

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 23, 2014

CLAIM NO. 201195561

TRANE COMMERCIAL SYSTEMS

PETITIONER

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

GENE C. BARBER
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

RECHTER, Member. Trane Commercial Systems ("Trane") appeals from the July 21, 2014 Opinion and Award and the August 28, 2014 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") finding Gene C. Barber ("Barber") permanently totally disabled. Trane argues the ALJ erred in failing to find a

pre-existing active disability, in finding total disability during periods Barber returned to work, and in finding Barber permanently totally disabled. It also argues the ALJ provided insufficient analysis to support the award of permanent total disability benefits. We disagree and affirm.

Barber was born on October 22, 1965. He began his employment with Trane as a welder in 1986, and has worked in various departments. He has a high school education and an electrical license. Previously, he worked for Kroger and Sears, then as a welder for Johnson Controls.

On December 28, 2010, Barber was working in wiring. He went to retrieve a tool and stepped on the end of an air hose, causing him to twist his left knee. He immediately felt pain and a "locking" sensation. His supervisor told him to remain seated for a time. However, Barber's pain persisted and he had to be driven to his car at the end of the day. He sought medical treatment the next day, was placed on crutches and remained on light duty until surgery was performed on February 11, 2011 by Dr. Wallace Huff.

Barber returned to work two weeks following surgery, but continued to have pain and discomfort in the knee. Upon reevaluation, loose bodies were identified in

the suprapatellar pouch. Barber underwent a left knee arthroscopy with removal of the loose body on April 1, 2011. Again, his pain persisted, even after physical therapy. Barber sought a second opinion from Dr. Christian Latterman, who recommended a repeat arthroscopy. This procedure was performed on June 6, 2011.

Because Barber's pain persisted, Dr. Latterman recommended a total knee replacement. He referred Barber to Dr. Christian Christensen for this procedure. Dr. Christensen performed a total knee replacement on October 30, 2012. Post-operative treatment has included knee aspiration, injections, and physical therapy.

Barber acknowledged he sustained a left knee injury playing football in high school in the early 1980s. He underwent reconstructive surgery of the left knee in 1983, and a partial medial meniscectomy in 1987. He also sustained a right knee injury playing basketball in 1991. Barber testified he had no problems with his left knee prior to the work injury. He was not treating for the knee, took no medication, and missed no work prior to the work injury. Barber also acknowledged having some back pain prior to the work injury. However, he had never experienced pain radiating into his leg until after the knee replacement surgery.

At the May 22, 2014 final hearing, Barber testified he continues to have pain, swelling and stiffness in his left knee. He has difficulty being on his feet and climbing stairs. Barber described his work as mostly physical. He did not feel he was capable of returning to his previous position, stating he could not climb up and down the conveyer line. He would have difficulty with the bending and stooping involved, and with standing all day.

The parties introduced Dr. Latterman's records and his June 27, 2012 deposition. He diagnosed a loose body and underlying posttraumatic arthritis of the left knee, and performed the June 6, 2011 arthroscopy. When this procedure provided no relief, Dr. Latterman diagnosed tri-compartmental arthritis and recommended a total knee replacement. In a December 16, 2011 note, he attributed the need for the knee replacement to pre-existing osteoarthritis. At his deposition, Dr. Latterman stated the knee replacement surgery was necessitated by pre-existing arthritis which was aggravated by his work injury. He explained Barber had an ACL tear and repair in the 1980s, and, once an ACL is torn, arthritis will begin to develop.

Dr. Frank Burke performed an independent medical evaluation ("IME") on May 10, 2012. He opined Barber sustained an acute twisting injury to his knee which tore

the medial meniscus. He stated Barber had pre-existing dormant arthritis which was aggravated into disabling reality by the work injury. To support this conclusion, Dr. Burke noted Barber had not required orthopedic intervention since 1987. Dr. Burke assessed a 23% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Dr. Burke performed a second IME on October 23, 2013, following Barber's total knee replacement surgery. Referencing the AMA Guides, he assigned a 30% impairment based upon the knee replacement and 3% impairment related to aggravation of pre-existing degenerative disc disease in the low back, for a combined 32% impairment rating as a result of the injury. Dr. Burke indicated Barber should not crawl, climb, lift, push or pull and should be allowed to change position from sitting or standing as needed for relief.

Dr. Daniel Primm performed an IME on May 8, 2013 and diagnosed a painful left knee after total left knee arthroplasty. He opined the indication for the knee replacement was the advanced pre-existing osteoarthritis and not the one twisting injury that occurred at Trane. He believed the work injury contributed less than 10% to the need for the surgery with the remainder due to severely advanced tricompartmental degenerative arthritis. Dr. Primm

felt the work injury produced a 1% impairment pursuant to the AMA Guides for the partial medial meniscectomy performed by Dr. Huff. Barber was capable of gainful employment but would have difficulty performing regular standing, climbing, crouching, or crawling.

In a May 9, 2013 note, Dr. Primm assigned a 2% impairment rating for partial medial and lateral meniscectomies and permanently restricted Barber to no squatting or crawling and occasional climbing. In a July 9, 2013 letter, Dr. Primm assigned a 30% impairment based upon the knee replacement, but attributed only 10% of that rating to the work injury. He felt Barber could be retrained for sedentary or light work, but is not capable of performing regular standing or significant climbing, crouching, or crawling. In a March 7, 2014 letter, Dr. Primm stated Barber's pre-existing arthritis resulted in a 15 to 20% impairment rating at the time of the work injury. He noted the prior ACL surgery would have produced a 3 to 10% impairment with the possible addition of 1% if a partial meniscectomy was performed at that time.

Dr. Ralph Crystal conducted a vocational evaluation on May 1, 2014. Testing revealed Barber can read at a 12.2 grade level, has sentence comprehension at an 8.7 level, can spell at a 12.7 level and performs math at an 8.0

level. Dr. Crystal opined Barber is not disabled from employment and can perform a wide range of work activities. He can perform security, manufacturing, clerical/cashier and service jobs. He can perform sedentary to light work at a bench, desk or table. Dr. Crystal concluded Barber did not have a loss of employability or earning capacity.

In his July 21, 2014 Opinion and Award, the ALJ first determined Barber did not have a pre-existing active disability based upon his testimony that he had no knee symptoms prior to the work incident. As to causation, the ALJ accepted Dr. Burke's opinion that the work incident resulted in a torn meniscus and aroused the previously dormant arthritic condition into disabling reality. Also finding Dr. Burke's opinion most credible as to impairment, the ALJ adopted his 32% impairment rating, which included a rating for the aggravation of pre-existing degenerative disc disease of the lumbar spine.

The ALJ next determined Barber is permanently totally disabled, explaining:

The ALJ finds that the Plaintiff has spent the large majority of his adult working life in the employ of the Defendant which he is no longer able to do and that his poor surgical results, and the accompanying significant physical restrictions and pain, preclude him from providing services to another in return for remuneration on a regular

and sustained basis in a competitive economy. The ALJ finds that the Plaintiff is therefore permanently and totally disabled and the issue of vocational rehabilitation is moot.

Accordingly, the ALJ awarded medical benefits and permanent total disability ("PTD") benefits. Trane filed a petition for reconsideration making the same arguments it raises on appeal. The ALJ denied the petition, but offered the following additional findings of fact with respect to the award of PTD benefits:

As noted, [Barber's] poor surgical result, significant physical restrictions, and pain, following the injury preclude him from performing the only job that he has ever held for any length of time. His age, lack of other skills that do not require physical work, and significant difficulty with ambulation due to pain, [have] rendered him permanently and totally disabled.

We begin with Trane's challenge to the award of PTD benefits. It argues the ALJ failed to enter sufficient findings of fact, and the award is unsupported by substantial evidence. Trane maintains the medical proof and Dr. Crystal's report establish Barber is capable of performing light or sedentary work. It also notes Barber takes minimal medication.

KRS 342.0011(11)(c) defines "permanent total disability" as the condition of an employee who has a

permanent disability rating and "a complete and permanent inability to perform any type of work as a result of an injury." "Work" is further defined by KRS 342.0011(34) as meaning the ability of a person to perform services for another for pay on a "regular and sustained basis in a competitive economy." The Kentucky Supreme Court has considered the definition of PTD as amended by the legislature in 1996 and has determined that whether a worker suffers from a total or partial disability requires a weighing of evidence and the consideration of numerous factors. Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). Those factors include the following:

[T]he worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities.

Id.

We believe the ALJ sufficiently articulated his reasoning for awarding PTD benefits. Citing Ira A. Watson and KRS 342.0011, he first acknowledged the factors to be considered. When read in conjunction with the ALJ's

thorough summary of the evidence, the Opinion and the Order on Reconsideration adequately explain the factors weighed. As stated, the ALJ based his award on Barber's lack of alternative vocational skills or experience, and the severity of his physical condition. Because he restated these considerations in the Order on Reconsideration, it is clear the ALJ weighed these factors heavily. Additionally, the ALJ noted Barber's age and his persistent pain. We believe this explanation demonstrates the ALJ exercised his discretion, and satisfactorily apprises the parties of the basis of the decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

Turning to the sufficiency of the evidence supporting the award, we note the question on review is whether the ALJ's assessment of permanent total disability is supported by the evidence. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Dr. Burke and Dr. Primm assessed impairment ratings related to the work injury. Barber testified to problems with his knee and back and the effect of those conditions on his ability to work and perform physical activities. It is well-established that the claimant's own testimony as to his condition has some

probative value and is appropriate for consideration by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The medical evidence contained significant restrictions. Based upon the medical evidence and restrictions therein, as well as Barber's testimony, the ALJ could reasonably conclude Barber was not capable of performing work on a regular and sustained basis in a competitive economy. Clearly, the record contained substantial evidence supporting such a finding. For that reason, we cannot say the decision of the ALJ finding Barber entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed as a matter of law.

Trane also argues the ALJ erred in finding Barber totally disabled during the post-injury periods when he continued to work. As stated earlier, the ALJ began the award of PTD benefits as of the date of Barber's injury. The evidence established Barber attempted to return to work several times, both following the injury and between his various surgical procedures. The evidence also established Trane paid temporary total disability ("TTD") benefits for some periods, and Barber earned his wage during his attempts to return to work. During the times Barber returned to work, Trane contends the work he performed was not "minimal". Thus, Trane contends Barber cannot be viewed as

totally disabled because he was capable of light duty work and a determination of total disability requires a finding of an inability to perform "any type of work." Therefore, it argues the award of PTD benefits should not commence as of the date of Barber's injury.

We find no error in the ALJ's determination regarding the date total disability began. Although Barber returned to work at various times following the injury, his return was under restrictions. Those periods of employment on restricted duty were interspersed with surgical procedures to remove additional loose bodies in the knee before Barber ultimately underwent the replacement surgery. The evidence supports the ALJ's conclusion that Barber did not reach maximum medical improvement until his recovery from the knee replacement surgery. Based on the evidence, it is reasonable to conclude Barber was not capable of working on a "sustained basis" during this period because his condition was not remedied by the arthroscopic surgeries prior to the knee replacement and his condition continued to worsen.

In specifically arguing Barber failed to prove total disability from December 28, 2010 until February 11, 2011, Trane stresses Barber testified he performed "pretty much the same stuff I'd already done." However, Barber also

testified he was restricted to light duty and had to use crutches during this time. At the hearing, Barber was asked whether he had difficulty performing his duties and responded "I had no choice but to do it." Trane also contends there is no evidence Barber was totally disabled for the period from February 28, 2011 through March 25, 2011. However, Trane overlooks Barber's testimony that, following the first surgery, he used a golf cart to get around and there was not a lot of difference in the condition of his knee. He still had loose bodies in the knee and he testified "every time I took a step, it was excruciating pain, but I had to work. I have to support my family." Barber was not questioned further on the specific activities performed during this period. The ALJ could reasonably conclude some of Barber's job restrictions were accommodated and/or that he worked beyond his restrictions or ability out of necessity. Barber remained a surgical candidate during the periods in question and was clearly not at MMI. The finding that Barber was totally occupationally disabled from the date of the injury is supported by substantial evidence, and therefore, the ALJ must also be affirmed concerning the period that could have been considered to be temporary total disability.

Trane next argues the ALJ erred in failing to find pre-existing disability in light of the prior knee surgeries. Trane notes Barber already had end stage osteoarthritis, which is a ratable condition, prior to the work injury. Therefore, it contends that impairment rating must be carved out from any award.

Dr. Burke specifically opined the arthritic condition of Barber's knee was a dormant condition aroused into disabling reality by the work injury. Even assuming *arguendo* Barber had a pre-existing impairment rating for the arthritis in his knee, such would not compel a finding of a pre-existing occupational disability. 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. The Court held a finding a claimant had a pre-existing impairment was not synonymous with a finding of a pre-existing active disability. The Court explained there should not be a carve out from a total disability award for pre-existing active impairment if there was no pre-existing disability. Although Trane offered evidence of a pre-existing impairment rating resulting from a prior knee injury and surgery, it failed to produce any evidence the prior condition produced any active disability prior to the work injury. Barber

worked for more than twenty years following the football injury in the 1980's and his testimony that he received no treatment and had no problems prior to the work injury is unrebutted. The record does not compel a finding of pre-existing active disability.

Accordingly, the July 21, 2014 Opinion and Award and the August 28, 2014 Order on Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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