

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 23, 2015

CLAIM NO. 201496140

ARKEMA

PETITIONER

VS.

APPEAL FROM HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE

PAUL T. ROWLEY
and HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

* * * * *

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

STIVERS, Member. Arkema seeks review of the December 18, 2014, Opinion, Award, and Order of Hon. Robert L. Swisher, Chief Administrative Law Judge ("CALJ") awarding Paul T. Rowley ("Rowley") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced pursuant to KRS 342.730(1)(c)1, and medical

benefits. On November 5, 2013, Rowley's small, ring, and index fingers of his left hand were severed just below the mid-joint by an industrial cross-cut saw. The CALJ enhanced the amount of TTD and PPD benefits pursuant to KRS 342.165(1) and ordered interest paid at the rate of 18% pursuant to KRS 342.040(1) on all past due and unpaid installments of TTD benefits. Arkema also appeals from the January 16, 2015, Order overruling its petition for reconsideration.

On appeal, Arkema challenges the award on three grounds. First, Arkema contends the ALJ could not rely upon the 22% impairment rating initially assessed by Dr. Elkin J. Galvis which was later adopted by Dr. Jules Barefoot.¹ Second, Arkema asserts the CALJ's assessment of 18% interest on unpaid TTD benefits should only be assessed on the difference between the amount of TTD benefits it should have paid and the amount of TTD benefits it paid. Specifically, Arkema argues it should not pay interest on the enhanced portion of the TTD benefits. Finally, Arkema argues the CALJ erred by failing to reduce Rowley's benefits by 15% pursuant to KRS 342.165(1).

¹ In a report dated June 30, 2014, Dr. Galvis assessed a 22% impairment rating. However, in a letter dated August 22, 2014, Dr. Galvis stated he would like to revoke the impairment rating as the rating was incomplete according to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment.

The testimony revealed Arkema moved its assembly line that manufactured Plexiglas and acrylic resin from Connecticut to Louisville approximately ten months prior to Rowley's November 5, 2013, injury.² Rowley and others were hired to start the line when Arkema opened its plant in Louisville. As a result, Rowley had been trained by various individuals including union workers from Connecticut who "came with the job." Rowley had been performing this job for approximately six weeks before severing his fingers.

Rowley testified at his May 14, 2014, deposition that he was trying to remove "lodged pieces of scrap trim acrylic sheet" from the operating line when his fingers were severed by an electric cross-cut saw. He described the November 5, 2013, event as follows:

Q: Now, I want to show you a picture of a person who is trying to show how you were injured. Does that look like what you were doing at the time you were injured?

A: No, not actually, not actually. I see what he's saying there, because there is a clamp-down bar that when the saw - that clamp-down bar comes down and that saw takes off, that sheet - this trim right here, the saw is cutting this trim right there. You can see where the saw is cutting that edge. I was up here farther, and that just

²Plexiglas is the trade name of the product manufactured only by Arkema.

jerked me in when it did it because I was -

Q: But you were reaching underneath.

A: No, I wasn't reaching underneath. I was right there. It actually jerked me in there.

Q: How did it jerk you in there?

A: I guess when the saw came down, it just jerked it in there even before that come down, because that's the first thing I looked at when it did it, I looked to see where the clamp-down bar was at.

Q: Were your eyes looking somewhere else? Were you trying to do maybe two things?

A: No. This piece of trim was going up in the air like this (indicating), it was jamming, and I grabbed it out and threw it out, and there was another piece jamming, so I grabbed that piece of trim. That's how they told me to do it. And right when I grabbed that second piece, it jerked me. My hand wasn't in front of that there. I mean, it -

Arkema immediately began paying TTD benefits at the rate of \$558.00 a week. Rowley was treated by Dr. Galvis at the C.M. Kleinert Institute Rehabilitation and Kleinert Kutz Hand Care Center.

Rowley introduced the February 20, 2014, report of Dr. Barefoot, who assessed a 17% impairment rating pursuant to the 5th Edition of the American Medical

Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), explaining as follows:

Using the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition, I would rate Mr. Paul Rowley's impairment as follows:

From page 443 of the Guides, figure 16-5, an amputation to the PIP joint equals an 80% digit impairment. This same value is found on page 440, table 16-4, where an amputation through the PIP joint equals an 80% digit impairment.

Referring to page 438, table 16-1, an 80% digit impairment of the middle finger equals a 16% hand impairment. An 80% ring and little finger impairment equals an 8% hand impairment for the ring finger, and an 8% impairment for the little finger.

Adding the above impairments together equals a 32% hand impairment.

Referring to page 439, table 16-2, a 32% hand impairment equals a 29% upper extremity impairment.

From page 439, table 16-3, a 29% upper extremity impairment equals a 17% whole person impairment.

Thus, I would rate Mr. Paul Rowley's whole person impairment at 17%. Mr. Rowley does appear to be at his point of maximal medical improvement.

Dr. Galvis submitted a June 30, 2014, report in which he noted the left little, ring, and middle fingers were amputated at the "proximal phalanx just distal to the

MCP joints." He noted there were well healed incisions and stumps with some sensitivity. Dr. Galvis provided his findings regarding: Static Two-Point Discrimination, Static Touch/Pressure-Hand, Range of Motion, Pain, Pinch Strength, and Grip Strength.³ In arriving at the impairment rating, Dr. Galvis explained as follows:

Left extremity:

Little MP flexion of 80 degrees impairs the digit 6%. Little MP extension of 0 degrees impairs the digit 5%. Combining amputation (83%), ROM (11%) yields 85% impairment. Ring MP flexion of 70 degrees impairs the digit 11%. Ring MP extension of -15 degrees impairs the digit 10%. Combining amputation (85%), ROM (21%) yields 88% impairment. Middle MP flexion of 68 degrees impairs the digit 11%. Middle MP extension of -16 degrees impairs the digit 10%. Combining amputation (86%), ROM (21%) yields 89% impairment.

Index MP flexion of 78 degrees impairs the digit 6%. Index MP extension of 10 degrees impairs the digit 3%. Index PIP flexion of 90 degrees impairs the digit 6%. Index DIP flexion of 42 degrees impairs the digit 15%. Combining DIP (15%), PIP (6%), MP (9%) yields 27% impairment. Adding Little (9%), Ring (9%), Middle (18%), Index (5%) yields 41% impairment. Hand impairment is 41%. 41% Hand impairment translates to 37% upper extremity impairment. Amputation of the Hand yields 34% impairment. Total extremity impairment is 37%.

³Dr. Galvis only determined Rowley's active range of motion in the left hand. He determined the Pinch Strength and Grip Strength in both the left and right hand.

Dr. Galvis listed the following tables and figures of the AMA Guides which were utilized in determining the impairment rating:

Table 16-1 Page 438

Table 16-2 Page 439

Table 16-3 Page 439

Table 16-4 Page 440

Figure 16-2 Page 441

Figure 16-3 Page 442

Figure 16-5 Page 443

Figure 16-21 Page 461

Figure 16-23 Page 463

Figure 16-25 Page 464

Combined Values Chart ... Page 604

Rowley introduced the August 19, 2014, letter from Dr. Barefoot in which he stated he had no disagreement with the findings of the Kleinert Institute. He noted the report from the Kleinert Institute revealed loss of motion present at the MP joint of the long finger and small finger as well as loss of mobility in the index finger. Dr. Barefoot stated he was in agreement with "the findings as noted in the Kleinert Institute examination assigning a 22% whole person impairment."

In an August 22, 2014, letter, Dr. Galvis stated as follows:

At this time I would like to revoke the impairment rating of June 20, 2014 regarding Paul Rowley as this rating is incomplete according [sic] the 5th edition of the AMA guidelines. Upon re-evaluation of the patient a corrected impairment rating can be calculated.

Arkema introduced the October 17, 2014, deposition of Dr. Barefoot during which he explained his reasons for adopting Dr. Galvis' impairment rating. Dr. Barefoot testified he increased the impairment rating after reviewing the report from the Kleinert Institute which was based on the amputation and range of motion. He acknowledged he did not conduct range of motion studies.

In determining Rowley had a 22% impairment rating, the CALJ provided the following findings of facts and conclusions of law:

Plaintiff's evaluating medical expert, Dr. Barefoot, initially assigned a 17% impairment rating based on a partial amputation of the last three fingers of plaintiff's left dominant hand. He subsequently amended his opinion and impairment rating and opined that the correct impairment rating is 22% taking into consideration the correct location of the amputations as well as deficits in range of motion. Plaintiff's treating orthopedic surgeon, Dr. Galvis, initially endorsed a 22% whole person impairment rating based on a combination of amputation

and range of motion deficits. Subsequently, however, Dr. Galvis revoked his impairment rating as "incomplete according to the 5th Edition of the AMA *Guidelines*." He indicated that upon reevaluation a corrected impairment rating could be calculated but, apparently, that was never done. Accordingly, the ALJ finds that the only impairment rating endorsed by a physician at this point is the 22% impairment rating assigned by Dr. Barefoot. In his supplemental report, and during his deposition, Dr. Barefoot explained the basis for his increasing the initial impairment rating of 17% to 22%. Having reviewed Dr. Barefoot's report as well as the pertinent medical records and considering that report in light of Dr. Barefoot's deposition testimony, the ALJ finds that Dr. Barefoot has offered a valid and authoritative assessment of plaintiff's residual functional impairment as a result of traumatic amputation of portions of the last three fingers on his left hand. Accordingly, the ALJ finds that plaintiff retains a 22% whole person impairment rating as a result of the stipulated work-related injury. Accordingly, the ALJ finds that plaintiff has a permanent disability rating of 25.3% (22% X 1.15 grid factor).

Significantly, Arkema's petition for reconsideration did not contend Dr. Barefoot's impairment rating was not in conformity with the AMA Guides. Further, we note in its brief to the ALJ, Arkema urged the CALJ to adopt the 17% impairment rating initially assessed by Dr. Barefoot. It argued that in his letter, Dr. Galvis revoked

his impairment rating stating the testing was incomplete and requested Rowley reappear for further measurements which did not take place. Arkema noted Rowley introduced a second letter from Dr. Barefoot adopting the impairment of Dr. Galvis. It noted Dr. Barefoot did not measure the range of motion during his only examination of Rowley. It maintained Dr. Barefoot confirmed the AMA Guides require the measurement of active range of motion and if that is normal one does not measure passive range of motion, but if the active range of motion is normal then the passive range of motion is also measured.

In its petition for reconsideration, Arkema only requested additional findings "as to how the CALJ could find permanent partial disability based upon a 22% impairment rating from Dr. Barefoot." Noting the impairment rating was withdrawn by Dr. Galvis because it was incomplete, Arkema stated it "needed further findings of fact on that as well."

The CALJ denied that portion of Arkema's petition for reconsideration stating as follows:

With respect to the defendant/employer's objection to the undersigned's assessment of permanent partial disability based on a 22% impairment rating assigned by Dr. Barefoot, the defendant/employer points to no patent error appearing on the

face of the Opinion and Award. While the defendant/employer contends that "this rating was withdrawn by the doctor who issued it because it was not considered complete", a review of the record fails to support that contention. While it is true that the treating physician, Dr. Galvis, revoked his own 22% impairment rating as incomplete, Dr. Barefoot did no such thing, and the defendant/employer's contention to that effect is groundless.

Arkema argues there has been a rescission of the 22% impairment rating and even though Dr. Galvis did not provide a "detailed discourse on his reasons," his letter provides answers. It argues there was a problem with the evaluation upon which Dr. Galvis' rating was based. It posits the problem must be with one of the measurements upon which the rating was based. Thus, the 22% impairment rating is unavailable for adoption or use by another physician.

Arkema argues for the first time on appeal that Dr. Galvis did not comply with the methodology required by the AMA Guides. Noting Dr. Galvis relied upon numerous tables in Chapter 16 of the AMA Guides to calculate a complicated range of motion impairment rating, Arkema maintains the principles for evaluating abnormal motion in the upper extremities are enunciated on pages 450 and 451 of the AMA Guides, specifically Section 16-4. It asserts

the AMA Guides require the evaluator to evaluate the active and passive range of motion for both upper extremities and Dr. Galvis failed to do either. Arkema argues the CALJ was not permitted to accept Dr. Barefoot's endorsement of this impairment rating citing to Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006) which holds an ALJ cannot give credence to an opinion of a physician assigning an impairment rating that is not based on the AMA Guides.

Arkema also cites Watkins v. Kobe Aluminum USA, Inc., 2013-SC-000334-WC, rendered August 21, 2014, Designated Not to Be Published, for the proposition that the impairment rating must comply with the AMA Guides. Arkema contends even though Dr. Barefoot explained why measuring passive range of motion is not necessary, the AMA Guides clearly state the comparison of range of motion between the relevant joints in both extremities is always important. It posits the charts used in the AMA Guides reflect average range of motion and not everyone is average. Arkema contends it is unknown whether Rowley falls into the average category because Drs. Galvis and Barefoot did not test correctly. It argues Dr. Barefoot's explanation for increasing the impairment rating is insufficient as he did nothing to independently support an

increase above the 17% impairment rating. Thus, Dr. Barefoot's adoption of a null rating is without foundation. It maintains Dr. Barefoot's 17% impairment rating was correctly calculated using the amputation tables in the AMA Guides and there is no evidence or argument his application was erroneous. Consequently, the 17% impairment rating should be used to calculate Rowley's PPD benefits.

We find no merit in Arkema's argument the CALJ erred by relying upon the 22% impairment rating assessed by Dr. Barefoot. The impairment rating of Dr. Galvis contains extensive testing and in depth analysis. In his initial report, Dr. Galvis provided ample explanation for his impairment rating and cited to the tables and figures in the AMA Guides upon which he relied. Significantly, he did not cite to Section 16-4 of the AMA Guides, Figure 16-4 of the AMA Guides contained on page 450, and Figure 16-9 on page 451. In his letter of August 22, 2014, Dr. Galvis stated he would like to revoke the impairment rating because it was incomplete according to the AMA Guides. Importantly, he did not state his impairment rating should be reduced because of an error in testing he performed in arriving at his impairment rating. Likewise, Dr. Galvis did not state the results of his range of motion testing were inaccurate. Thus, we believe Dr. Barefoot could rely

upon Dr. Galvis' range of motion measurements in increasing Rowley's impairment to 22%.

The CALJ found Dr. Barefoot's deposition testimony explaining the basis for increasing his initial impairment rating to 22% to be credible. Based on Dr. Barefoot's report, the pertinent medical records and Dr. Barefoot's deposition testimony, the CALJ concluded Dr. Barefoot offered a valid and authoritative assessment of Rowley's residual functional impairment due to the loss of his three fingers.

During his deposition, Dr. Barefoot acknowledged he did not conduct range of motion studies. In his opinion, the AMA Guides direct the "active range of motion would be the measurements that would be recorded." When asked about the language in Section 16-4 on page 450 and 451, Dr. Barefoot emphasized the language at the bottom of page 451 of the AMA Guides directs the measurements of active motion take precedent. He provided one example why measurements for active and passive range of motion would be taken which he explained did not apply in this case. Dr. Barefoot emphasized the impairment rating in this case is going to be based on an active range of motion. Thus, obtaining a passive range of motion would not help.

Dr. Barefoot explained he assumed the amputation was through the PIP joint. However, in reviewing Dr. Galvis' report it was obvious "the amputation was not through the PIP joint but through the proximal phalanx before you got to the PIP joint." Accordingly, Dr. Barefoot reasoned:

Now, obviously, the majority of the difference occurred from the limited mobility that they noted and measured, which I just commented on but did not measure, concerning range of motion of the MCP joints of these fingers, and, once again, if you calculate all that up for the range of motion of the MCP joints, that is, indeed, the difference between my report and theirs.

The assessment of impairment for the purposes of arriving at a disability rating in a workers' compensation claim is a medical question solely within the province of the medical experts. Kentucky River Enterprises Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). Furthermore, a fact-finding authority does not extend to interpreting the AMA Guides. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Although assigning a permanent impairment rating is a matter for medical experts, determining the weight and character of medical testimony and drawing reasonable inferences therefrom are matters for the CALJ. Knott County Nursing Home v. Wallen, 74 S.W.3d

706 (Ky. 2002). Moreover, authority to select an impairment rating assigned by an expert medical witness rests with the CALJ. See KRS 342.0011 (35) and (36); Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

Because Dr. Barefoot is a licensed physician, it was appropriate for the CALJ to assume his expertise in utilizing the AMA Guides was comparable or superior to any other expert medical witnesses of record. The CALJ, as fact-finder, has no responsibility to look behind an impairment rating or meticulously sift through the AMA Guides to determine whether an impairment assessment harmonizes with that treatise's underlying criteria. Except under compelling circumstances where it is obvious even to a lay person that a gross misapplication of the AMA Guides has occurred, the issue of which physician's AMA rating is most credible is a matter of discretion for the CALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

That said, we are cognizant of the Kentucky Supreme Court's recent holding in Central Baptist Hospital v. Hayes, 2012-SC-000752-WC, rendered August 29, 2013, Designated Not To Be Published, in which it stated:

Usually an ALJ may not question a medical expert's interpretation of the Guides, but may only determine which

expert's findings he finds to be most credible. [citation omitted]. But once an ALJ is presented with overwhelming evidence that the impairment rating calculated by the medical expert is in contravention of the *Guides*, he has the responsibility to assign a different rating.

As previously noted, any impairment rating assigned by an ALJ must be in compliance with the *Guides*. KRS 342.0011(35); KRS 342.730(1)(b). In this matter, Central Baptist provided sufficient evidence to show that the combined 10% impairment rating assigned to Hayes was erroneous and not in compliance with the *Guides*. Table 17-2 and Section 17.2c of the *Guides*, state that an impairment rating for gait derangement may not be combined with an impairment rating for arthritis. No medical analysis or expertise is necessary to come to this conclusion. Thus, Dr. Nicholls should not have combined the two different impairment ratings, and Hayes cannot be assigned the combined 10% impairment rating.

Slip Op. at 2.

Our review of the report and testimony of Dr. Barefoot, Dr. Galvis' report and his letter, as well as the AMA Guides cited by Arkema, leads us to conclude the case *sub judice* is not one where the CALJ was presented with overwhelming evidence that the impairment rating calculated by Dr. Barefoot was in contravention of the AMA Guides. Here, as previously noted, there is no evidence the

measurements of Dr. Galvis regarding range of motion, pinch strength, and grip strength were inaccurate.

Further, Dr. Galvis' August 22, 2014, letter does not provide insight or a reason for his request to withdraw his impairment rating. Given there is nothing in the record impeaching the test results of Dr. Galvis and Dr. Barefoot's explanation for the increase in the impairment rating, we believe substantial evidence supports the CALJ's determination Rowley has a 22% impairment rating as a result of the almost total amputation of his three fingers.

More importantly, Arkema's analysis of the AMA Guides and its requirements concerning an impairment rating represents an independent review of the AMA Guides by an attorney, not a physician. This Board has consistently stated that the proper method for impeaching a physician's methodology under the AMA Guides is through cross-examination or the opinion of another medical expert. For example, in Brasch-Berry General Contractors v. Jones, 189 S.W.3d 149 (Ky. App. 2006), the ALJ relied on a physician who placed the worker in a DRE lumbar Category IV and assigned a 26% impairment rating, even though he repeatedly testified that if the AMA Guides were strictly followed, the worker would only qualify for a Category III impairment. Two other physicians in that claim placed the

injured worker in a lumbar Category III that called for an impairment of 10-16%. The Court affirmed the Board's reversal of the ALJ's decision since the medical opinion which persuaded the ALJ was not in accordance with the AMA Guides and, for that reason, did not qualify as substantial evidence. Here, Dr. Barefoot provided his reasons for increasing the impairment rating which are supported by the uncontradicted test results set forth in Dr. Galvis' report. Dr. Barefoot's opinions were not challenged by another physician. Accordingly, the CALJ's determination Rowley has a 22% impairment shall be affirmed.

Concerning the second issue on appeal, Arkema asserts the CALJ noted the parties stipulated TTD benefits were paid at the rate of \$588.43 per week from November 6, 2014, through the present. Because Arkema continued to pay TTD benefits throughout the proceeding, the parties agreed it would be entitled to a dollar for dollar credit against any benefits awarded. Rowley testified at the hearing he recently began receiving TTD benefits of \$685.10 per week and had received a check prior to the hearing to compensate him for the previous underpayment. Since Rowley's income benefits had been increased by 30% pursuant to KRS 342.165(1) the CALJ set his TTD benefit rate at \$890.63 per week. Relying upon Dr. Barefoot, the CALJ determined

Rowley attained MMI as of February 20, 2014, and awarded TTD benefits from November 5, 2013, through February 20, 2014, at the rate of \$890.63. Arkema would receive credit for the TTD benefits paid. Arkema was also entitled to a credit against its obligation to pay PPD benefits for its ongoing payment of TTD benefits at the rate of \$685.10.

With respect to the interest due on the TTD benefits, the CALJ entered the following findings of facts and conclusions of law:

Plaintiff contends that he is entitled to interest on past due TTD benefits at the rate of 18% per annum, instead of the default rate of 12% per annum pursuant to KRS 342.040. In so arguing, plaintiff alleges there have been substantial delays in the filing of the average weekly wage form by the defendant/employer and that the defendant/employer's human resources witness testified that he could produce such information almost immediately. Plaintiff contends that that delay not only gave rise to a substantial underpayment of TTD benefits but should give rise to the application of the penalty interest provisions of KRS 342.040. The defendant/employer argues that any initial shortage of TTD was an inadvertent error and not properly sanctionable. The defendant/employer further posits that "the error appears to have occurred as the additional average weekly wage here is based on three quarters, and the last quarter is such that the plaintiff earned almost twice as much as he had in previous quarters." The defendant/employer alleges that once the error was brought

to its attention, benefits were immediately brought up to date with interest and it notes that plaintiff's temporary total disability benefits have been paid "long past MMI."

As an initial note, the ALJ finds that any underpayment in the rate of temporary total disability benefits occasioned by the application of the safety violation penalty is not a circumstance under which the penalty interest provisions of KRS 342.040 is triggered. The real question is whether there has been an unreasonable delay by the defendant/employer in payment of TTD benefits at the appropriate weekly rate. Based on the acknowledgement in the defendant/employer's brief, it appears to the ALJ that temporary total disability benefits were based upon an average weekly calculation which was inconsistent with the provisions of KRS 342.140(1)(d). Instead of simply paying temporary total disability benefits based on the average weekly wage of \$1,027.65 as demonstrated by its own AWW-1 form, the defendant/employer unilaterally determined that that reflected an inaccurate picture of plaintiff's actual weekly wage earnings and adjusted the average weekly wage and, therefore, the TTD for its own purpose. While it is commendable that the defendant/employer has continued to pay temporary total disability benefits beyond the date of maximum medical improvement, it was inexcusable to pay those benefits initially at a rate which was clearly erroneous and contrary to law. The ALJ finds, therefore, that the underpayment of temporary total disability benefits from November 5, 2013 through February 20, 2014, the date on which plaintiff reached maximum medical improvement and

would no longer qualify for TTD was without reasonable foundation, and interest on those benefits is payable at the rate of 18% per annum in lieu of the 12% per annum previously paid. The defendant/employer shall forthwith tender the additional interest in the prescribed period of temporary total disability benefits.

The CALJ entered the following award of TTD benefits:

Plaintiff shall recover from the defendant and/or its insurance carrier temporary total disability benefits in the sum of \$890.63 per week from November 5, 2013 through February 20, 2014, together with interest at the rate of 18% per annum on all past due and unpaid installments of such compensation. The defendant shall take credit for all payments of temporary total disability benefits already paid.

Arkema argues the CALJ's award seems to direct that the difference between the TTD rate of \$890.63 which includes an increased amount for a safety penalty and the TTD benefit rate actually paid bears interest at 18%. It notes the CALJ stated in the opinion that any underpayment in the rate of TTD benefits occasioned by the application of a safety violation penalty is not a circumstance under which the interest penalty provision of KRS 342.040(1) is triggered. It notes a similar statement was made on the record by the CALJ at the final hearing. Thus, Arkema contends it was the CALJ's intent not to apply penalty

interest to all past due benefits, but only to the shortfall between the TTD benefit paid and the TTD benefit which should have been paid before inclusion of the amount due for the 30% safety penalty. Arkema notes its petition for reconsideration requested the CALJ to vacate the award of 18% on the TTD benefits awarded. It argues it had a reasonable foundation for refusing to pay TTD benefits enhanced by 30% during the pendency of the proceedings. Thus, it had no obligation to voluntarily pay maximum TTD benefits in addition to 30% prior to an award. Therefore, the award of 18% interest on \$890.63 per week must be vacated. Arkema concludes with the following:

Consistent with the ALJ's statement (and later finding) that penalty interest should not apply to that portion of the TTD 'occasioned by the application of the safety violation penalty', the 18% should apply only to the unpaid portion of TTD up to the base TTD rate awarded: \$685.10. This was the highest amount that Petitioner could be expected to voluntarily pay prior to the ALJ's award.

. . . .

Petitioner is not seeking to have *all* penalty interest vacated. Instead, it seeks only to ensure that it applies only to that portion of TTD which it might have voluntarily paid *prior* to application of the safety penalty. In other words, it should apply only to those unpaid amounts of TTD up to \$685.10. [footnote omitted] As a

result, Petitioner respectfully requests a remand to the ALJ to clarify his findings and his application of the law in light of this argument.

We agree with Arkema that the CALJ's award of 18% interest on TTD benefits of \$890.63 per week is erroneous. As noted by the CALJ, Arkema is not responsible for paying 18% interest on the amount of TTD benefits enhanced by 30%. An award of 18% on past due TTD benefits is appropriate when the employer intentionally fails to pay TTD benefits which it knew it had an obligation to pay. KRS 342.040(1). Here, the CALJ determined the "underpayment in the rate of TTD benefits not occasioned by the application of the safety violation is not a circumstance" which triggers the provisions of KRS 342.040. He stated the question is whether there had been unreasonable delay in the payment of TTD benefits at the appropriate weekly rate. The CALJ concluded there was an unreasonable delay. Thus, Arkema only owes interest on the difference between the TTD benefits actually paid and the sum of \$685.10, the correct amount of TTD benefits due Rowley from November 5, 2013, through February 20, 2014. Specifically, Arkema owes interest at 18% per annum on the difference between the amount it paid from November 5, 2013, through February 20, 2014, and the amount it should have paid of \$685.10.

Consequently, the claim will be remanded to the CALJ for clarification that Arkema only owes interest on the amount it underpaid each week in TTD benefits from November 5, 2013, through February 20, 2014. Arkema shall not be responsible for paying interest on the enhanced portion of the TTD benefits pursuant to KRS 342.165.

Concerning Arkema's entitlement to a reduction in the award of PPD benefits by 15% pursuant to KRS 342.165, the CALJ provided the following findings of fact and conclusions of law:

The most vigorously contested in this issue involves a determination of whether the so-called safety penalty provided in KRS 342.165 should be assessed against either, both or neither parties. In arguing that the penalty should be assessed against the defendant/employer, plaintiff points out that the defendant/employer was cited and fined by OSHA for a violation of a specific safety regulation for not adequately guarding the crosscut saw. Plaintiff argues that the record establishes that there was a violation of a specific safety provision and that the intent to violate that provision is inferred for its failure to comply with that regulation under the precepts of *Chaney v. Dags Branch Coal Company*, 244 S.W.2d 95 (Ky. 2008). Plaintiff concludes that there is no question that his injury was caused "in any degree" by the safety violation in that the injury would not have occurred at all if modifications and guarding had been in place at the time of injury. The defendant/employer, on the other

hand, submits that there was no job duty or reason for plaintiff to attempt to touch, grab or clean out Plexiglas trim while the crosscut saw was in operation and that any fault with regard to the occurrence of the injury event lies solely with plaintiff. It notes that there was warning signage in the immediate vicinity of the accident site and that, according to the testimony of its representative, Bobby Smith, the safety regulation violated was of not placing one's hand near the saw.

KRS 342.165(1) provides as follows as applies to the issues in the present claim:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to the installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased by thirty percent (30%) in the amount of each payment. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful or reasonable order or administrative regulation of the executive director or the employer for the safety of employees or the public, the

compensation for which the employer would otherwise have been liable under this chapter, shall be decreased fifteen percent (15%) in the amount of each payment.

. . .

Having carefully considered the evidence in the record, the ALJ is persuaded and finds that the defendant/employer's failure to adequately guard against an employee placing his hand in the path of the crosscut saw is a violation of 29 CFR 1910.212(a)(1) and pursuant to the holding in *Dags Branch*, the ALJ infers that the defendant/employer intended to violate that statutory provision. Moreover, it is beyond question that plaintiff's injury was not only "in any way" but directly caused by the defendant/ employer's intentional failure to comply with the cited regulation. From plaintiff's description of the injury event and from the undersigned's review of the photographs, it is apparent that it was very easy for plaintiff simply to extend his hand into the path of the crosscut saw while attempting to perform what he considered to be an obligation required of him to remove scrap trim from the cutting surface.

. . .

A review of the evidence in the record does not establish that there was any written policy, procedure or safety rule promulgated by the defendant/employer and in place at the time of the injury which specifically addressed the hazard of placing one's hand in the vicinity of an operating saw. While the work space did have

warning signs and while it is logical to assume that an employee would generally not intentionally place his hand in a zone of danger, the scenario presented in this matter is exactly why such devices in work areas are to be adequately guarded. Moreover, plaintiff testified that he had been instructed by company employees who had come from Connecticut to install the line in question that the scrap trim was to be cleared away in order to maintain the integrity of the manufacturing process and keep the line moving. While Mr. Reolo and Mr. Smith have testified that it was not necessary to remove scrap trim from the cutting surface or cutting path because the crosscut saw would have cut through it, there is no evidence that that information was ever imparted to plaintiff or that he understood that to be the case. In fact, the ALJ infers exactly the opposite given that he reached in as he had been trained to do to remove scrap trim in the past. While Messrs. Reolo and Smith may have believed that there was never any reason for an employee to place his hand where plaintiff placed his hand at the time of injury, it is clear to the ALJ that plaintiff had not been told that and did not have that understanding. In any event, the ALJ infers from plaintiff's testimony that this was not the first time that he had cleared out scrap trim that way leading to an inference that his supervisors had either acquiesced in or actually condoned that activity in the past. In any event, the defendant/employer has simply not persuaded the ALJ that the work accident in question was caused in any degree by the intentional failure of plaintiff to use any safety appliance furnished by him or to obey any lawful and reasonable safety rule or regulation.

In response to Arkema's request for additional findings of fact on this issue, in the January 16, 2015, Order, the CALJ entered the following:

With regard to the defendant/employer's request for additional findings of fact with regard to the imposition of the safety penalty pursuant to KRS 342.165 as well as the "specific reasons for the ALJ's findings", the undersigned notes that the Opinion and Award specifically sets forth the pertinent findings with regard to the safety violation. The defendant/employer' petition does not contend that the imposition of that safety violation penalty constitutes patent error on the face of the Opinion and Award. Having reviewed the Opinion, Award and Order, the CALJ is satisfied that his reasons for imposing the penalty on plaintiff and declining to impose the penalty on plaintiff are adequately addressed and discussed in the Opinion.

On appeal, Arkema argues even though there was substantial evidence to support imposition of a 30% penalty, there was, at least, a level of evidence supporting a 15% reduction in Rowley's benefits. It contends Mike Reolo ("Reolo"), its production sheet supervisor, provided reliable testimony on this issue. Arkema also argues the testimony of Reolo and its Human Resource Manager, Bobby Smith ("Smith"), establishes there was no reason for Rowley to reach near the cross-cut saw while it was running and prominent warnings were posted

where Rowley reached into the machine. Further, Rowley admitted he was aware of these signs. It dismisses Rowley's claim he was trying to reach into the machine to remove scrap in the path of the cross-cut saw since it does not make sense and there was no other evidence in the record which supports his statement. Consequently, his testimony cannot constitute substantial evidence. Arkema posits since it stresses safety there is no reason for it to train its employees to put their hands near fast moving automatic saw blades. Further, it contends there was no need for it to have a written policy telling a worker not to put his hands within inches of a large computer driven saw. Instead, the warnings posted beside the saw in question accomplish this far better than similar statements contained in a policy manual or employee handbook.

Arkema takes issue with the CALJ's statement that while it was logical to assume an employee would generally not intentionally place his hands in a zone of danger, the scenario presented in this case is exactly why devices in work areas are to be adequately guarded. It argues this statement by the CALJ, while relevant to the application of a 30% penalty, has no bearing in the analysis regarding its entitlement to a 15% reduction in Rowley's benefits. It asserts an incorrect standard was applied and to permit

this finding to stand means common sense need not be a factor and the burden is on the employer to make it impossible for its employees to disregard instructions. Therefore, Arkema asserts it is entitled to remand to the CALJ with instructions to reduce Rowley's benefits by 15%.

We find no merit in Arkema's argument the CALJ erred in not reducing Rowley's benefits by 15%. Notably, Reolo testified he did not train Rowley in operating the line which cut the Plexiglas. During his May 14, 2014, deposition regarding his training, Rowley testified as follows:

Q: And did they train you to touch the saw blade or to reach into the saw blade?

A: I was doing how they showed me to do it. When it backed up, that's what they showed me to do.

Q: Which was what?

A: Grab that piece of trim and pull it out of there. I wasn't touching the saw blade, though.

Q: Did they train you to touch the saw blade or to get near it while it was working?

A: Yeah, yeah.

Q: What did they train you to do?

A: I told you we had to go in there and shut that disconnect off and adjust the air and adjust the blades, and even when it was backing up, you went in

there and pulled the trim out of the way.

Q: So, if you had to work near or with the saw, you were trained to turn the saw off?

A: On the trim saws.

Q: Okay. What about on the - what about the saw you got cut on?

A: On a cross-cut saw, no. I mean, we just go in there and pull the trim out. That's how they showed me to do.

Q: Who told you to do that?

A: All the guys I worked with.

Q: What are their names?

A: Stedman Bakersfield. I think Stedman - Bakersfield I think is his last name. Matthew Ralston.

Q: Did they tell you that you could go in there while the saw was operating and put your hand near it?

A: Yeah, yes.

Q: They did?

A: Yes.

Q: Anybody else?

A: They did the same thing. We would take - when I would apply -

KRS 342.165(1) reads, in relevant part, as

follows:

. . .

If an accident is caused in any degree by the intentional failure of the

employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under this chapter shall be decreased fifteen percent (15%) in the amount of each payment.

Here, Arkema did not establish Rowley failed to use any safety appliance supplied by Arkema or to obey any law, reasonable order, or administrative regulation of the Commissioner or the employer regarding employee safety or the public. Rowley testified he knew the signs were there but on the date he was injured he was performing his job as he had been trained by Arkema's Connecticut employees. That testimony by Rowley constitutes substantial evidence in support of the CALJ's decision that KRS 342.165(1) did not apply. "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the CALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The CALJ 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); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). The CALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). In that regard, the CALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by the CALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing a CALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The

Board, as an appellate tribunal, may not usurp the CALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Rowley's testimony, if believed, constitutes substantial evidence in support of the CALJ's refusal to reduce his benefits by 15%. The fact Reolo and Smith may have testified to the contrary is of no import. It is the CALJ who determines the testimony upon which he will rely, and we find no fault in his reliance upon Rowley's testimony over the testimony of Reolo and Smith.

Accordingly, the CALJ's determinations Rowley's injury merited a 22% impairment rating pursuant to the AMA Guides and his income benefits shall not be reduced by 15% pursuant to KRS 342.165(1) are **AFFIRMED**. The CALJ's imposition of 18% interest on Rowley's TTD benefits of \$890.63 per week from November 5, 2013, through February 20, 2014, is **REVERSED**. This claim is **REMANDED** to the CALJ for entry of an amended order awarding 18% interest on the difference between the TTD benefits paid from November 5, 2013, through February 20, 2014, and \$685.10 the amount

owed by Arkema from November 5, 2013, through February 20, 2014.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JOHANNA ELLISON
300 W VINE ST STE 600
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON CHED JENNINGS
455 S 4TH ST STE 1450
LOUISVILLE KY 40202

CHIEF ADMINISTRATIVE LAW JUDGE:

HON ROBERT L SWISHER
657 CHAMBERLIN AVE
FRANKFORT KY 40601