

RENDERED: FEBRUARY 7, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-000820-WC

ENTERPRISE MINING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-11-01566

JOHNNY WILDER;  
HON. WILLIAM J. RUDLOFF,  
ADMINISTRATIVE LAW JUDGE;  
and WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION  
REVERSING

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BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

MOORE, JUDGE: Enterprise Mining appeals the decision of an administrative law judge (ALJ), as affirmed by the Workers' Compensation Board, to award

Enterprise's former employee, Johnny Wilder, permanent total disability benefits (PTD) due to a work-related cumulative trauma injury. Upon review, we reverse.

### **FACTUAL AND PROCEDURAL HISTORY**

Johnny Wilder was employed by Enterprise Mining for approximately eleven years as a heavy equipment operator. He stopped working for Enterprise on April 27, 2011, due to severe pain. Wilder did not attribute his severe pain to any instance of specific trauma. According to Wilder, he had been living with symptoms of pain and numbness on the left side of his lower back and legs beginning in late 2009. His pain gradually spread to his neck, the rest of his back, elbows, knees, ankles, shoulders, hands, left wrist, and joints. His pain became so unbearable that, as of his last day of work, it precluded him from safely operating heavy machinery or working in any other capacity.

Wilder was later evaluated by a number of physicians, only one of whom—orthopedic surgeon Robert K. Johnson—diagnosed him with a work-related cumulative trauma injury. In his 34-page report, Dr. Johnson opined that “[o]ver a period of many years, operating heavy equipment, Mr. Wilder was subjected to significant jarring as well as stressful physical activities.” Dr. Johnson also determined that Wilder’s cumulative trauma injury warranted a 9% whole person impairment rating (WPI). However, Dr. Johnson added that he agreed with several other physicians, most notably Dr. Jayalakshmi Pompati (Wilder’s treating rheumatologist), that Wilder was also severely affected by a condition known as “ankylosing spondylitis.”

Ankylosing spondylitis is a type of degenerative arthritis. The medical evidence of record, including that provided by Dr. Johnson, agrees that it is a nonwork-related condition. The physician who provided the most detailed discussion of this disease is Dr. Richard Sheridan.<sup>1</sup> In his deposition, he testified:

DR. SHERIDAN: [Ankylosing spondylitis is] a kind of arthritis. The cause is unknown; usually develops in males at a ratio of nine to one over females; usually develops between the ages of 20 and 40, but can develop either before 20 or after 40.<sup>[2]</sup> It typically has involvement of the entire spine, the rib cage joints, the shoulders, elbows, wrists, hips, knees, and ankles.

Q: And what is it? What does it do?

DR. SHERIDAN: Well, in its end stages, it causes ankylosis or fusion of the entire spine from the neck to the sacrum. So that the spine becomes flexed and the patient will end up walking bent over, looking down at the ground. You can also have involvement, severe involvement, of joints that may require surgery, such as the hip joints, which may require a total hip replacement, or the shoulder joints, which may require total shoulder replacement.

That aside, Wilder filed a workers' compensation claim against Enterprise on December 5, 2011, alleging an injury date of April 27, 2011, due to work-related cumulative trauma. Wilder further claimed that his work-related cumulative trauma entitled him to an award of PTD. After a period of discovery and motion practice, the ALJ agreed with both of Wilder's claims. Dr. Johnson's

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<sup>1</sup> Dr. Sheridan testified on behalf of Enterprise. He opined that Wilder sustained no cumulative trauma injury at all; to that extent, his testimony was disregarded by the ALJ. The ALJ acted well within his discretion in doing so. We cite Dr. Sheridan here only because his description of ankylosing spondylitis is consistent with the other evidence of record and undisputed.

<sup>2</sup> On April 27, 2011, Wilder was 45 years old.

report was the only medical evidence of record supporting the existence, extent, and severity of Wilder's work-related cumulative trauma injury. It was the only medical evidence that the ALJ relied upon to find that work-related cumulative trauma caused Wilder a 9% WPI and had rendered Wilder permanently and totally disabled.

The upshot of Enterprise's argument in its subsequent appeal to the Workers' Compensation Board was that Dr. Johnson's report did not actually support that Wilder had become permanently and totally disabled due to work-related cumulative trauma. To the contrary, Enterprise argued that Dr. Johnson's report stood for the proposition that Wilder's nonwork-related ankylosing spondylitis was responsible for Wilder's permanent and total disability. Nevertheless, the Board disagreed and affirmed. This appeal followed. For the sake of clarity, we will discuss the relevant portions of Dr. Johnson's report, the ALJ's findings and conclusions regarding Wilder's entitlement to PTD, and additional relevant details in the context of our analysis, below.

### **STANDARD OF REVIEW**

The ALJ is the finder of fact in workers' compensation matters. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). In that regard,

KRS 342.285(2) provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. *American Beauty Homes v. Louisville & Jefferson County Planning*

& *Zoning Commission*, Ky., 379 S.W.2d 450, 457 (1964). Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. *Special Fund v. Francis*, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, Ky., 474 S.W.2d 367 (1971). Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.*, Ky., 514 S.W.2d 46 (1974). The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. *Special Fund v. Francis*, *supra*, at 643.

*Id.*

## ANALYSIS

Enterprise does not contest the ALJ's finding that Wilder sustained a compensable cumulative trauma work injury, or the ALJ's conclusion that Wilder's cumulative trauma work injury warranted a 9% whole person impairment. Enterprise's sole argument on appeal is that no substantial evidence of record supports that Wilder's cumulative trauma work injury rendered Wilder permanently and totally disabled within the meaning of the Workers' Compensation Act. Upon review, we agree.

In general, the claimant in a workers' compensation proceeding has the burden to prove every element of his claim, including entitlement to permanent total disability benefits. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925 (Ky.

2002). KRS 342.0011(11)(c) states that a finding of permanent total disability must be established by evidence demonstrating an employee's "complete and permanent inability to perform any type of work as a result of an injury." KRS 342.730(1)(a) precludes nonwork-related impairments from being considered in determining whether an employee is totally disabled. *See also McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 859 (Ky. 2001) ("only those harmful changes which are proximately caused by work-related trauma are compensable pursuant to Chapter 342."). Nevertheless, a worker who sustains both a work-related injury and a nonwork-related impairment is entitled to receive income benefits to the extent that the compensable, work-related injury caused a complete inability to work. *See International Harvester Co. v. Poff*, 331 S.W.2d 712 (Ky. 1959). "Therefore, a worker with an AMA impairment from a nonwork-related condition who sustains a work-related injury may receive income benefits for total disability if there is substantial evidence that the work-related harmful change, by itself, is sufficient to cause an AMA impairment and to cause the worker to be unable to perform any work." *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503, 508-09 (Ky. 2000).

Here, Wilder was affected by a work-related impairment (*i.e.*, the cumulative trauma described by Dr. Johnson's report), but all of the medical evidence of record—including Dr. Johnson's report—agrees that Wilder was also affected by a nonwork-related impairment when he stopped working on April 27, 2011 (*i.e.*, ankylosing spondylitis). Accordingly, the dispositive issue is whether

substantial evidence supports that the manifestation of Wilder's cumulative trauma injury, by itself, was sufficient to cause him to be unable to perform any work.

As indicated, Dr. Johnson's report is the only medical evidence of record that the ALJ relied upon to support the existence, extent, and severity of Wilder's cumulative trauma injury. The ALJ's opinion summarizes Dr. Johnson's report as follows:

**Dr. Robert Johnson** conducted an independent medical evaluation for the plaintiff on March 14, 2012. The plaintiff reported pain in the neck, head, back, elbows, knees, ankles, shoulders, hands, left wrist and left eye. He reported that the symptoms had developed gradually over the course of 25 years as a heavy equipment operator. The plaintiff stood with an extreme head forward posture, reporting neck pain and stiffness aggravated to intolerability by jarring. The plaintiff reported that he cannot bend his low back, and if he does bend, he cannot straighten back up. He reported weakness, numbness, tingling and pain in his left wrist and hand. The plaintiff reported that his physician had ordered him to use a walker for ambulation.

The Plaintiff had diminished mobility in his left ankle and left calf. He has pain and swelling in both elbows, and his arms shake. Dr. Johnson noted a fine tremor in the right arm when the plaintiff extended it, but not at any other time during the evaluation. The plaintiff's left hand was weaker than the right, but the right had started to lose strength. The plaintiff reported that he has so much pain that he cannot think.

The plaintiff reported that he started noticing symptoms such as back pain in March 2010. Dr. Johnson noted that as of April 27, 2011 Dr. Wicker and Dr. Pompati had ordered the plaintiff off work indefinitely.<sup>[3]</sup> The

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<sup>3</sup> The record demonstrates that it was a physician's assistant working under Dr. Wicker (Marty Mullins, PA-C), rather than Dr. Wicker himself, who ordered Wilder "off work indefinitely." That aside, nothing in the record suggests that Dr. Wicker, Marty Mullins, or Dr. Pompati

plaintiff reported that he receives Enbrel injections for pain, but it has side effects. The plaintiff also takes Lortab. Dr. Pompati has ordered that the plaintiff must use a wheelchair or a walker at all times.

Dr. Johnson reviewed the plaintiff's medical records. He noted lumbar and cervical MRIs showing degenerative changes without impingement but with loss of disc space and possibly nerve irritation. An EMG/NCV study showed normal results. A full body bone scan showed polyarticular degenerative changes and sacrolitis. He noted a record dated November 15, 2011 by a physician's assistant that stated the plaintiff's medical issues in his back related to his job, and continuing to work will continue to have adverse health consequences.<sup>[4]</sup>

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diagnosed a work-related injury or restricted Wilder from working because of a work-related injury.

<sup>4</sup> This November 15, 2011 note came from a physician's assistant named Terry Williams. It consists of Williams' signature and three unexplained "yes" answers to three questions posed on a form prepared by Wilder's attorney. The questions are: 1) "Do you believe that his present medical issues to his back is [sic] caused, either wholly or in part, by his job activities?" 2) "Do you believe that continuation in his job duties will continue to have adverse health consequences?" and 3) "Have all of your opinions been rendered within the realm of reasonable medical probability?"

Dr. Johnson's report mentions this note only to state that Wilder had seen Williams on an estimated four visits to a general medical clinic, and that Williams had most recently treated Wilder for strep throat. Nothing indicates that the ALJ or Dr. Johnson relied upon Williams' note. But, to the extent that it could have been relied upon, it does not constitute substantial evidence. It is the quality and substance of a physician's testimony, not the use of particular "magic words," that determines whether it rises to the level of reasonable medical probability, *i.e.*, to the level necessary to prove a particular medical fact. *Turner v. Commonwealth*, 5 S.W.3d 119, 122–23 (Ky. 1999). Three unexplained "yeses" cannot be considered testimony of quality or substance. *See also Gibbs v. Premier Scale Co.*, 50 S.W.3d 754, 762 (Ky. 2001) ("[A] diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an "injury" for the purposes of Chapter 342.").

Regarding Williams being a physician's assistant rather than a physician, we also pause to point out that, according to the Board's interpretation of the Workers' Compensation Act, only a "physician" as defined by KRS 342.0011(32) is qualified to render a medical diagnosis. *See Drayer Physical Therapy v. Reese*, Nos. 2011–CA–001502–WC, 2011–CA–001634–WC, 2012 WL 3155696 at \*4-\*5 (Ky. App. Aug. 3, 2012) (Court of Appeals affirmed Board's interpretation that trained physical therapist was unqualified to diagnose cumulative trauma injury because physical therapists are not included within the definition of "physician" per KRS 342.0011(32)) (we find *Drayer* persuasive on this point and cite it per Civil Rule (CR) 76.28(4)(c)); *see also Homestead Nursing Home v. Parker*, 86 S.W.3d 424, 426 (Ky. App. 1999) ("Although our review of the Board's statutory interpretations is less deferential than our review of its factual determinations, nevertheless, an administrative agency's construction of its



Dr. Johnson conducted a physical examination, finding the plaintiff to be in intense distress. The plaintiff had significantly diminished range of motion in the cervical and lumbar spine. He had decreased sensation in the latter aspect of the left lower extremity and in the left upper extremity. The plaintiff had diminished strength in the left upper extremity. He had diminished range of motion in the left shoulder.

Dr. Johnson opined that the plaintiff's job caused his symptoms. He opined that cumulative trauma over long years of operating heavy equipment [sic]. He found some symptom exaggeration but opined that the plaintiff has genuine symptoms involving numerous joints. He opined that the plaintiff started off with cumulative trauma primarily to his back. Polyarthrititis developed, followed by a somatoform disorder. Dr. Johnson opined that the arthritis and somatoform disorders are not work-related. He assessed a 42% whole person impairment in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He opined that of this impairment, 9% was caused by cumulative trauma and attributable to the plaintiff's job.<sup>5]</sup>

Dr. Johnson opined that the plaintiff had no active pre-existing condition. He opined that the plaintiff's job

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statutory mandate, particularly its construction of its own regulations, is entitled to respect[.]” (Citations omitted.)

<sup>5</sup> In a chart, Dr. Johnson's report attributes this 42% WPI to the combination of:

- 6% relating to Wilder's "back" (no further elaboration is given for this figure);
- 12% because "Mr. Wilder has a neck currently ratable based upon mobility, etc. at 12%. In my opinion, 75% of this is due to his arthritis and 3% is due to his cumulative trauma disorder. Ratable impairment, in my opinion, relative to cumulative disorder occurring at work. The remaining 9% of the neck is due to arthritis";
- 11% because "The Jamar strength testing, if valid, is 11% WPI. In my opinion, a functional capacity evaluation with validation criteria is required for this to be conclusive";
- 5% because of "the shoulders";
- 6% for "the ankles for flexion and extension";
- 2% for "right sided inversion"; and
- 15% for "ankylosis of the left ankle. If this appears extreme, the reader is directed to Table 17-25, Page 541. Ankylosis in a position of 15 degrees inversion.

As the ALJ's opinion notes, Dr. Johnson opined that only the 6% relating to Wilder's "back" and 3% relating to Wilder's neck were indicative of a work-related injury.

resulted in cumulative trauma to his neck and back. Arthritis developed thereafter. The plaintiff can ambulate with a cane or walker but has been instructed to use a wheelchair. He found the plaintiff at MMI as of March 14, 2012.

Dr. Johnson found that the plaintiff lacks the physical capacity to perform his pre-injury job. He found that the plaintiff lacks the capacity to perform any job for gainful employment because he is in a wheelchair bound and suffering extreme pain.

With this in mind, the ALJ found Wilder to be totally disabled for the following reasons:

In the present case the ALJ considers the plaintiff's debilitating physical injuries, his limited education and lack of transferrable skills, alongside his work history. The plaintiff's injuries necessitate that he cease working and use a walker or wheelchair just to get around. In spite of his occupational youth, the plaintiff has a steady work history. Thus the ALJ finds most persuasive the opinions of Dr. Johnson and Mr. Ellis.<sup>[6]</sup> The ALJ is persuaded that if this plaintiff could work, he would be working. I therefore find that the plaintiff is permanently and totally disabled.

There are several problems with the ALJ's interpretation of Dr. Johnson's report and consequent reasoning. Several issues addressed in the ALJ's opinion also require clarification.

First, the ALJ's opinion emphasizes that Wilder complained of an array of symptoms and that Dr. Johnson opined that Wilder's symptoms were caused by Wilder's job. It is true, as the ALJ indicates, that Wilder's complaints did relate to his neck, head, back, elbows, knees, ankles, shoulders, hands, left

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<sup>6</sup> William Ellis was a vocational expert. He rendered no opinion regarding the cause of Wilder's disability.

wrist, left eye, hands, and joints. Also, Dr. Johnson did place an “X” in a “yes” column corresponding to the question, “Within reasonable medical probability, was plaintiff’s injury the cause of his/her complaints.” But, Dr. Johnson’s report only attributed a back condition and a neck condition to Wilder’s cumulative trauma injury, *i.e.*, 9% impairment. It specifically excluded, as nonwork-related, any condition relating to Wilder’s head, elbows, knees, ankles, shoulders, hands, left wrist, left eye,<sup>7</sup> hands, and joints.

Second, no part of Dr. Johnson’s report contains any opinion that Wilder’s cumulative trauma injury caused Wilder to be unable to work or warranted any work-related restrictions. To the extent that this report discusses the effects of Wilder’s injury, it only indicates:

- Wilder suffered a 6% whole person impairment due to work-related cumulative trauma to his back;
- Wilder suffered a 3% whole person impairment due to work-related cumulative trauma to his neck. Nothing in Dr. Johnson’s report attributes Wilder’s complaints of “neck pain and stiffness aggravated to intolerability by jarring” (as mentioned by the ALJ) to cumulative trauma, but Dr. Johnson did assess an *additional* 9% whole person impairment relating to Wilder’s neck due solely to Wilder’s nonwork-related diagnosis of ankylosing spondylitis;

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<sup>7</sup> Wilder admitted that the condition of his left eye was actually due to nonwork-related glaucoma.

- Wilder’s cumulative trauma gradually occurred over a period of 25 years and Wilder had been able to work through its symptoms “for quite some time”;
- Wilder did not cease working until *after* his ankylosing spondylitis and some form of nonwork-related behavioral disorder<sup>8</sup> manifested; and
- Wilder’s ankylosing spondylitis was “crippling,” “disabling,” and “generalized.”<sup>9</sup> Indeed, Dr. Johnson’s report explains that ankylosing

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<sup>8</sup> Dr. Johnson largely summarizes what he perceived to be Wilder’s behavioral disorder as follows:

Mr. Wilder has a somewhat flat expression except when he is complaining of pain during the physical examination. The examination is conducted routinely performing some provocative tests, which are positively not painful under ordinary circumstances. He would groan, grimace and, at times, cry out. In my opinion, there is a gross exaggeration. However, I am not expert in behavioral sciences. In my opinion, this area should be investigated.

<sup>9</sup> The following excerpt from Dr. Johnson’s report narrates many of these points:

In my opinion, Mr. Wilder developed neck and, in particular, back symptoms due to cumulative trauma occurring over a long career of operating heavy equipment. This is verified by examination and diagnostic studies. Mr. Wilder continued working for quite some time when these initial symptoms occurred. Reports from examining physicians, in my opinion, validate my opinion also. Subsequently, while Mr. Wilder was still working and was affected by these changes, which, in my opinion, are genuine cumulative trauma, two other situations occurred. The predominant one is an ankylosing spondylitis type arthritis involving numerous joints primarily affecting the sacroiliac joints on the bone scan. The second one is a significant behavioral pattern. I have recommended a functional capacity evaluation with validation criteria because of the behavioral pattern. I do not engage in psychological, psychiatric or rheumatologic expertise. Findings suggestive of behavioral abnormalities were noted if one reads between the lines. In my opinion, this requires a more direct approach. The physical findings that I am rating in Section J are, in my opinion, definitely not all related to the problems at the onset. The onset problems were neck and back cumulative trauma and the current situation is a crippling, disabling, generalized

spondylitis, by itself, caused all but 9% of Wilder's total 42% whole person impairment, and affected Wilder's neck, shoulders, ankles, and joints, as well as Wilder's strength and ability to balance himself.

This, in turn, leads to the third problem regarding the ALJ's analysis.

The ALJ's statement that "[Wilder's] injuries necessitate that he cease working and use a walker or wheelchair just to get around" derives from an apparent misinterpretation of the following section of Dr. Johnson's report:

#### K. RESTRICTIONS

1. The plaintiff described the physical requirements of the type of work performed at the time of injury as follows: He formerly operated heavy equipment.

2. Does the plaintiff retain the physical capacity to return to the type of work performed at the time of injury?  
( ) Yes (X) No

3. Which restrictions, if any, should be placed upon plaintiff's work activities as the result of the injury?

Mr. Wilder is totally incapable of any gainful employment. He is supposed to be in a wheelchair or using a walker. He has extreme degrees of pain and numerous problems that have not even been ratable.

This section of Dr. Johnson's report indicates that Wilder currently lacks the physical capacity to return to the type of work he performed at the time of his injury. The fact that Dr. Johnson provided an answer to the question, "Which

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arthritis.

We include these excerpts only to clarify Dr. Johnson's statements. They do not form any basis for our decision.

restrictions, if any, should be placed upon plaintiff's work activities as the result of the injury?" also led the ALJ to assume that Dr. Johnson believed Wilder currently lacks the physical capacity to return to that type of work *because of his injury (i.e., that Wilder's cumulative trauma injury caused Wilder to "have numerous problems that have not even been ratable," and to be "in a wheelchair or using a walker," "in extreme degrees of pain," and, thus, to be "totally incapable of any gainful employment")*.

But, taken in context with Dr. Johnson's entire report, this section does not evidence that Dr. Johnson believed that work-related cumulative trauma caused Wilder a complete inability to work. It simply evidences that Dr. Johnson believed assessing Wilder work-related restrictions due to cumulative trauma would be a *moot point* in light of Wilder's separate and subsequent manifestation of "crippling, disabling, [and] generalized" ankylosing spondylitis arthritis. To that end, no part of Dr. Johnson's report links Wilder's "extreme degrees of pain" to Wilder's cumulative trauma injury. The "numerous problems that have not even been ratable," to the extent they are described in Dr. Johnson's report, all relate to ankylosing spondylitis, the condition of Wilder's sacroiliac joints due to

ankylosing spondylitis, and the side-effects of medications Wilder takes to treat his ankylosing spondylitis.<sup>10, 11</sup>

Most tellingly, Dr. Johnson's comments that Wilder "is totally incapable of any gainful employment" and "is supposed to be in a wheelchair or using a walker" are direct references to a set of restrictions that Dr. Pompati, Wilder's rheumatologist, imposed upon Wilder *because* she diagnosed him with ankylosing spondylitis.<sup>12</sup> Unfortunately for Wilder, nothing of record demonstrates that Dr. Pompati restricted him from work and to a wheelchair or walker for any reason other than ankylosing spondylitis; and, nothing of record demonstrates that

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<sup>10</sup> Specifically, Dr. Johnson's report states:

The reader is asked to note that Guides V has no specific rating method for arthritis. Mr. Wilder is clearly totally and permanently incapacitated. The reader is asked to note that Guides V has no methodology for the adverse effects of medications. This is a major part of Mr. Wilder's problem. I do not rate psychological or behavioral patterns because that is not in my area of expertise but, as an M.D., I can assure the reader that Mr. Wilder has significant behavioral abnormalities that have not been addressed by the treating physicians, at least as far as the records I have seen. On his bone scan, the most significant area of abnormality is the sacroiliac joints. I know of no method of evaluating those without further studies, according to the Guides V.

<sup>11</sup> Dr. Pompati, Wilder's rheumatologist, began treating Wilder with Enbrel and methotrexate injections (*i.e.*, the "medications" referenced in Dr. Johnson's report) shortly after diagnosing Wilder with ankylosing spondylitis. Dr. Johnson's report notes that these caused Wilder severe abdominal pain and gastrointestinal symptoms.

<sup>12</sup> Dr. Johnson's report notes that on August 11, 2011, Dr. Pompati reported a bone scan that Wilder had undergone earlier that month "showed evidence of sacroiliitis and increased uptake in multiple joints suggestive of degenerative arthritis." On the same day, Dr. Pompati wrote Wilder a note stating, "To whom it may concern: John Wilder is completely disabled for any occupation. For further information, please contact us." Dr. Johnson's report goes on to provide: "On October 3, 2011, a note from Dr. Pompati stated walker for permanent use. The diagnosis is ankylosing spondylitis." Dr. Johnson's report further provides: "On January 3, 2012, a prescription for portable wheelchair with a diagnosis of ankylosing spondylitis was issued."

Wilder needed to be restricted from work, or to a wheelchair or walker, for any other reason. Indeed, Dr. Johnson did nothing more than incorporate the reasons given by Dr. Pompati for why Wilder cannot work; in his report, he explicitly states: “I am not a rheumatologist. I am agreeing with Dr. Pompati’s findings and recommendations in terms of Mr. Wilder’s complete inability to engage in gainful employment.”

To summarize, the ALJ’s finding of Wilder’s permanent total disability due to work-related cumulative trauma is based solely upon Dr. Johnson’s report, and it is therefore based upon a misinterpretation of Dr. Johnson’s report, rather than substantial evidence; all of the reasons found in the record given by Dr. Johnson for why Wilder is totally incapable of working derive solely from Wilder’s ankylosing spondylitis, which Dr. Johnson himself opined was a nonwork-related condition. Wilder has cited no other evidence of record capable of supporting the ALJ’s finding of work-related, permanent total disability, and in our own review we have found none. In short, and unfortunately for Wilder, substantial evidence does not support that Wilder is permanently and totally disabled within the meaning of Kentucky’s Workers’ Compensation Act. The ALJ’s decision to award Wilder permanent total disability benefits was therefore erroneous as a matter of law.

## **CONCLUSION**



For these reasons, we REVERSE, with directions to award Wilder permanent partial disability benefits consistent with the 9% impairment rating of record.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent. As fact-finder, the ALJ has sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). When conflicting evidence is presented, the ALJ may choose whom and what to believe. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123, 124 (Ky. 1977).

The ALJ chose to believe Dr. Johnson's testimony and did not improperly interpret his report regarding the cause of Wilder's back and neck condition. Dr. Johnson attributed Wilder's back and neck condition to cumulative trauma caused by his work. Because there is sufficient evidence to support the ALJ's award, I would affirm.

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