# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: December 30, 2013**

CLAIM NO. 201101014

GARLAND CHANEY PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

CHEYENNE ELKHORN COAL CO. INC.,
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING IN PART,**
**VACATING IN PART**
**AND REMANDING**

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

**RECHTER, Member.** Garland Chaney ("Chaney") appeals from the May 14, 2013 Opinion, Award and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ") and from the August 1, 2013 order ruling on the petitions for reconsideration. The ALJ awarded Chaney temporary total

disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for a foot injury. On appeal, Chaney raises six arguments challenging the sufficiency of the evidence supporting the ALJ's decision. In a seventh claim of error, he argues the ALJ erred in determining the parties stipulated his average weekly wage ("AWW") at the benefit review conference. He further claims the AWW was miscalculated, leading the ALJ to erroneously determine an overpayment had been made. We determine there was sufficient evidence to support the ALJ's findings of fact. However, we agree with Chaney the ALJ erred in calculating his AWW and, therefore, partially vacate and remand for additional findings.

On June 8, 2010, Chaney was employed as a shuttle car operator in a mine when a 600 pound canopy fell on his foot. The second and third toes of his left foot were fractured, and his first toe was severely damaged. Ultimately, the first toe was partially amputated. Chaney testified he continues to have constant pain, a burning sensation in his foot, and problems with his balance. He also believes he developed anxiety and depression as a result of the work injury, for which he is prescribed medications. Chaney acknowledged he had taken "some nerve

pills" in the past but had not taken any medication for a "long time" prior to the work injury.

Immediately following the accident, Chaney was treated at the Pikeville Medical Center on June 8, 2010. X-rays revealed fractures of the first, second, and third toes. The laceration of the great toe was repaired, and Chaney was referred to Dr. Anbu K. Nadar.

Dr. Nadar amputated Chaney's great toe in July, 2010. On October 26, 2010, Dr. Nadar diagnosed complex regional pain syndrome ("CRPS") and referred Chaney to Dr. Gutti for pain management. In an August 9, 2011 report, Dr. Nadar indicated he reviewed medical records from the Pikeville Medical Center and Buchanan General Hospital as well as evaluations by Drs. Gutti, Lawrence and Jenkinson. His impression was "Crush injury to the left foot with amputation of the left great toe and residual stiffness of the 2nd and 3rd toe. Neuropathic pain with diagnosis of CRPS." Dr. Nadar believed Chaney was at maximum medical improvement ("MMI") and limited him from prolonged standing, walking, climbing and squatting. Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assigned impairments of 5% for the great toe, 1% for stiffness in the second and third toe, 3% for limitation of

ankle dorsiflexion and 3% for neuropathic pain for a combined 12% whole person impairment.

Dr. Nadar referred Chaney to Dr. Steven Lawrence for a second opinion regarding possible amputation of the second and third toes. X-rays revealed non-union of the distal phalanx of the second and third toes, and post-traumatic changes of the partial great toe amputation. His impression was neuropathic pain, non-union of the distal phalanx of the second and third toes, status post crush injury. Dr. Lawrence felt most of Chaney's discomfort was related to neurogenic pain, and did not recommend further amputation. Instead, he recommended referral for pain management.

Dr. Sai P. Gutti began treating Chaney on December 21, 2010, also on referral from Dr. Nadar. Chaney provided a history of left foot pain without relief for approximately six and a half months. In a May 26, 2011 report, Dr. Gutti stated Chaney had reduced range of motion of the left foot secondary to pain and stiffness. Dr. Gutti diagnosed left foot pain, crush injury, hyperalgesia, alloydynia, neuropathy, and peripheral vascular disease. He assessed a 7% impairment pursuant to the AMA Guides, and opined Chaney did not retain the physical capacity to return to the type of work performed at the time of the

injury. Dr. Gutti recommended restrictions of no walking over thirty minutes and no use of foot pedals/controls.

Dr. Gregory T. Snider performed an independent medical evaluation ("IME") on October 12, 2011. Dr. Snider diagnosed status amputation of the left great toe at the IP joint, foot pain, and healed comminuted fractures of the distal phalanges of the left second and third toes. He believed Chaney reached MMI as of September 8, 2010, and no further medical treatment was necessary or reasonable. Further, he specifically disagreed with Dr. Nadar's diagnosis of CRPS. He assigned a 4% impairment rating pursuant to the AMA Guides, and opined Chaney could return to work without restrictions.

Dr. David J. Jenkinson performed an IME on March 7, 2011. Dr. Jenkinson diagnosed a crush injury to the left foot resulting in the amputation of the first toe, and fractures of the left second and third toes. He disagreed with Dr. Gutti's diagnoses of RSD, CRPS and neuropathy, noting Chaney had none of the objective diagnostic criteria set forth in Table 16-16 of the AMA Guides. Dr. Jenkinson stated Chaney was at MMI as of the date of the examination and could return to his former work without restriction. He assigned a 4% impairment related to the amputation of

the great toe and minor stiffness in the second and third toes.

Records from the Buchanan Health Center included a June 1, 2010 discharge summary which noted Chaney had a history of chronic lumbar disc syndrome and an anxiety disorder. At that time, Chaney was taking anxiety medication.

Chaney submitted the June 9, 2011 psychological report of Eric Johnson, Ph.D. Chaney reported irritability, significant feelings of depression, and an inability to sleep more than four hours per night. Dr. Johnson's diagnostic impressions were major depressive disorder, moderate to severe; adjustment disorder with anxious mood; and stresses due to loss of income, restricted activities and medical problems. Because Chaney had not been treated for his psychological symptoms, Dr. Johnson opined Chaney was not yet at MMI. He estimated Chaney currently has a 26% psychological impairment of which approximately 5% is due to pre-existing psychological symptoms.

Dr. David Shraberg performed an IME on October 13, 2011. Dr. Shraberg noted Chaney had been "a somewhat isolative, introverted, and slightly irritable man" throughout his lifetime. He found no permanent psychiatric

impairment or need for treatment related to the work injury. Dr. Shraberg disagreed with Dr. Johnson's assessment of a pain disorder which would preclude Chaney from working. He noted Chaney had returned to his usual baseline activities with the exception of work.

Ultimately, the ALJ found Chaney sustained a crush injury to his toes, with no direct injury to his ankle and no resulting neuropathic pain or RSD/CRPS. Regarding Chaney's impairment rating, the ALJ found the opinions of Drs. Snider and Jenkinson persuasive. Neither physician placed continuing restrictions and, for that reason, the ALJ concluded Chaney retains the physical capacity to return to the type of work performed at the time of the injury. The ALJ also relied on Dr. Snider's assessment that Chaney reached MMI on September 8, 2010. As to the allegation of a psychological impairment, the ALJ found Dr. Shraberg most persuasive. Finally, the ALJ determined Chaney was not entitled to enhancement of his PPD benefits by the three multiplier.

Regarding the AWW and overpayment of TTD benefits, the ALJ provided the following analysis and conclusions:

> Both counsel argue the issue of Average Weekly Wage, but it appears that the issue is *res adjudicata*. In the

> Benefit Review Conference Order and Memorandum of December 7, 2011, it appears that the parties stipulated Plaintiff's AWW at $885.30. The BRC Order and Memorandum was signed by both counsel and ratified by the ALJ. I have found nothing that sets aside that order and am therefore bound by same under the provisions of 803 KAR 25:010, Sections 13(14) and 16.
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> With regard to the issue of overpayment or underpayment, TTD was paid by the Defendant employer at the rate of $602.01 per week from June 9, 2010 through March 16, 2011 for a total of $24,166.40. As the AWW was $885.30, the rate should have been $590.22. Further, the date of MMI was March 7, 2011. Thus, there was an overpayment of TTD as to both rate and duration. The Defendant is entitled to recover overpaid TTD benefits for a period from March 8, 2007 until June 9, 2007[1].

Chaney filed a petition for reconsideration raising the same arguments he now makes on appeal. By order dated August 1, 2013, the ALJ denied Chaney's petition for reconsideration as a re-argument of the merits.

We first address Chaney's challenge to the calculation of his AWW. He argues the AWW should be calculated by using the week ending March 3, 2010 through the week ending June 3, 2010, resulting in an AWW of $902.96. By this calculation, Chaney contends there is no

overpayment of TTD benefits as to rate, and no overpayment as to duration based upon Dr. Nadar's opinion.

However, the threshold issue is whether the parties stipulated AWW in the BRC order. The December 7, 2011 BRC order did contain a stipulation to an AWW of $855.30. However, that same order also indicated AWW was a contested issue. The ALJ's May 14, 2013 Opinion also indicates both a stipulation and a contested issue regarding AWW. In fact, both parties presented arguments regarding AWW in their briefs to the ALJ.

The stipulations must be read in conjunction with the contested issues to ascertain the parties' true intent. Clearly the parties did not agree on an AWW despite what is reflected in the 'stipulations' portion of the BRC order. The ALJ indicated he felt bound by the stipulation. We conclude otherwise. Therefore, we vacate and remand with directions for the ALJ to specifically determine Chaney's AWW based upon the evidence presented. Should the ALJ find a different AWW on remand, he must also address the issue of overpayment of TTD benefits as to rate.

Chaney's remaining arguments challenge the sufficiency of the evidence supporting the ALJ's opinion.

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[1] The dates were corrected in response to the employer's petition for reconsideration.

He argues the ALJ erred in failing to find his neuropathic pain, ankle condition, and psychological conditions compensable. He challenges the ALJ's reliance on the opinions of Drs. Jenkinson and Snider, claiming they are unreliable because neither physician reviewed reports from Drs. Nadar and Gutti. Chaney further argues the evidence compels a finding he is permanently, totally disabled or, in the alternative, entitled to enhancement of his award by the three multiplier. Finally, he asserts his testimony and the report from Dr. Johnson establishes he developed a psychological condition as a result of the work injury.

As the claimant in a workers' compensation proceeding, Chaney had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable

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

As the 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 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 Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481

(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 the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The evidence was conflicting regarding Chaney's physical and psychological conditions. Where evidence is conflicting, the ALJ as fact-finder has wide discretion to pick and choose whom and what to believe. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977). The opinions of Drs. Jenkinson, Snider and Shraberg are substantial evidence supporting the ALJ's conclusions regarding the injuries sustained in the incident and the extent and duration of Chaney's disability. Drs. Jenkinson and Snider opined the work incident produced only injuries to Chaney's toes, with no injury to his ankle. Both opined Chaney could return to his former work without restriction. Dr. Snider stated there was no need for further treatment related to the work injury. Dr. Shraberg found no psychiatric impairment attributable to the June 8, 2010 injury. Their opinions are substantial evidence supporting the conclusion Chaney is not totally disabled and is not entitled to the three multiplier.

Similarly, the ALJ's determination Chaney reached MMI on September 8, 2010 is supported by substantial

evidence. The ALJ was well within his role as fact-finder in relying on the opinion of Dr. Snider on that issue. Chaney is simply rearguing the merits, asking the Board to re-weigh the evidence and reach a conclusion contrary to that of the ALJ. The Board has no such authority. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the May 14, 2013 Opinion, Award and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge, and the August 1, 2013 order on petitions for reconsideration are **AFFIRMED IN PART, VACATED IN PART** and this matter is **REMANDED** for entry of an amended Opinion, Award and Order in conformity with the views expressed herein.

ALL CONCUR.

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