Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **March 11, 2019**

CLAIM NO. 201583544

RICHIE WARD PETITIONER

VS.

APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

WRIGHT CONCRETE & CONSTRUCTION
And HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Richie Ward appeals from the October 5, 2018 Opinion, Award and Order and the November 8, 2018 Order rendered by Hon. Monica Rice Smith, Administrative Law Judge ("ALJ"). Ward argues the ALJ erred in finding he

retains the physical capacity to return to the type of work performed at the time of the injury. We affirm.

Ward performed carpentry, concrete work, and equipment operation for Wright Concrete & Construction ("Wright"). The job required a lot of walking, standing, bending, heavy lifting, and stooping. On May 12, 2015, a hydraulic hose blew off of a drill and struck Ward in the head and face. The blow knocked Ward unconscious and he was immediately taken to Pikeville Medical Center, then later transferred to University of Kentucky Medical Center. He was treated for an open skull fracture and subdural hemorrhage. The issue on appeal concerns only Ward's ability to return to his prior position at Wright, and we focus our review of the proof accordingly.

Ward eventually came under the care of Dr. Jay Narola for treatment of a traumatic brain injury. On June 7, 2016, Dr. Narola completed a psychiatric evaluation and diagnosed major depressive disorder (moderate to severe, with paranoid features); chronic post-traumatic stress disorder; mild to moderate neurocognitive disorder (secondary to traumatic brain injury); traumatic brain injury secondary to work accident; sinus allergies; chronic pain condition; injury to right eye; and injury to jaw. Over the course of the following eight months, Dr. Narola conducted frequent psychotherapy sessions with Ward and prescribed various psychiatric medications in an on-going effort to find a successful combination to alleviate Ward's depression, anxiety and mood fluctuations. On various occasions, Ward's family members reported his marijuana and alcohol use, which was confirmed by drug screening. On February 17, 2017, Dr. Narola noted a drug screen

revealed traces of marijuana and no amount of his prescribed medicine including Lamotrigine, Buspropion, Duloxetine, Hydroxyzine and Qustiapine. Dr. Narola advised Ward that he could no longer provide psychiatric treatment for him due to repeated non-compliance.

In an April 11, 2017 report, Dr. Narola formally discharged Ward for non-compliance with his medications and marijuana abuse. His discharge diagnoses were anxiety disorder, depressive disorder, mild to moderate neurocognitive disorder (secondary to traumatic brain injury and marijuana use), and personality disorder. Dr. Narola recommended that Ward discontinue marijuana use and seek psychiatric help for his clinical anxiety, depression and cognitive deficits secondary to his work injury. Additionally, Dr. Narola concluded Ward is malingering and "presenting himself in the worst possible light." He did not provide an opinion as to Ward's capacity to return to his pre-injury work.

Dr. Timothy Allen performed an independent psychiatric evaluation on March 21 and 22, 2016, before Ward began treatment with Dr. Narola. Dr. Allen diagnosed mild neurocognitive disorder, mild traumatic brain injury, and personality change due to the mild traumatic brain injury (combined type). Dr. Allen concluded Ward needed further treatment, and declined to place him at maximum medical improvement ("MMI"). As of the date of the examination, Dr. Allen assessed a 25% impairment rating for psychiatric causes and a 10% impairment rating due to mental status changes, both of which are related to the May 12, 2015 injury.

Dr. David Shraberg performed a neuropsychiatric examination on November 10, 2016. By virtue of the accident and Ward's behavioral disorder, Dr.

Shraberg concluded he suffers residual impairment from the traumatic brain injury. These residual symptoms include distractibility, and hypomanic-type behavior with pressure of speech. Neuropsychological testing suggested frontal lobe syndrome with impulsivity and disinhibitory behaviors, difficulty focusing, vertigo, and chronic neck and back pain. However, Dr. Shraberg's neuropsychological testing also revealed strong evidence of symptom magnification. He also noted Ward's marijuana use exacerbated his conditions. Dr. Shraberg believed Ward had reached MMI and assessed an impairment rating of 10%. As to Ward's ability to work, Dr. Shraberg stated his primary neurobehavioral disorder is stable but would, to some extent, impair him from doing the type of work he has done over his lifetime.

After treatment was terminated with Dr. Narola, Drs. Allen and Shraberg revisited Ward's case. Dr. Allen's opinion changed after he reviewed Dr. Narola's medical records and Dr. Shraberg's report. In a July 7, 2017 letter, Dr. Allen stated he was informed via Dr. Narola's records of Ward's marijuana use and non-compliance with psychiatric medications. Dr. Allen felt Ward is now at MMI. While confirming Ward suffered a complicated mild traumatic brain injury, Dr. Allen opined his behavior and actions since that time have exacerbated his current symptoms. He now assessed a 10% whole person impairment rating, half due to the work injury and half due to exacerbation by non-compliance with medications and use of substances including marijuana and alcohol. Because of Ward's intentional poor performance on cognitive assessments, Dr. Allen did not believe he could reliably determine whether he has any cognitive impairment.

In a March 7, 2017 addendum, Dr. Shraberg indicated he reviewed the Dr. Narola's office notes which suggest Ward had recovered from his traumatic brain injury and, based upon his subjective symptoms alone, he would no longer have any neuropsychiatric impairment nor require any treatment. Dr. Shraberg advised avoiding drugs that affect concentration and mood (such as marijuana) would further improve his overall mental acuity and functional ability to return to his usual and customary employment neuro-psychiatrically.

Dr. Stephen Montgomery evaluated Ward on February 1, 2018. He diagnosed personality change due to traumatic brain injury (aggressive type); mild neurocognitive disorder due to traumatic brain injury; alcohol disorder; cannabis use disorder; status post traumatic brain injury; headaches; vertigo; chronic neck and back pain; and cataracts. Dr. Montgomery characterized Ward's behavioral problems as significant, but neurocognitive tests were consistently invalid due to poor effort. For this reason, Dr. Montgomery found insufficient data to determine the level of cognitive impairment, or to conclude that Ward's alcohol and marijuana use is the primary cause of his behavioral difficulties. He recommended that Ward refrain from any further use of alcohol and cannabis, which would likely worsen his condition. Though he placed Ward at MMI, Dr. Montgomery did not believe he would fully return to pre-accident baseline functioning. He felt psychiatric treatment will help to a degree. Dr. Montgomery stated Ward's psychiatric and behavioral difficulties are directly and causally related to the May 12, 2015 traumatic brain injury. He assigned a Class 3 Moderate Impairment and assessed a 25% whole person impairment. At a subsequent deposition on March 21, 2018, Dr.

Montgomery stated he found no evidence that Ward was exacerbating his symptoms, and was in fact minimizing them.

At a deposition, Ward testified he continues to have headaches, vertigo, and nightmares. His neck and shoulder pain persist. He stated he has not been able to drive and has difficulty climbing ladders due to the vertigo. He thought the medication prescribed by Dr. Narola initially helped him, but eventually caused unbearable lethargy so he discontinued use. Ward stated he has not been able to find another psychiatrist who would accept workers' compensation insurance. He has trouble focusing and filling out paperwork on his own. Ward indicated he had no anger issues before the accident.

Later, at the final hearing held August 6, 2018, Ward testified he continues to have problems with vertigo, depression, anger, and pain in his neck and back. Looking up makes him dizzy and sick. He explained his anger has improved, but his depression continues. He has difficulty sleeping, and with short-term memory. Ward does not believe he can return to his prior work at Wright or any of his prior jobs, because he is unable to concentrate or be around other people. Further, he no longer drives and suffers claustrophobia.

Wright submitted surveillance video taken over the course of three days in December, 2017. The video showed Ward climbing a ladder multiple times, occasionally while carrying a piece of stove pipe to the roof. In his testimony, Ward acknowledged standing on a step ladder to pick pears from a tree but denied any other ladder use.

The ALJ determined Ward sustained a 10% whole person impairment as a result of the May 12, 2015 work injury. Because of the proof indicating Ward's consistent lack of effort on cognitive assessments, the ALJ rejected Dr. Montgomery's 25% impairment rating. She also emphasized Dr. Montgomery's opinion was partially based on Ward's own description of his symptoms and without a review of the entirety of Dr. Narola's records. The ALJ entered the following findings relevant to this appeal:

> The ALJ finds that Ward has failed to establish he is totally disabled or unable to return to his prior work. Dr. Montgomery is the only doctor that ultimately opines Ward is unable to work. He states Ward's ability to tolerate stress precludes his ability to work. However, as previously discussed, Dr. Montgomery's opinion is based on incomplete history of the treatment with Dr. Narola and the less than credible reporting of the severity of Ward's continued symptoms by Ward and his wife.
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> Although Dr. Allen initially opined Ward could not work, after a complete review of Dr. Narola's treatment records, Dr. Allen opines his prior impairment rating was inaccurate and Ward's functioning is higher than portrayed during his exam. Dr. Allen, Dr. Narola, and Dr. Shraberg opine [Ward] is presenting himself in the worse possible light to bolster his disability. It is clear Ward sustained a very traumatic injury, but Ward has not satisfied his burden of proving [he] is unable to return to the work he was performing at the time of the injury.
>
> The surveillance video further indicates Ward's continued deception regarding his ability. Ward testified he had tried to climb a ladder but could not because of vertigo. He stated just being a couple feet off the ground caused his vertigo. He acknowledged he had only been on a ladder one time to change a light bulb. He then later testified he was on a ladder getting pears off a tree. The surveillance video shows Ward not only climbing a

> ladder (on at least a third occasion) numerous times but while carrying something up the ladder.
>
> Based on the foregoing, Ward sustained a 10% whole person impairment. Ward has failed to sustain his burden of proving he is totally disabled or entitled to the three multiplier.

Ward filed a petition for reconsideration making the same arguments he raises on appeal. The ALJ overruled Ward's petition for reconsideration, finding as follows:

> As explained in the Opinion, Award and Order, although Dr. Allen initially opined Ward could not return to employment, his initial opinion was not based on a complete review of the treatment records. After reviewing the records of Dr. [Narola], Dr. Allen opined his initial impairment rating was inaccurate and that Ward's functioning was higher than portrayed. He advised he could not determine if Ward had any cognitive impairment as a result of the work event. With no cognitive impairment determined, it is reasonable to conclude there is no basis to preclude Ward from returning to his customary work or any work. Further, Dr. Shraberg in his final report opined Ward had recovered and had no neuropsychiatric impairment. He advised Ward required no further treatment. There is evidence to support the ALJ's assessment and [] there is no error in the ALJ's assessment that Dr. Montgomery was the only doctor to "ultimately opine" Ward is unable to work and that [he] is not entitled to the triple multiplier.

On appeal, Ward argues he lacks the capacity to return to his pre-injury work, and therefore is entitled to enhanced benefits pursuant to KRS 342.730(c)1. He argues the evidence compels a finding in his favor, and challenges the ALJ's statement that "Dr. Montgomery is the only doctor that ultimately opines he is unable to work". Ward claims this statement is inaccurate, and emphasizes

there is no medical opinion directly stating he is able to return to work. In fact, Ward highlights Dr. Allen's April 5, 2016 statement that Ward is not able to return to work in any capacity, which was not affirmatively retracted in the July 7, 2017 supplemental report. Likewise, Ward observes Dr. Shraberg's conclusion that the primary neurobehavioral disorder is stable and impairs him to some extent in doing the type of work he performed over his lifetime.

As the claimant in a workers' compensation proceeding, Ward bore the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in proving his entitlement to the three multiplier, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

Ward has identified evidence which would support a different result. Indeed Dr. Shraberg opined Ward's disorder would impair him from doing his customary work. However, in assessing the proof, the ALJ was also entitled to consider Dr. Shraberg's later statement that Ward's testing suggested symptom magnification. He also noted such symptom magnification was corroborated by testing conducted by Dr. Allen, as well as Dr. Narola's treatment records. Dr. Shraberg ultimately concluded Ward had recovered from his traumatic brain injury, and would no longer have any neuropsychiatric impairment based upon his

subjective symptoms alone. 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).

Substantial evidence supports the ALJ's determination regarding Ward's entitlement to enhanced benefits. As discussed, Dr. Shraberg concluded Ward had recovered. Dr. Allen found no reliable evidence of cognitive impairment as a result of the work event, and the ALJ was free to rely on this statement rather than Dr. Allen's prior opinion. Dr. Narola believed Ward was malingering. Additionally, the ALJ determined Ward and his wife were not credible concerning his capabilities, and that he exaggerated his symptoms.

An ALJ bases the determination of whether an individual retains the physical capacity to return to the type of work performed at the time of the injury on the totality of the evidence, including the credibility of the claimant regarding his retained physical capacity. While a claimant's own testimony may be of some probative value on the question, it is not determinative. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The opinions of Drs. Shraberg, Allen and Narola, the finding that Ward was less than credible, the surveillance video, and the results of neuropsychiatric testing all provide a reasonable basis to determine Ward failed to carry his burden of proving entitlement to the three multiplier. While Ward has identified some evidence supporting a different conclusion, there was substantial evidence presented to the contrary. The ALJ acted within her discretion to

determine which evidence to rely upon, and it cannot be said her conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the October 5, 2018 Opinion, Award and Order and the November 8, 2018 Order rendered by Hon. Monica Rice Smith, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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