild bilateral carpal tunnel syndrome.

Dr. Farrage assessed a 25% whole person impairment rating attributed to the January 7, 2016, slip and fall injury with no impairment rating for a preexisting active condition. He opined Morton has achieved maximum medical improvement. Regarding restrictions, Dr. Farrage opined as follows:

> Ms. Morton satisfies the Department of Labor Guidelines for a 'light to medium' occupation with a lifting capacity of no more than 30 lbs on an occasional basis and up to

> 15 lbs on a frequent basis. She should avoid excessive and repetitive cervical bending and rotation. She should avoid above shoulder level activity. No walking, sitting, or standing restrictions are imposed. She can negotiate stairs. She should avoid ladder climbing or working from unprotected heights. Premorbid driving restrictions should be maintained. The patient does retain the physical capacity to return to her previous job description with accommodation to the above mentioned restrictions.

Morton filed the job description for her pre-injury position at Genesis. Relevant to the issue on appeal are the "essential job functions" which include physical demands of pulling, lifting, carrying, and pushing up to 40 pounds.

Several of Dr. Strenge's reports and records were filed in the record by both parties. Pertinent to the issue on appeal is the February 1, 2018, Q & A report of Dr. Strenge in which Dr. Strenge checked "yes" by the following comment: "I have reviewed the job description for the job Ms. Morton was performing at the time of her injury (attached). Ms. Morton can perform all duties listed in that job description." Dr. Strenge subsequently wrote the following: "While the patient's cervical fusion is solid/healed and she has been released to work without specific restrictions, some lifting requirements of her job may not be well tolerated and certainly will exacerbate her residual symptoms of neck pain and possibly upper extremity numbness."

The May 8, 2018, Benefit Review Conference ("BRC") Order and Memorandum list the following contested issues: benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid or contested medical expenses, injury as defined by the ACT, TTD, and KRS 342.165. Under "other" is the following: "Compensability of cervical fusion."

On May 8, 2018, Genesis filed its witness list, exhibit list, and list of contested issues and stipulations. In this document, Genesis reserved the right to depose a representative from Hickman County "that may be able to offer pertinent testimony regarding the Plaintiff's current employment."

At the May 22, 2018, Hearing, the following dialogue between counsel for the parties and the ALJ took place:

> ALJ: I was just about to address that. I'm going to order that proof remain open for the filing of the Dr. Kriss deposition transcript, for evidence relating to the plaintiff's current wages, and evidence related to the information provided by the plaintiff in response to the motion to compel only. Any objection or questions about any of that?
>
> Counsel for Morton: And, Your Honor, I think that we've actually produced all the evidence or all the request for production regarding the motion to compel. I think the only evidence that you're wanting to get in is any of that 50 pages or so related to her current employer.
>
> Counsel for Genesis: Yes.
>
> Counsel for Morton: Okay. So [sic] think the parties are in agreement that that evidence could come in and Dr. Kriss should come in if his deposition transcript ever shows up.
>
> ALJ: So is it accurate to say that proof is remaining open solely for evidence related to the plaintiff's current wages?
>
> Counsel for Morton: Current wages or other documents out of that request for production that he just received, if he feels like any of that's relevant.

The May 22, 2018, Hearing Order indicates proof was left open "for the filing of the Dr. [Timothy] Kriss deposition transcript, for evidence relating to current

wages and related to the information provided by the Plaintiff in response to the Motion to Compel only."

On May 23, 2018, Genesis filed the contents of Morton's personnel file at Clinton Hickman Intermediate Care Facility, her employer at the time. In its "Notice of Filing," it asserted, in relevant part, as follows:

> The attached documents were received from Plaintiff's counsel as discovery responses, and subject to the judge's approval, will be authenticated by the Defendant via a post-hearing deposition of the appropriate company representative(s).
>
> These documents would have been filed and authenticate [sic] earlier, but were not received from Plaintiff's counsel until the day of the Final Hearing.

On May 23, 2018, Genesis filed a motion requesting a telephonic status conference in order to discuss taking the deposition of a representative from Morton's current employer "to provide testimony related to the personnel materials recently filed as evidence." It represented as follows: "Counsel for Plaintiff has indicated his belief that the ALJ's Order on proof time does not permit the scheduling of this deposition."

By order dated May 25, 2018, the ALJ left proof open for an additional seven days "for the purpose of filing the Plaintiff's current job description and documents related to the Plaintiff's current wages only."

On May 30, 2018, Genesis filed a statement by Connell which states, in relevant part, as follows: "There is no written job description for Regina Morton. Ms. Morton works as Certified Dietary Manager for our organization."

In the July 23, 2018, Opinion, Award, and Order, regarding application of the three multiplier, the ALJ set forth the following findings:

> The Plaintiff credibly testified that she could not return to the same job due to her physical restrictions. The restrictions described by Dr. Farrage are to avoid shoulder level activity; to avoid excessive and repetitive cervical bending and rotations; and to avoid ladder climbing or working from unprotected heights. The Plaintiff testified that the job required cooking, lifting, putting stock away, and managing staff. She estimated that the heaviest items she had to lift were from 50 to 100 pounds. The ALJ therefore finds that the Plaintiff does not retain the physical capacity to return to the same job.

Genesis filed a petition for reconsideration asserting the ALJ abused his discretion by not permitting the deposition of Morton's current supervisor, Connell.

In the September 10, 2018, Order, regarding the issue on appeal, the ALJ held as follows:

> IT IS HEREBY ORDERED, that the Defendant had ample opportunities to request evidence and that the Plaintiff was responsive to the discovery requests issued in this matter. The Defendant's Petition is therefore DENIED with respect to the request for additional discovery at this stage of the process along with the corresponding request for amended findings based thereupon.

On appeal, Genesis asserts the ALJ's exclusion of Connell's deposition testimony constitutes an abuse of discretion and requests this Board to reverse the ALJ's award of the three multiplier and re-open proof to permit the taking of Connell's deposition. We affirm on this issue.

We find the ALJ did not commit an abuse of discretion. Long recognized is the ALJ's broad discretion as fact-finder and gatekeeper and arbiter of the record both procedurally and substantively. Dravo Lime Co., Inc. v. Eakins, 156

S.W.3d 283 (Ky. 2005). In carrying out this function, it is not unreasonable for an ALJ to either permit or prohibit additional proof in order to maintain a reasonable element of administrative due process. Id.; Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Indeed, one of the purposes of the Act is to facilitate the speedy resolution of disputes, and the ALJ is charged with resolving all disputes in a summary manner. Searcy v. Three Point Coal Co., 134 S.W.2d 228, 231.

As an initial matter, the order dated May 25, 2018, *the last order that clarifies the purpose behind leaving proof time open for an additional seven days after the Hearing,* is silent regarding the taking of Connell's deposition or any deposition of a Hickman County representative despite Genesis, in its May 23, 2018, motion, having requested a telephonic conference in order to specifically address this issue. In the same motion, Genesis noted counsel for Morton indicated his belief that the ALJ did not intend for such a deposition to take place. However, the May 25, 2018, order following the telephonic conference on the same date merely states proof was to be left "for the purpose of filing the Plaintiff's current job description and documents related to the Plaintiff's current wages **only**." (emphasis added.) Also, the discussion between counsel and the ALJ at the Hearing, as set forth herein verbatim, as well as the May 22, 2018, Hearing Order, contains no reference to taking Connell's deposition. Most importantly, the May 8, 2018, BRC Order fails to address a subsequent deposition despite Genesis reserving the right to depose a representative in its May 8, 2018, exhibit list. Therefore, if the ALJ intended for Genesis to have the opportunity to depose Connell or any other representative from Hickman County during the seven days of additional proof time, there is no evidence of this intent in the form of an order.

If we assume the ALJ did intend for the additional proof time to encompass the opportunity for Genesis to depose Connell or another representative from Hickman County, *Genesis failed to take the deposition or even make arrangements for the taking of the deposition during the allotted time*. We take issue with Genesis' assertion Connell's "deposition could have been completed within two weeks of the Hearing, allowing both parties ample time to submit briefs and for the ALJ to issue a fully-informed Opinion based on all pertinent facts." This claim by Genesis begs the question – did Genesis request fourteen days at the May 25, 2018, telephonic conference? Also, if Genesis failed to schedule the deposition within the seven days granted by the ALJ, would an extra seven days have made a difference?

Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *See* Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). The ALJ's actions in the case *sub judice* certainly do not constitute an abuse of discretion.

Assuming, *arguendo*, the ALJ erred by failing to indulge Genesis with an indefinite amount of additional proof time for the taking of Connell's deposition, it was nothing more than harmless error as substantial evidence abundantly supports the ALJ's determination Morton does not retain the ability to perform her pre-injury job at Genesis. 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). Morton testified at the Hearing

that she would be unable to return to her pre-injury job which involved lifting up to 100 pounds. Importantly, Morton testified she *is* able to perform her job at Hickman County where the heaviest items she is required to lift are spoons and forks. Even if Genesis had deposed Connell in a timely manner during the allotted seven days of additional proof time granted by the ALJ, and had Connell testified Morton's job at Hickman County in fact requires lifting more than utensils, the ALJ certainly has the discretion to reject such contradictory evidence and rely exclusively on Morton's testimony. Here, the ALJ determined Morton's testimony regarding her ability to labor is credible, and this testimony comprises substantial evidence in support of the ALJ's determination Morton does not retain the physical ability to return to her pre-injury job. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Further bolstering the ALJ's determination are the medical restrictions of Dr. Farrage which include a lifting restriction of no more than 30 pounds on an occasional basis and up to 15 pounds on a frequent basis. In contrast, the job description filed in the record for Morton's pre-injury job with Genesis indicates her position requires the ability to pull, lift, carry, and push up to 40 pounds. In total, this evidence comprises substantial evidence in support of the ALJ's determination Morton does not retain the ability to perform her pre-injury job at Genesis.

Accordingly, the July 23, 2018, Opinion, Award, and Order and the September 10, 2018, Order are **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION: **METHOD**

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