

RENDERED: AUGUST 16, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000225-WC

MTS AMBULANCE
(ACTION DELIVERY SERVICE)

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-72060

BARBARA ZACUR;
HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

DIXON, JUDGE: MTS Ambulance petitions this Court for review of a decision of the Workers' Compensation Board (Board) affirming the decision of an

Administrative Law Judge (ALJ) in favor of Barbara Zacur. Finding no error, we affirm.

Zacur was born April 19, 1954. She graduated high school and subsequently obtained a medical assistant certificate and EMT license. Zacur worked as an EMT for MTS from April 2008, until her termination in February 2010. On two separate occasions, Zacur was injured while attempting to lift a patient. After the first incident, Zacur felt sharp pain in her right elbow. With the second incident, Zacur experienced pain in both elbows radiating to her fingers.

Zacur sought treatment for her elbow injuries and ultimately had surgical intervention consisting of an ulnar nerve transfer on each elbow. Zacur subsequently had a cervical fusion to resolve neck pain, and she later underwent a right-side ulnar nerve re-release.

Zacur sought workers' compensation benefits for her right elbow and cervical injuries. Following a final hearing, the ALJ assessed a 30% permanent partial impairment for Zacur's work injuries. The ALJ also found Zacur was physically unable to return to her pre-injury work as an EMT, warranting application of the three multiplier in KRS 342.730(1)(c)(1). To support the enhanced benefit, the ALJ noted that the EMT job description required frequent lifting in excess of 125 pounds, and the ALJ relied on a functional capacity examination (FCE) conducted by Robert Hammond, OTR, which concluded Zacur was limited to light duty work due to her right elbow pain. The ALJ also cited the Form 107 report of Dr. Bruce Guberman, which indicated that Zacur did not retain

the physical capacity to return to her pre-injury work and that she had restrictions of no heavy lifting, no pushing or pulling with her right arm, and no repetitive motion with her right arm. Further, the ALJ considered Zacur's own testimony that she could not physically perform the full duties of her job as an EMT.

The ALJ summarily overruled MTS's petition for reconsideration, and MTS appealed to the Board. Before the Board, MTS argued the ALJ's application of the three-multiplier was not supported by substantial evidence. The Board affirmed the ALJ's award, and this petition for review followed.

MTS's sole argument challenges the sufficiency of the evidence supporting the ALJ's finding that Zacur was entitled to the three multiplier in KRS 342.730(1)(c)(1).

The statute reads, in relevant part:

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments[.]

MTS contends the FCE (July 2011) and Dr. Guberman's Form 107 (September 2011) were unreliable evidence of physical capacity because Zacur subsequently underwent cervical fusion (September 2011) and ulnar nerve re-release (December 2011). As a result of the subsequent treatment, MTS opines that the most reliable evidence regarding physical capacity was a March 2012, note

from Dr. Powell, who performed the latter two procedures, releasing Zacur to return to work as an EMT without restrictions. MTS theorizes that the medical release by Dr. Powell proved that Zacur had recovered from her injuries in the months following the FCE and evaluation by Dr. Guberman and that she could return to work as an EMT.

The findings of an ALJ in favor of an injured worker will not be disturbed on appeal where the decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). “The [ALJ], as the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Furthermore, the ALJ is free “to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof.” *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

The record reflects that Dr. Powell wrote a note on December 8, 2011, indicating that Zacur had limitations due to her elbow and that he doubted she could resume her full duties as an EMT. In the March 2012, note Dr. Powell released Zacur to return to work; however, he also indicated that she still had pain in her elbow that required physical therapy. At the final hearing, Zacur testified that she could not perform her job as an EMT due to the pain in her elbow, noting that the job required her to push patients in gurneys and wheelchairs.

Although MTS argues the release from Dr. Powell was conclusive on the issue of physical capacity, in actuality, it was merely one piece of evidence for the ALJ to consider. Whether an injured worker retains the physical capacity to return to the type of work performed pre-injury is a question of fact for the ALJ to determine based on the totality of the lay and medical evidence. *Carte v. Loretto Motherhouse Infirmary*, 19 S.W.3d 122, 126 (Ky. App. 2000). Here, the ALJ evaluated the evidence and chose to rely on the FCE, Form 107, and the testimony of Zacur. After reviewing the record, we find no error.

For the reasons stated herein, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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