Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 13, 2013

CLAIM NO. 201173382

CHRISTOPHER ROBINSON PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

SOUTHERN WATER
and HON GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Christopher Robinson ("Robinson") appeals from the June 24, 2013 Opinion, Award and Order rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). Robinson also appeals from the July 23, 2013 Order denying his petition for reconsideration. Robinson argues the ALJ erred in selecting an impairment rating and in finding he

could continue to earn the same or greater wage for the indefinite future. We disagree and affirm.

Robinson injured his low back on September 5, 2011, when the excavator he was operating tilted, throwing him onto the floorboard. He was able to finish the shift, but his condition worsened that night. Robinson sought treatment at the emergency room. Eventually, Dr. Steven Kiefer performed surgery. Robinson returned to work as a supervisor, the same position he has held since 2009, performing mostly light duty work. He testified he still is required to operate equipment, but is unable to operate an excavator all day and cannot "tram" the excavator to the job site. Robinson testified he continues to have pain in his back, left hip, and leg. He explained he had not yet experienced recurrent leg and foot pain at the time Dr. Kiefer provided a release without restrictions.

Dr. James Owen evaluated Robinson in June, 2012, and diagnosed a recurrent or potentially new L5-S1 disk herniation. Dr. Owen assessed a 19% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") using the range of motion model ("ROM"), based upon a surgically treated disc lesion and multilevel nonsurgical disc involvement.

Southern Water submitted reports and the deposition of Dr. Russell Travis, who diagnosed continued pain in the low back and left lower extremity of undetermined etiology. Dr. Travis found no objective findings on examination, and determined the post-operative MRI with and without contrast shows no evidence of recurrent disc, herniated disc, or nerve root impingement. In assigning a 10% impairment rating, Dr. Travis utilized the diagnosis related estimate ("DRE") methodology.

Responding to Dr. Owen's rating and diagnosis, Dr. Travis explained normal postoperative epidural fibrosis is often misdiagnosed as a new disc herniation. He also took into consideration that Dr. Kiefer completely explored both the L4-5 and L5-S1 levels and did not find a herniated disc at either level. Dr. Travis further disagreed with Dr. Owen's 19% impairment rating, stating none of the conditions permitting utilization of the ROM methodology in the AMA Guides were satisfied.

Dr. Steven P. Kiefer, the treating surgeon, assessed a 10% impairment rating pursuant to the AMA Guides, placing Robinson in DRE Category III.

The ALJ determined the 10% rating assessed by Dr. Travis was more credible. The ALJ stated Dr. Travis' rating was more consistent with a single surgery and with

an individual who was released to work with no restrictions. The ALJ noted Dr. Travis opined the ROM method utilized by Dr. Owen was not the most appropriate method for determining Robinson's impairment pursuant to the AMA Guides.

With respect to the appropriate multiplier, the ALJ noted Robinson had returned to work at the same or greater wage than that earned at the time of his injury and was returned to work without restrictions by Dr. Kiefer, the treating surgeon. The ALJ then concluded:

> From these facts, it is likely plaintiff will be able to continue earning a same or greater wage for the indefinite future. As such, plaintiff is not entitled to the application of the 3x multiplier in KRS 342.730(1)(c)1 even if he did not retain the ability to return to the exact job he was performing at the time of his injury.

Robinson filed a petition for reconsideration raising essentially the same arguments he now makes on appeal. By order dated July 23, 2013, the ALJ denied the petition for reconsideration as an impermissible attempt to have the ALJ re-weigh the evidence.

On appeal, Robinson argues the ALJ erred in adopting the 10% rating assigned by Dr. Travis against the weight of the substantial evidence. Robinson argues selection of Dr. Travis' rating was unreasonable in light

of the ongoing pain resulting from the injury, particularly because the radiating symptoms he currently experiences were not present when he was last evaluated by Dr. Kiefer. Therefore, Dr. Kiefer did not consider these symptoms when assessing a 10% impairment rating. Further, Robinson notes Dr. Owen stood by his use of the ROM method, even after reviewing Dr. Travis' report.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the ALJ's findings are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ'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).

Moreover, the ALJ has the discretion to choose which physician's opinion to believe. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The authority to select an impairment rating assigned by expert medical testimony rests solely with the ALJ. *See* KRS 342.0011(35) and (36). *See also* Staples v. Konvelski, 56 S.W.3d 412 (Ky. 2001). 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 ALJ. *See* REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

Clearly, with regard to the evidence of Robinson's physical condition, it was within the ALJ's province to select Dr. Travis' assessment of 10% impairment to the exclusion of Dr. Owen's assessment. Dr. Travis explained his reasoning and provided an explanation as to the impropriety of the use of the ROM model in this case. The ALJ was well within his role as fact-finder in accepting Dr. Travis' opinions regarding the proper assessment of impairment in this claim and in rejecting the impairment rating assessed by Dr. Owen. Additionally, Dr. Kiefer's rating supports the ALJ's findings. The evidence does not compel a finding of a greater impairment.

Robinson next challenges the finding he can continue to earn the same or greater wage for the indefinite future. He notes his current work is light duty as opposed to the medium to heavy work he performed at the time of his injury, and that he utilizes an assistant.

There is no evidence the employer will continue to provide one, Robinson points out. He further asserts the medical evidence supports his testimony that he cannot operate equipment for the entire day. This evidence, he argues, compels a finding he is unlikely to continue to earn the same or greater wage for the indefinite future.

While this evidence supports Robinson's desired conclusion, it falls short of compelling the application of the three multiplier. Robinson's treating surgeon returned him to work without restrictions to the same job he performed at the time of the injury. Dr. Travis likewise assigned no restrictions. Dr. Owen, Robinson's examining physician, stated that, since Robinson had returned to work, he retained the physical capacity to perform the work. This proof constitutes the requisite substantial evidence to support the finding Robinson retains the physical capacity to return to the type of work he performed at the time of the injury. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ further found, even if Robinson did not retain the physical capacity to perform the type of work he performed at the time of the injury, he was likely to continue to earn the same or greater wage for the indefinite future. Thus, pursuant to Fawbush v. Gwinn, 103

S.W.3d 5 (Ky. 2003), Robinson would not be entitled to application of the three multiplier. The ALJ considered all of the evidence in determining Robinson was likely to be able to continue earning the same or greater wage. Based upon the totality of the evidence, we cannot say the ALJ's determination is clearly erroneous. Robinson's argument concerning the three multiplier is essentially an attempt to have the Board re-weigh the evidence and direct a finding contrary to the ALJ's decision, which we may not do.

Accordingly, the June 24, 2013 Opinion, Award and Order rendered by Hon. Grant S. Roark, Administrative Law Judge and the July 23, 2013 order denying Robinson's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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