

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 25, 2016

CLAIM NO. 201094412

ANGEL DYRSTAD, ADMINISTRATOR
OF THE ESTATE OF MARK DYRSTAD

PETITIONER

VS. APPEAL FROM HON. JOHNATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

CROSSETT COMPANY
HON. JOHNATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

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

RECHTER, Member. The Estate of Mark Dyrstad ("The Estate") appeals from the September 24, 2015 Opinion and Order and the October 29, 2015 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ determined Mark Dyrstad ("Dyrstad") suffered no permanent impairment as a result of a January 25, 2010 work-related

injury, and dismissed the claim. The Estate now appeals, arguing the decision is not based on substantial evidence. For the reasons set forth herein, we affirm.

Dyrstad worked for Crossett Company as a warehouse selector putting orders together. The job required the use of both hands and lifting up to fifty pounds. On January 25, 2010, Dyrstad was changing the industrial battery of an electric pallet jack and was using a crane to bring a new battery to the floor. One of the hooks of the crane released once the battery was hooked, and a large wooden piece of the crane went down, striking Dyrstad in the left elbow. Dyrstad was left hand dominant.

Crossett Company paid Dyrstad's medical treatment and temporary total disability benefits for the periods when he was off work. He was able to return to light duty work but was never able to return to his job as a warehouse selector. Fifteen months after the work injury, Dyrstad was severely injured in a non-work-related motorcycle accident. He died from the injuries on July 6, 2011.

Following the work injury, Dyrstad visited the Saint Elizabeth Medical Center emergency room. X-rays of the left elbow revealed a nondisplaced corner fracture of the radial head. An x-ray of the left shoulder was normal.

Dyrstad was diagnosed with a soft tissue injury to the left upper arm.

Thereafter, Dyrstad visited Dr. Forest Heis on February 1, 2010. He reported pain in his left shoulder and elbow following a work injury. Dr. Heis' impression was a left elbow radial head fracture and olecranon fracture, which he characterized as minor. He prescribed a sling and passive range of motion exercises. Dyrstad returned on February 25, 2010 with continued complaints of pain in his left elbow, though somewhat improved. Dr. Heis removed the sling and released him to return to restricted duty in one week. Dr. Heis also ordered a second x-ray of Dyrstad's left elbow which was normal and showed the two areas of injury were healed.

At a March 17, 2010 visit, Dr. Heis noted Dyrstad's continued complaints of left elbow pain and ordered an MRI. However, on the day of the scheduled MRI, Dyrstad fell on some steps. He stated his left elbow and hand began to spasm, and he lost his balance, causing the fall. As a result of the fall, Dr. Heis diagnosed a left clavicle fracture, left hand fracture, olecranon fracture and complex regional pain syndrome. Dr. Heis performed a left clavicle open reduction and internal fixation on April 13, 2010. On June 29, 2010, Dyrstad underwent the MRI of

his left elbow, which revealed no radial head fracture. The examination findings were limited due to "patient motion." An EMG/NCV study performed on July 29, 2010 indicated mild carpal tunnel syndrome. At a December 10, 2010 visit, Dr. Heis noted full range of motion in Dyrstad's left elbow and released him to return to work. He did attempt to return to full duty but was unable to do so. Thereafter, Dr. Heis again placed Dyrstad off work on January 12, 2011.

In a Form 107 dated May 11, 2011, Dr. Heis diagnosed a left clavicle fracture, a left radial head fracture, an olecranon fracture and complex regional pain syndrome. He did not believe Dyrstad was at maximum medical improvement ("MMI") and therefore did not assign an impairment rating. As to causation, Dr. Heis stated "the mechanism of injury is consistent with the pathology found."

Dr. Arnold Penix evaluated Dyrstad on February 22, 2011 on behalf of the workers' compensation insurance carrier. Dr. Penix determined Dyrstad was at MMI but could not return to his former position using his left arm. He restricted Dyrstad from lifting more than ten pounds.

The Estate submitted the medical records of Dr. Luis Pagani. Dyrstad was referred by Dr. Heis for pain

management. On September 21, 2010, Dr. Pagani took a history of Dyrstad's work-related injury and subsequent fall, and noted Dyrstad's continued complaints of left elbow pain and loss of grip strength. Dr. Pagani prescribed various medications for pain management and continued to treat Dyrstad until January 5, 2011. On that date, Dr. Pagani again diagnosed a fracture of the left elbow and directed Dyrstad to return in one month. This was Dyrstad's last visit with Dr. Pagani.

In a letter dated March 27, 2014, Dr. Pagani indicated he had reviewed his treatment records as well as Dr. Heis'. Dr. Pagani explained Dyrstad's work injury resulted in a fracture of his left elbow, which caused abnormalities in the ulnar nerve. These abnormalities caused periodic painful spasms affecting the left upper extremity, and causing the fall on the steps and subsequent clavicle fracture. Referring back to his last office visit with Dyrstad, Dr. Pagani characterized his left elbow as "useless" and assessed a 100% impairment rating of the left upper extremity. This translated to a 54% whole person impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Dr. Thomas Bender reviewed Dyrstad's medical records and a surveillance video dated March, 2011. Dr. Bender noted Dyrstad sustained a vertical fracture of the left radial head that was non-displaced and a small avulsion from the medial epicondyle due to the work injury. Dr. Bender did not believe Dyrstad's fall and clavicle fracture was related to the work injury, and opined Dyrstad was manipulating a factitious tremor. He also criticized Dr. Pagani's records and conclusions because they revealed no significant musculoskeletal dysfunction or significant loss of strength or mobility. Dr. Bender concluded Dyrstad was at MMI within six months of the January 25, 2010 injury and would have been able to return to work without restrictions. He assessed a 0% impairment pursuant to the AMA Guides.

Dyrstad's widow, Angel Dyrstad, testified at the final hearing. She stated Dyrstad was severely limited in the use of his left arm following the work-related accident, and was unable to raise his left arm above his head or shoulders or lift more than ten pounds. Angel also testified he was unable to play with his children while he wore the sling, and never returned to "100%" prior to his death.

In his Opinion and Order, the ALJ noted the surveillance video depicted Dyrstad catching a football repeatedly, lifting his hands above shoulder level, and lifting a pipe with his left hand. Ultimately, the ALJ explained he was unconvinced by Dr. Pagani's opinion because it was issued when Dyrstad had not yet reached MMI. Instead, the ALJ found Dr. Bender's opinion most credible and relied upon it to dismiss the Estate's claim. The Estate's subsequent petition for reconsideration was summarily denied.

On appeal, the Estate argues the ALJ's decision is not based on substantial evidence. As the claimant in a workers' compensation proceeding, the Estate had the burden of proving each of the essential elements of its cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because it was unsuccessful in that burden, 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by

the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Contrary to the Estate's assertions, we do not believe the ALJ misinterpreted Dr. Pagani's report. The ALJ explained that Dr. Pagani issued his impairment rating based on his last visit with Dyrstad in February, 2011, at which point Dr. Pagani did not believe he was at MMI. The Estate counters Dr. Pagani determined Dyrstad was at MMI after his last evaluation, based on his retrospective review of Dr. Heis' medical records.

Dr. Pagani's report is somewhat unclear, and open to different interpretations. However, he explicitly states, referring to his last office visit with Dystrad, "At that point in time, he was not considered maximally medically improved but was restricted to work with no use of the left arm." Thus, the ALJ did not mischaracterize Dr. Pagani's report. Regardless, the ALJ was not obliged to accept Dr. Pagani's impairment rating. As fact-finder, the ALJ may reject any testimony and believe or disbelieve various parts of the evidence. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Furthermore, we disagree with the Estate's assertion the ALJ improperly relied upon the surveillance

video of Dyrstad. The Estate argues the video was never authenticated and no witness testified the person in the video is actually Dyrstad. However, the Estate never objected to the admission of Dr. Bender's report, who viewed and relied upon the video in rendering his medical opinion. If the Estate believed it was improper for Dr. Bender to rely upon the video, it was obligated to object pursuant to 803 KAR 25:010 Section 10 (6).

The ALJ relied exclusively on Dr. Bender's report, which constitutes substantial evidence to dismiss the Estate's claim for benefits beyond the medical and temporary total disability benefits paid during Dyrstad's lifetime. Because the evidence was conflicting, the ALJ acted within his discretion in selecting a physician upon whom to rely. We are therefore without authority to reweigh the evidence and reach an alternate conclusion.

Accordingly, the September 24, 2015 Opinion and Order and the October 29, 2015 Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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