

OPINION ENTERED: JUNE 18, 2012

CLAIM NO. 201101008

C & S VAULTS

PETITIONER

VS.

**APPEAL FROM HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE**

JOE T. PRESTON
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

* * * * *

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

SMITH, Member. C & S Vaults ("C & S") appeals from the January 4, 2012 Opinion and Award rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") awarding Joe Thomas Preston ("Preston") temporary total disability ("TTD"), permanent partial disability ("PPD"), and medical benefits based upon finding Preston's right shoulder condition was work-related. C & S also appeals from the ALJ's order on reconsideration rendered January 27, 2012. C

& S argues the ALJ's determination that Preston sustained a work-related right shoulder injury was not supported by substantial evidence. C & S also argues the ALJ failed to provide sufficient findings of fact to justify her conclusions.

Preston, now age 46, is an unmarried resident of Sitka, Kentucky who completed the 11th grade. He does not have a GED, but does retain a commercial driver's license. He was hired by C & S in October 2010 as a burial vault delivery driver. His Form 101 alleges he was injured on January 17, 2011 as he was unloading a vault and it "came down and landed on his right side, from the shoulder down", injuring his right shoulder, neck and right arm.

Preston testified by deposition and at the formal hearing. He also submitted the Form 107-I, medical report of Jerry W. Brackett, M.D. Preston testified the accident occurred as he was attempting to unload a burial vault he had delivered to a funeral home in Manchester, Kentucky. Preston stated the average vault was solid steel and weighed between 325 pounds and 800 pounds. He explained how the accident happened as follows:

A. . . . I was driving a flatbed truck that--that day--when we had like a short stop we used a flatbed. And it was kind of icy and snowy on the ground, and as I was going to pull

the vault off the back of the truck, it was a 10-gauge vault--I think it was a 10-gauge vault--my foot had slipped and the vault had come down on my right shoulder and everything.

Q. What foot slipped?

A. The left foot.

Q. Left foot slipped--

A. Yeah.

Q.--As you were pulling the vault off of the--

A. The back of the truck.

Q. And what happened to the vault?

A. Well, the vault, it came off the back of the truck and it got me in the right shoulder and arm and everything. I think it was a 10-gauge or a 12-gauge vault. That's probably one of the heaviest vault there are, [sic] 10-gauge is.

Q. And where on your right shoulder and arm did it strike you?

A. Right--for my neck by here (indicating) all the way down.

Q. More in the back or not--

A. Yeah.

Q. What happened to the vault after it hit you?

A. Well, it hit the ground. It flopped over on the ground and . . .

Q. What happened next?

A. Well I manhandled it up. All you had to do was stand it up. Then I drove back to the shop and told them what happened and then Cheyenne McKinney sent me over to Highland Regional.

Preston indicated at the time of the accident the funeral home had not yet opened. The vault was not damaged and was left in a designated area.

Preston was treated at Highland Regional Medical Center, where x-rays were performed and he was referred to his family physician, Thomas A. Smith, M.D.

C & S submitted the medical notes of Dr. Smith who saw Preston for follow-up treatment. The history taken on March 24, 2011 indicates Preston fell on the ice at work on January 17, 2011 and caught himself with his right hand. He reported pain in his right hand, arm and shoulder. On February 14, 2011, Dr. Smith saw Preston on follow-up noting he needed pain medication for continued pain in his wrist from the fall at work after slipping on the ice. On March 2, 2011, Dr. Smith saw Preston for complaints of right shoulder pain existing since the fall. On March 24, 2011, Preston followed up with Dr. Smith, again complaining of shoulder and arm pain and numbness to the left fingers and arm. On April 7, 2011, Dr. Smith recorded that the cervical MRI, EMG/NCV, and X-ray reports were all negative. He recommended Preston "take it easy with that hand as much as

possible" and recommended a further EMG/NCV study of the right upper extremity and MRI of the right shoulder and right upper extremity. The records attached to the hearing transcript show that Dr. Smith took Preston off work from April 7, 2011 to June 9, 2011.

Preston filed the medical report of Jerry W. Brackett, M.D. Dr. Brackett's handwritten report, dated May 25, 2011, recorded the following history:

Was taking a valt[sic] off back of truck when he fell and injured rt shoulder. had arm(;) and mid back, and neck pain - stated valt [sic] weight was 6 (six) hundred pounds. States when he fell from truck he fell back 6 feet and hit on rt shoulder.¹

Dr. Brackett conducted a physical examination; however his written results are indecipherable. He recorded he reviewed positive x-rays, MRI, and EMG/NCV studies. He diagnosed frozen right shoulder and assessed a whole person impairment of 13% pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides".) He also determined Preston had no active impairment prior to that injury. Dr. Brackett did not indicate whether Preston's injury was the cause of his complaints, nor did he indicate how the work-

¹ This represents our best attempt at deciphering this physician's written notes

related injury caused the harmful change. He also concluded Preston did not retain the capacity to return to the type of work performed at the time of the injury. He assigned restrictions of no lifting, bending, pushing, pulling or any activity requiring the use of the upper extremity for lifting.

C & S filed the medical report of Philip F. Corbett, M.D. who examined Preston on November 2, 2011. Preston provided a history of an injury on January 17, 2011 while attempting to remove a vault from the back of his truck. In the process, his foot slipped on an icy step causing the vault to fall on him. Preston tried to break his fall by extending his right hand behind him, but after hitting the ground, the vault struck the front of his right shoulder.

Preston sought treatment at Highlands Regional Medical Center emergency room where x-rays were performed and he was referred to a primary care physician and taken off work.

Dr. Corbett reviewed medical records and reports from Dr. Brackett, the Paul B. Hall Medical Center and Dr. Jason Rice, who had examined Preston several years ago. After a physical examination, Dr. Corbett noted:

On the basis of the contemporaneous record from the hospital, this patient was seen for complaints of pain and swelling in his right wrist without evidence of a fracture leaving a

presumptive diagnosis of contusion and sprain. Today's x-rays of the patient's right wrist demonstrate there is no evidence of untoward skeletal deformity. Patient's complaints of shoulder pain began, according to the medical records, about a month after the date of injury making it difficult, in my opinion, to establish a causal relationship to the patient's complaints of right shoulder pain to the accident. None of the records record a direct blow to the patient's right shoulder from a falling 600 pound casket. None of the diagnostic imaging studies indicate a fracture, dislocation, or other traumatic injury as a reflection of such an episode. Therefore, the remaining diagnoses, if one accepts that perhaps there was a direct blow to the shoulder, remain as a contusion on the shoulder without muscular strain. The prognosis for these injuries is for full resolution within a matter of three months. With that time having passed and the patient's ongoing complaints, it is difficult to support an objective diagnosis at this time. The patient shows no evidence of dysfunction of the right upper extremity neurologically or musculoskeletally.

Dr. Corbett determined Preston's subjective complaints of pain were not supportable on the basis of his objective findings. There being no neuromuscular dysfunction, Dr. Corbett assessed a 2% impairment and assigned no restrictions. Furthermore, Dr. Corbett determined Preston retained the physical capacity to work in the moderately heavy range, although he was significantly deconditioned.

C & S filed medical records from Highlands Regional Medical Center Emergency Room Department showing Preston presented on January 17, 2011 reporting he slipped and hurt his right wrist at work that morning. Diagnostic testing was performed and Preston was given medication and released.

The ALJ, after summarizing Preston's testimony and the medical evidence, issued the following findings of fact and conclusions of law relevant to this appeal:

In applying the principles of Koroluk vs. United Parcel Service, supra [No. 2006-SC-000946-WC (Ky. 2007)], it is clear to the undersigned that Plaintiff sustained an injury as defined by the Act and discussed in Robertson vs. United Parcel Service, 64 SW3d 284 (Ky. 2001). There was a reported event, and even instructions from his supervisor for him to go for medical treatment, which he did. The medical records are consistent with a work injury occurring on January 17, 2011, including a trip to urgent/emergency treatment at the venue where Plaintiff was instructed to go by his employer. More importantly, there was no evidence from the Defendant/employer contradicting the Plaintiff's version of events. The Plaintiff was injured at work, the supervisor was notified and Plaintiff was instructed to go for medical treatment. I find that Plaintiff sustained a work-related injury on January 17, 2011. In making this finding I rely upon the testimony of the Plaintiff and the medical records of Highlands Regional Medical Center.

3. Work relatedness/Causation.

When the causal relationship between an injury and a medical condition is not apparent to the lay person, the issue of causation is solely within the province of a medical expert. Elizabethtown Sportswear vs. Stice, 720 SW2d 732, 733 (Ky. 1986); Mengel vs. Hawaiian Tropic Northwest and Central Distributors, Inc., 618 SW2d 184 (Ky. 1981).

Here, the Plaintiff's treating physician, Dr. Thomas Smith, consistently and over a period of several months, related the medical treatment he was providing to the Plaintiff to the January 17, 2011 work injury. In his records he related the symptoms of Plaintiff to the work injury. Additionally, the evaluating physician, Dr. Jerry Brackett, opined that the cause of Plaintiff's current symptoms was the work injury. I do not find Dr. Corbett's opinion persuasive as it relates to the issue of causation. I find that as a result of the work injury on January 17, 2011 the Plaintiff has sustained a work injury that was the causative factor in the Plaintiff's shoulder and right upper extremity condition. For this finding I rely upon the medical records of Dr. Thomas Smith and the report of Dr. Jerry Brackett.

. . . .

5. Extent and Duration with Multipliers.

Since 1996, permanent partial disability has been measured by reference to a permanent impairment rating rendered pursuant to the most recent edition of the AMA Guides to the Evaluation of Permanent Impairment and

the factors and multiplier set forth in KRS 342.730. I find that Plaintiff suffered a work-related injury that resulted in permanent impairment per the AMA Guides. There are two medical opinions in the record concerning the permanent impairment of the Plaintiff. Dr. Brackett assigned a 13% whole body impairment and opined Plaintiff did not retain the capacity to return to the work he performed at the time of the injury. Dr. Corbett assigned a 2% but importantly does so without the benefit of the MRI scan report or video disk of the shoulder. I adopt Dr. Brackett's opinion as it relates to the permanent impairment of the Plaintiff. I find that Dr. Brackett's opinion is more persuasive in part because he had the benefit of diagnostic tests that Dr. Corbett did not have. I find that Plaintiff has 13% permanent partial impairment to the body as a whole [sic] AMA Guides and rely upon Dr. Brackett for this finding.

The next inquiry is whether Plaintiff is entitled to a statutory multiplier pursuant to KRS 342.730 (1) (c)(1) or (2). After considering the testimony in the record, I find the Plaintiff has not met his burden in proving that he is entitled to either multiplier.

Although it may be true that Plaintiff has taken a job that requires lifting lighter weights than his previous employment with the Defendant/employer (milk cases vs. steel vaults) he has not proven that the restrictions and limitations entitle him to an enhancement as contemplated in the statute. I find the medical and lay evidence is not of the substance or character to rely upon in determining that the Plaintiff lacks

the physical capacity to return to the same type of job he was doing at the time of this injury. Again the medical evidence is Dr. Brackett vs. Dr. Corbett and, on this particular issue, I find Dr. Corbett's testimony is more persuasive. Even the Plaintiff acknowledges he no longer considers himself to have any permanent restrictions. Therefore, I decline to find that Plaintiff is entitled to a multiplier pursuant to KRS 342.730 (1)(c)(1) or (2).

C & S filed a petition for reconsideration on January 16, 2012, arguing that, although the ALJ found C & S had failed to contradict the plaintiff's version of events relating to the January 17, 2011 work injury and the physical injuries resulting therefrom, review of the evidence shows clear contradictions and inconsistent testimony concerning both the nature of Preston's work and the alleged injuries. C & S argued Preston offered three conflicting accounts relating to how he was injured. At his September 12, 2011 deposition, Preston testified the vault which he was pulling from the back of his truck fell forward, striking him on the right shoulder, but he did not allege falling to the ground. At the formal hearing, Preston claimed he fell to the ground as a consequence of the vault striking him on the right shoulder. However, the vault did not completely fall out of the truck. When examined by Dr. Corbett on November 2, 2011, Preston

reported both he and the vault hit the ground and the vault struck him on the right shoulder in the process.

C & S also notes the initial history solicited from Preston at Highlands Regional Medical Center the day of his injury shows no reference to Preston being struck on the right shoulder by a burial vault. None of the treatment notes reflect complaints of right shoulder symptoms. Accordingly, C & S argued patent errors existed sufficient to allow the ALJ to amend her Opinion and Award.

The ALJ denied the petition for reconsideration by order dated January 27, 2012. The ALJ noted the arguments on reconsideration were almost identical to the arguments made before the opinion was rendered. The ALJ stated the arguments had been considered and were a re-argument of the merits.

On review, we find the appeal by C & S to be a factual re-argument of the case. C & S impermissibly requests this Board to substitute its judgment for that of the ALJ. As we frequently admonish, this is not the Board's function. See KRS 342.285 and Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

The burden of proof below rested with Preston. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Preston was successful on the issue of the occurrence of a

work-related injury, the question on appeal is whether, upon consideration of the record as a whole, there is substantial evidence to support the ALJ's finding. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). 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). As fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, *supra*. Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

C & S mistakenly believes that, because the patient history recorded in the contemporaneous medical record from Highlands pertaining to Preston's initial treatment does not mention the vault striking Preston's shoulder, a finding that Preston did not sustain a work-related shoulder injury on January 17, 2011 is compelled. Whether the patient history recorded in one medical record is more credible than that recorded in another medical record or the patient history to which the claimant testified under oath, however, is a finding of fact ultimately to be determined by the ALJ. The ALJ was well aware of the conflicting accounts of the injury, weighed the evidence, and concluded the work injury produced Preston's shoulder and right upper extremity condition.

Additionally, as noted by the ALJ, Dr. Smith consistently related his treatment to the work injury and Dr. Brackett opined the cause of Preston's current symptoms was the work injury. Their opinions are substantial evidence on the issue of medical causation and support the ALJ's conclusion the work injury was the causative factor in Preston's shoulder and upper extremity conditions.

C & S's arguments are addressed to the weight to be given to the evidence. It is not the Board's role to re-weigh the evidence. If, as here, the ALJ's findings are

supported by substantial evidence, then the Board may not disturb those findings. Since it is clear from the ALJ's opinion, award and order, as well as from her ruling on C & S's petition for reconsideration, she was laboring under no material misimpression as to the evidence or pertinent law, we affirm.

Accordingly, the January 4, 2012, Opinion and Award and the January 27, 2012 order on petition for reconsideration rendered by Hon. Jeanie Owen Miller are hereby **AFFIRMED**.

ALL CONCUR.

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