Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 15, 2015

CLAIM NO. 201169699

ELMO GREER & SONS PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

CLARENCE A. TURNER and
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Elmo Greer & Sons ("Greer") seeks review of the Opinion, Order and Award rendered November 20, 2014 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") awarding Clarence A. Turner ("Turner") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for work-related

injuries he sustained on November 1, 2011 when he fell at work. Greer also appeals from the January 5, 2015 order denying its petition for reconsideration.

On appeal, Greer argues the ALJ erred in awarding PPD benefits based upon the impairment rating assessed by Dr. Craig Roberts which included an additional 3% impairment rating for pain. Greer also argues the ALJ erred in awarding TTD benefits through April 27, 2014 rather than through either March 6, 2014 or March 10, 2014 based upon the opinions of Dr. Scott Riley or Dr. Stephen Umansky. Because the ALJ made the appropriate analyses regarding his award of TTD and PPD benefits, and his decision is supported by substantial evidence, we affirm.

Turner filed a Form 101 on August 14, 2013, alleging he injured his upper extremities, right shoulder, scapula, neck, back and anterior chest on November 1, 2011 when he stepped on a pipe which was not properly chocked, causing him to fall approximately fifteen to eighteen feet. His work history consists of farming, working as a processor at a milk plant, and as a yard jockey for a trucking company. He has also worked in construction as an equipment operator, equipment fueler, foreman and supervisor.

Turner testified by deposition on June 27, 2014, and again on September 25, 2014. He is a resident of

Winchester, Kentucky, and was born on March 16, 1968. Turner is a high school graduate. He has been certified by the U.S. Department of Justice, Bureau of Alcohol, Tobacco and Firearms to transport, ship and receive explosives. Turner has not worked since the November 1, 2011 accident. He testified he has looked for employment, but is not currently working. He also stated he is in the process of obtaining a commercial driver's license.

Turner stated Greer is based out of London, Kentucky, and is involved in highway construction. He has worked on jobs in multiple states while employed there. He also stated his job with Greer included working with a pick, shovel and sledge hammer. He does not believe he can perform his previous work at Greer because he cannot use a sledge hammer, jack hammer or lift powder bags used in blasting due to residual pain and weakness for his injuries. He continues to take over-the-counter Motrin for relief from his injuries.

Turner is right hand dominant. On November 1, 2011, he was assisting a co-worker with unloading a shipment of pipe to be used in a construction project. The co-worker attempted to chock the load so Turner could cut the shipping bands. When the co-worker assured him the load was chocked,

Turner cut the bands. The pipe apparently rolled over the chock which caused him to fall.

He was taken to the emergency room in London, Kentucky on the date of the accident and discovered he had broken bones in his left wrist and right elbow. He underwent surgery for the right elbow, and has had multiple surgeries on his left hand and wrist. Turner stated he has continued weakness in his left hand, and pain in his left side of his back below the shoulder, and approximately eight to ten inches above his belt on the right.

In support of the Form 101, Turner filed the records from the St. Joseph Hospital in London, Kentucky, including the emergency room record. X-rays revealed fractures of the left wrist and right elbow.

Turner also submitted the records of Dr. Gregory Grau, an orthopaedic surgeon from Winchester, Kentucky with whom he treated from November 3, 2011 through July 12, 2012. Dr. Grau performed left wrist and right elbow surgeries on November 3, 2012.

Dr. Grau referred Turner to Dr. Riley who first saw him on August 16, 2012. Dr. Riley’s records reflect he treated Turner through September 7, 2013 when he referred him to Dr. Umansky. Dr. Riley noted Turner fell at work and suffered a right radial head fracture and a left distal

radius fracture. He noted Turner had recovered from the elbow injury, but continued to have left wrist pain. He thought Turner may have developed left carpal tunnel syndrome as a result of the injury and surgery. He ordered EMG/NCV testing which confirmed the diagnosis of carpal tunnel syndrome. He subsequently performed surgery to remove the plates and screws. He noted Turner's condition continued to improve until he underwent an evaluation by Dr. Ronald Burgess in May 2013 at which time he experienced a popping sensation in the left wrist. Dr. Riley thought this could have been the result of adhesions breaking loose during the evaluation process.

Dr. Umansky's treatment records from November 2013 through March 10, 2014 were filed by Turner. He performed TFCC repair surgery for the left wrist on November 17, 2013.

Dr. Roberts, an orthopedic surgeon, evaluated Turner on May 18, 2014. Turner continued to complain of right elbow pain with lifting and left wrist pain with hand weakness. He diagnosed a right elbow radial head fracture, left radius intra-articular fracture with carpal tunnel syndrome and TFCC tear with distal radial ulnar joint instability which required three surgeries. He noted Turner had residual hand weakness, pain and post-traumatic wrist arthrosis, all due to the work injury. Pursuant to the

American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assessed a 0% rating for the right elbow injury, 7% for the left wrist, and 3% for pain, which combined resulted in a 10% whole body impairment.

In a supplemental report dated October 30, 2014, Dr. Roberts stated Turner has a 12% impairment rating based upon the AMA Guides. He further opined Turner is unable to lift greater than twenty pounds on a maximum occasional basis, or over ten pounds on a more frequent basis. He also advised him not to use vibratory tools or work in cold environments.

Greer filed the April 16, 2014 report of Dr. Ronald Burgess. Dr. Burgess had previously seen Turner on May 22, 2013. He opined Turner had reached maximum medical improvement ("MMI"), and assessed a 0% impairment rating pursuant to the AMA Guides. He noted Turner had normal stability of the distal radicular joint and full range of motion of his wrist. In a subsequent noted dated August 19, 2014, Dr. Burgess stated he disagreed with the impairment rating assessed by Dr. Roberts. He opined Turner would have a 2% impairment rating pursuant to the AMA Guides. Dr. Burgess opined Turner could return to work without

restrictions when he completed work-hardening, on April 28, 2014.

Dr. Burgess testified by deposition on September 24, 2014. He is an orthopaedic surgeon with a sub-specialty in hand and upper extremity surgery. He stated at both the evaluations performed May 22, 2013 and April 16, 2014 he reviewed medical records and imaging studies, and performed physical examinations. He stated the treatment rendered by Dr. Grau was routine for the injuries Turner sustained. He noted the carpal tunnel release performed by Dr. Riley was successful. He believed Turner was nearing MMI when he saw him in May 2013, and he saw no basis for assessing an impairment rating. He next saw Turner in April 2014, after the additional treatment by Dr. Umansky. He stated grip strength testing was unreliable and unusable. He assessed a 2% impairment rating due to the carpal tunnel release. He disagreed with the additional 3% impairment assessed by Dr. Roberts for pain. He stated he was never provided with Turner's job description.

A Benefit Review Conference ("BRC") was held on September 10, 2014. The BRC Order and Memorandum reflects the issues preserved were benefits per KRS 342.730, work-relatedness/causation, correct calculation of the average weekly wage, credit for subrogation from a case pending in

the Boyd Circuit Court related to the accident, exclusion for prior active disability or condition, TTD, and whether Turner retains the capacity to return to the type of work performed on the date of the accident. In their briefs to the ALJ, the parties agreed the correct average weekly wage was $1,038.84.

The ALJ rendered his decision on November 20, 2014. He determined Turner sustained work-related injuries on November 1, 2011. He awarded TTD benefits from November 2, 2011 through April 27, 2014, when Dr. Burgess stated Turner would complete work-hardening. The ALJ determined Turner had 0% impairment for the right elbow. After performing an analysis pursuant to FEI Installation, Inc. v. Williams 214 S.W.3d 313 (Ky. 2007), the ALJ awarded future medical benefits for this condition pursuant to KRS 342.020. Regarding the left wrist injury, the ALJ awarded PPD benefits based upon the 12% impairment rating assessed by Dr. Roberts. Regarding the additional 3% assessed by Dr. Roberts, the ALJ stated as follows:

> In this specific instance, after careful review of the lay and the medical testimony, the Administrative Law Judge finds persuasive the opinion of Dr. Roberts and finds that plaintiff retains a 12% functional impairment rating as a result of his left wrist fractures and three subsequent

> surgeries resulting from the November 1, 2011 work-related accident.
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> In so finding, the Administrative Law Judge did not find Dr. Burgess's opinion to be persuasive as Dr. Burgess believes that the Plaintiff is exaggerating his symptoms and had a good result from his three wrist surgeries and therefore can return to work without restrictions. This is contrary to the finding of Dr. Roberts who believes that the Plaintiff has permanent restrictions and is unable to lift more than 20 pounds maximum, 10 pounds frequently, and no use of vibratory tools or working in a cold environment.
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> Dr. Roberts [sic] findings are more in line with the testimony of the Plaintiff who testified that he has weaknesses and has difficulty using his wrist, and in fact developed a popping sensation after doing grip strength testing with Dr. Burgess. In addition, the Administrative law Judge found the Plaintiff to be an extremely credible individual who has been consistent in his testimony and would like to return to work and if fact is looking for work that he can perform.

The ALJ enhanced the award of PPD benefits based upon the 12% impairment rating by the three multiplier found in KRS 342.730(1)(c)1, and he awarded future medical benefits pursuant to KRS 342.020.

Greer filed a petition for reconsideration essentially arguing the ALJ should have relied upon the opinions expressed by Dr. Burgess rather than those of Dr.

Roberts. It also argued the ALJ incorrectly awarded TTD benefits through April 27, 2014, because Dr. Burgess opined he had reached MMI on April 16, 2014. Greer also argued the ALJ erred in enhancing the award by the three multiplier contained in KRS 342.730(1)(c)1, because Turner had been released to return to work without restrictions. On January 5, 2015, the ALJ issued an order denying the petition for reconsideration.

As the claimant in a workers' compensation proceeding, Turner had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Turner was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting the ALJ's decision. 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 and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine

all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The function of the Board in reviewing an ALJ's decision is limited to determining whether the findings made 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). 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). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be

disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Here, the ALJ provided a sufficient explanation for his reliance upon the impairment rating assessed by Dr. Roberts. The ALJ clearly explained why he found the opinions of Dr. Roberts more credible than those of Dr. Burgess. The ALJ's decision to rely on the impairment rating assessed by Dr. Roberts falls squarely within the discretion afforded to him and will not be disturbed. Since Turner does not argue on appeal the application of the three multiplier pursuant KRS 342.730(1)(c)1 is erroneous, it will not be addressed.

Regarding the ALJ's award of TTD benefits from November 2, 2011 through April 27, 2014, we likewise find no error. Greer argues the ALJ should have chosen either March 6, 2014 or March 10, 2014 based upon the opinions of Drs. Riley and Umansky. Dr. Burgess evaluated Turner on April 16, 2014, and indicated he had reached MMI. However, in his report he noted Turner was in a work-hardening program, and he would not be released to return to work without restrictions until April 28, 2014. Therefore, it was not unreasonable for the ALJ to conclude Turner would not actually reach MMI until that date, and he did not err in awarding TTD benefits through April 27, 2014.

As both this Board and the Kentucky Court of Appeals noted previously, temporary total disability is defined as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement permitting a return to employment. KRS 342.0011(11)(a). This definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Both prongs of the test in W.L. Harper Const. Co., Inc. v. Baker, supra, must be satisfied before TTD benefits may be awarded. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Court further explained, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at

the time of his injury." In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court stated as follows:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
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> . . . .
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> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured. (Emphasis added)

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court elaborated as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment.
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> . . . .
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> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

Here, the ALJ did not err in awarding TTD benefits through April 27, 2014, the date Turner was to complete work hardening. As opined by Dr. Burgess, he would not be released without restrictions until completion of the program. Because the ALJ's determination regarding TTD benefits is supported by the record, his decision will not be disturbed.

Accordingly, the opinion, award and order rendered November 20, 2014 and the January 5, 2015 order on

reconsideration by Hon. R. Scott Borders, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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