

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 19, 2015

CLAIM NOS. 201366840 & 201182531

GOLDEN FOODS

PETITIONER/CROSS-RESPONDENT

VS.

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

JANICE HICKS

RESPONDENT

AAK USA KI LLC;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/CROSS-PETITIONER

RESPONDENT

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Golden Foods appeals and AAK USA KI, LLC ("AAK") cross-appeals from the December 2, 2014 Opinion, Order and Award, the January 1, 2015 Second Amended Opinion, Order and Award and the January 15, 2015 orders overruling petitions for reconsideration rendered by Hon.

R. Scott Borders, Administrative Law Judge ("ALJ"). The ALJ found Janice Hicks ("Hicks") sustained permanent partial disabilities as a result of injuries occurring on June 21, 2011 and September 6, 2013. Golden Foods argues the ALJ erred in relying on the impairment rating assessed by Dr. Warren Bilkey and in awarding the three multiplier for the 2011 injury. In its cross-appeal, AAK argues the ALJ erred by mischaracterizing and affording unwarranted weight to Dr. Bilkey's opinion and in applying a multiplier to the 2013 injury. For the reasons set forth below, we affirm.

Hicks filed Claim No. 2011-82531 on June 18, 2013 alleging an injury to her right shoulder on June 21, 2011 when she tripped over a box and fell. She filed Claim No. 2013-66840 on November 22, 2013 alleging injuries to her neck and left shoulder on September 6, 2013 when she bent over a labeling machine and the cover struck her on the neck and left shoulder.

Hicks testified by depositions taken August 26, 2013 and April 21, 2014, and at the hearing held October 3, 2014. Hicks, born June 25, 1962, has a high school education with no specialized or vocational training. She began working for Golden Foods, a manufacturer of shortening for bakeries and restaurants in 2004. Her work

required lifting boxes of product weighing fifty pounds. On June 21, 2011, she was working on the line, where her duties included loading and watching boxes progress to the palletizer. A forklift brought loaded pallets to her and she would wrap them in plastic. Hicks was wrapping a pallet when she tripped over a box and fell, striking her shoulder on the floor. She was able to complete her shift. The next day she sought treatment at Caritas Hospital where she was treated and released. Hicks returned to light duty work, performing office work, passing out tools and sweeping. She continued to have soreness in her arm and eventually came under the care of Dr. Navin R. Kilambi who performed surgery on her right shoulder. Hicks indicated she could not perform her regular duty work because of her inability to lift and "climb up a lot." She never returned to full duty work.

On September 6, 2013, Hicks sustained a second injury while working in the same facility, which was now being operated by AAK. The cover of a labeling machine fell on her neck and left shoulder. Hicks testified she continues to have problems with swelling and pain in both her right and left shoulders. She also has pain in her neck as a result of the second injury.

Hicks testified she was involved in a motor vehicle accident ("MVA") in March 2014, injuring her neck and low back. She treated with Dr. Wilkerson, who diagnosed a back sprain. Hicks indicated she no longer receives treatment for the effects of the MVA and she believes the condition of her neck returned to the state it was in following the second work injury. The MVA primarily affected her low back.

Hicks testified she last worked in November 2013 and was terminated from AAK in March 2014 for excessive absences. She indicated she was working light duty following the first injury and did not feel capable of performing that work due to her pain. She frequently called in sick. At the time of the hearing, Hicks was employed by Malone Staffing in housekeeping at Audubon Hospital, working 37.5 hours per week. She did not believe she was capable of performing her past work for Golden Foods or AAK.

Hicks submitted treatment records from Occupational Physician Services where she was seen on July 26, 2011 and gave a history of the July 21, 2011 work injury. She was diagnosed with a sprain/strain of the right shoulder and allowed to return to work with restrictions of no pushing or pulling with the right arm,

no above shoulder work, and no lifting greater than five pounds with the right upper extremity.

Dr. Kilambi's records indicate he initially saw Hicks on August 4, 2011 for complaints of right shoulder pain. He diagnosed right shoulder cuff bursitis/strain, AC joint pain, and possible superior labrum injury. Dr. Kilambi obtained an MRI arthrogram that revealed a small superior glenoid labrum tear and mild tendinopathy. He performed a bursectomy and acromioplasty with distal clavicle resection on December 9, 2011. On March 28, 2012 he noted Hicks was developing adhesive capsulitis. Dr. Kilambi performed manipulation under anesthesia which improved her pain. In December 2012, he referred her to pain management.

Dr. Michael Best evaluated Hicks on March 27, 2013 regarding her right shoulder condition. He diagnosed a right shoulder strain and subacromial impingement syndrome causally related to the June 21, 2011 injury. Dr. Best opined Hicks retains the physical capacity to return to the type of work she performed at the time of her injury. He assigned a 2% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He explained the appropriate calculation of permanent

impairment for a distal clavicle resection with normal range of motion would be calculated as follows:

Table 16-27, page 506 indicates a 10% upper extremity impairment for the distal clavicular excision. The 10% upper extremity impairment is then multiplied by the 25% acromioclavicular maximum impairment by Table 16-18, page 499. The impairment would equal 2.5% to the upper extremity.

The Fifth Edition AMA Guides indicates that the 2.5% upper extremity impairment would be rounded up to 3% upper extremity impairment, which by Table 16-3, page 439 is equal to 2% whole person impairment.

Hicks introduced reports from Dr. Warren Bilkey, who performed an independent medical evaluation ("IME") on September 10, 2013. Using Table 16-27 of the AMA Guides, Dr. Bilkey assigned a 10% upper limb impairment for the distal clavicle resection. Additionally, he found impairment for loss of motion of the right shoulder producing a combined 14% upper extremity impairment that converts to an 8% whole person impairment. Dr. Bilkey stated he disagreed with Dr. Best's rating. He noted the AMA Guides very specifically apply multipliers to certain tables, but do not apply the multiplier to Table 16-27.

Dr. Bilkey performed a second IME on March 5, 2014 regarding the September 6, 2013 injury. He diagnosed a contusion injury to the neck and left shoulder. Dr.

Bilkey assigned restrictions of no lifting over eight pounds with the left arm, avoidance of repetitive overhead work with the left arm, and no overhead work. He noted Hick's injury prevented her from doing the full scope of her usual work duties she was performing prior to the September 6, 2013 injury. Dr. Bilkey indicated a provisional rating based upon his examination would be 5% for the cervical condition, 3% for the left upper extremity and 3% for chronic pain for a combined 11% whole person impairment. Dr. Bilkey stated his rating must be considered provisional because she was not yet at maximum medical improvement for the 2013 injury. He indicated that, should Hicks have access to additional treatment, there would be a need to reassess permanent impairment after maximum medical improvement status is reached.

Dr. Bilkey testified by deposition on January 28, 2014. In discussing his impairment rating for Hicks' right shoulder injury, he explained a contradiction he perceives in the AMA Guides. He noted the introductory paragraph does refer to the use of Table 16-18 in conjunction with other tables. However, many of the tables specifically document in footnotes that Table 16-18 is to be applied, while Table 16-27 has no footnote referring to the use of Table 16-18. The tables which reference the use of Table

16-18 are related to joint impairment and do not provide upper extremity impairment ratings. Additionally, Dr. Bilkey indicated he had recently attended coursework for renewal of board certification by the American Board of Independent Medical Examiners and had specifically asked about this situation. Dr. Bilkey's view was confirmed.

Dr. Ellen Ballard evaluated Hicks on February 13, 2014. Dr. Ballard performed EMG/NCV testing on March 12, 2013. Her impression was a normal electro-diagnostic study of the right upper limb. She noted there was no electro-diagnostic evidence of nerve entrapment or cervical radiculopathy. Dr. Ballard evaluated Hicks again on March 11, 2014. She indicated Hicks was given a note that she does not need any restrictions for the 2013 injury and can return to regular duty. Given that her testing was normal, Hicks does not require any further treatment.

Dr. Michael Moskal performed an IME on August 26, 2013 regarding the right shoulder injury. Dr. Moskal diagnosed reported pain in multiple locations. He stated there was no evidence Hicks has a current problem related to work, the event of June 21, 2011, and/or the treatment after the 2011 event. Dr. Moskal assigned a 2% impairment rating for the right shoulder pursuant to the AMA Guides. He assigned no restrictions for the shoulder condition.

Dr. Philip Corbett performed an IME on June 3, 2014. Dr. Corbett assigned a 6% impairment for the right shoulder pursuant to the AMA Guides. Dr. Corbett diagnosed a contusion to the cervical spine and assigned a 5% impairment, producing an 11% combined impairment rating. Dr. Corbett indicated he did not have prior medical records and could not determine whether Hicks had a pre-existing active condition. He found no evidence to support restrictions related to the cervical spine or upper extremities.

Dr. Corbett testified by deposition on July 28, 2014. He explained the 10% upper extremity impairment for the distal clavicle resection would be reduced by a 25% multiplier through the use of Table 16-18. Accordingly, he changed his earlier 6% whole person impairment rating to a 1% impairment for the right shoulder.

In an October 14, 2014 supplemental report, Dr. Corbett, after reviewing additional medical evidence regarding treatment in 2008, 2010 and 2012, opined Hicks did have a pre-existing active condition prior to the 2013 work injury. Dr. Corbett noted Dr. Ballard found no evidence of lost range of motion, lost neurologic function, or necessity for further treatment or restricted future activity at the time of her February 2014 evaluation. Thus,

Dr. Corbett opined it is likely that an injury between that point and his own evaluation on June 3, 2014 would have to be due to an intervening injurious incident.

Records from St. Mary and Elizabeth Hospital indicate Hicks was treated in the emergency room on March 24, 2014 following an MVA. Hicks complained of pain in her neck and upper back. Imaging studies were read as similar to prior studies on May 29, 2013 and November 23, 2013. She was prescribed medication and released.

Additional records from Occupational Physician Services were introduced documenting treatment on several occasions in August 2008 for left shoulder pain occurring when she was taking boxes off the line at work. She was diagnosed with a sprain/strain of the left shoulder, assigned temporary restrictions, and prescribed medication.

After an extensive review of the evidence, the ALJ determined Hicks met her burden of proving she sustained an injury to her right shoulder on June 21, 2011 and that she sustained injuries to her neck and left shoulder as a result of the September 6, 2013 incident. The ALJ determined the employer failed to meet its burden of proving Hicks suffered from a prior active condition that was both ratable and symptomatic immediately prior to the

occurrence of the work-related events. He found there was "no evidence whatsoever" in the record to indicate the March 2014 MVA was an "intervening/supervening" event causing her current complaints in her neck and shoulders.

The ALJ adopted Dr. Bilkey's 8% impairment rating for the right shoulder and awarded permanent partial disability benefits enhanced by the three multiplier based upon Dr. Bilkey's restrictions and Hicks' description of her job duties. The ALJ adopted Dr. Bilkey's impairment rating for the cervical and left shoulder conditions and awarded permanent partial disability benefits enhanced by a 3.2 multiplier pursuant to KRS 342.730(1)(c)(1) and (3).

Golden Foods filed a petition for reconsideration requesting additional findings of fact regarding application of the three multiplier and the finding of an 8% impairment rating. AAK filed a petition for reconsideration raising the same arguments it makes on appeal. Hicks filed a petition for reconsideration noting the ALJ's decision did not provide for the suspension of benefits during periods she receives temporary total disability benefits.

The ALJ rendered his Second Amended Opinion, Order and Award on January 1, 2015 correcting the error identified by Hicks. By separate orders dated January 15,

2015, the ALJ overruled the petitions of Golden Foods and AAK as re-arguments on the merits.

On appeal, Golden Foods first argues the ALJ erred in relying on the impairment rating assessed by Dr. Bilkey for the right shoulder condition. Golden Foods contends Dr. Bilkey's rating is not in conformity with the AMA Guides. It argues the correct methodology in the AMA Guides, as set forth in the introductory paragraph of section 16.7, requires that the percentage found in Tables 16-19 through 16-30 be multiplied by the relative maximum value of the unit involved as specified in Table 16-18. Golden Foods further asserts the explanation Dr. Bilkey provided for his methodology at deposition is invalid.

We find no error in the ALJ's reliance on the impairment rating assessed by Dr. Bilkey. First, we note the admissibility of Dr. Bilkey's rating and/or proper use of the AMA Guides were not preserved as contested issues at the benefit review conference. Thus, Golden Foods is only permitted to challenge the appropriate weight to be afforded Dr. Bilkey's rating.

Dr. Bilkey stated he relied on the AMA Guides in assessing Hicks' functional impairment rating caused by the work-related injury. In making those assessments, he cited to various tables and standards contained within the AMA

Guides. He explained his rationale and pointed out an inconsistency, explaining that only those tables specifically containing footnoted references to the application of Table 16-18 were to be reduced through use of that table. In light of this evidence, we believe the ALJ could reasonably conclude Dr. Bilkey's application of the AMA Guides was accurate, and the injury of July 6, 2011, resulted in an 8% impairment rating. While Drs. Corbett, Best and Moskal arrived at different conclusions based on their interpretations of the AMA Guides, their opinions represent nothing more than conflicting evidence which the ALJ, as fact-finder, was free to reject. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Hence, we find no error in the ALJ's reliance upon Dr. Bilkey's impairment rating.

Next, Golden Foods argues Hicks is not entitled to application of the three multiplier with respect to the 2011 injury because Dr. Ballard released her to return to work without restrictions. It contends there is no medical or lay evidence that she would have been prevented from assuming her regular work duties.

Hicks bore the burden of proof and risk of non-persuasion regarding every element of her claim. See Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008).

Because she met her burden of proof regarding enhancement by the three multiplier, the question on appeal is whether there was substantial evidence to support 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). 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 based on 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).

Hicks testified to her inability to do the lifting and climbing required for the job she performed prior to her 2011 injury. A claimant's self-assessment of his or her ability to labor based on physical condition is evidence upon which the ALJ may rely. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Furthermore, she never returned to full duty work following the first injury. This testimony constitutes substantial evidence exists to support the finding Hicks is entitled to application of the three multiplier for the 2011 injury.

Golden Foods notes in passing that "there is no evidence that an actual analysis was done pursuant to Fawbush for the first injury." Based upon the evidence of record, we do not believe the ALJ was required to complete an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). No specific wage information was submitted concerning Hicks initial average weekly wage ("AWW") upon her return to work following the 2011 injury. She received temporary total disability benefits for approximately six months beginning December 9, 2011. Her AWW for the 2011 injury was stipulated to be \$528.40. The AWW for the second injury in September 2013 was determined to be \$469.54. While she testified to working for the same hourly wage of \$12.74 and to having the same scheduled hours, no evidence establishes she worked sufficient overtime post-injury to produce an AWW equal to or greater than the AWW earned at the time of her 2011 injury.

In its cross-appeal, AAK argues the ALJ mischaracterized the evidence and afforded unwarranted weight to Dr. Bilkey's report. According to AAK, the ALJ mischaracterized Dr. Corbett's report. The ALJ stated Dr. Corbett agreed with Dr. Bilkey that Hicks suffered a cervical spine injury that was ratable, but disagreed in regard to whether the left shoulder condition is ratable.

AAK notes Dr. Corbett concluded he did not find ratable impairment in the left arm, but that any condition would have been attributable to a pre-existing active condition.

AAK contends the ALJ mischaracterized the evidence regarding the issue of prior active impairment by stating:

In this instance, there is simply no evidence in the record indicating that Plaintiff suffered from a prior active condition to either her left shoulder, right shoulder, or cervical spine that was both ratable and symptomatic immediately preceding the occurrence of the respective work-related accidents.

AAK identifies medical evidence from Occupational Physician Services in 2008 and St. Mary & Elizabeth Hospital in 2010 establishing the left shoulder and spine were symptomatic prior to the 2013 work injury. AAK further notes Hicks complained of left shoulder or cervical problems following the 2011 injury.

The ALJ correctly cited to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), in which the Court of Appeals held a condition must be both symptomatic and impairment ratable in order for it to be found pre-existing and active. While AAK focuses on evidence in the record that Hicks' left shoulder was symptomatic in 2008 and again in 2010, it produced no physician's opinion that Hicks' left shoulder condition was impairment ratable prior

to the 2013 injury. The ALJ could reasonably conclude AAK failed to meet its burden of proving a pre-existing active impairment rating for the left shoulder.

AAK also argues the ALJ mischaracterized the evidence regarding the 2014 MVA. It contends the evidence establishes the MVA was an intervening event. It emphasizes Dr. Corbett specifically discussed the MVA, and Dr. Ballard found no lost range of motion, lost neurological function or necessity for treatment prior to the MVA. Thus, AAK contends it is medically probable that an injury occurred between Dr. Ballard's evaluation and Dr. Corbett's evaluation three months later and would have to be due to an intervening event.

Contrary to AAK's argument, the evidence does not mandate a finding the MVA is an intervening/superseding event. Diagnostic studies following the 2014 MVA were essentially unchanged from prior studies on May 29, 2013 and November 23, 2013. Hicks testified her condition following the MVA returned to the baseline that existed prior to the accident. Furthermore, we do not believe the ALJ mischaracterized the evidence from Dr. Corbett. Dr. Corbett did not specify an impairment rating attributable to the MVA or state what impairment rating was applicable for Hicks' condition immediately prior to the work

injuries. His impairment assigned for the right shoulder is related to the clavicular resection that is unquestionably related to the 2011 work injury. The cervical impairment is based upon DRE Category II for "non-verifiable and non-reproducible radicular complaints", which is precisely what Hicks complained of prior to the MVA. Dr. Corbett did not believe there was a ratable condition for the left shoulder. We cannot say the ALJ's determination that the employer failed to meet its burden of proving Hicks suffered from prior active impairment is clearly erroneous, requiring reversal.

Next, AAK argues Dr. Bilkey's opinion regarding the 2013 injury cannot constitute substantial evidence pursuant to Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004) because he was unaware of the prior injuries and treatment other than treatment twenty years earlier. Additionally, he was unaware of the MVA. Further, AAK contends the ALJ mischaracterizes the evidence from Dr. Bilkey, noting the ALJ stated Dr. Bilkey assigned a 6% rating for the left shoulder. However, Dr. Bilkey actually assigned only a 3% impairment.

The case *sub judice* is easily distinguished from Cepero, an unusual case involving not only a complete failure to disclose, but affirmative efforts by the

employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous.

After reviewing the evidence and the ALJ's decision in the present claim, we cannot conclude Dr. Bilkey was provided a history so inaccurate or incomplete as to render his opinion lacking in probative value. Treatment of the left shoulder on a few occasions within weeks of the 2008 injury and a few weeks of complaints of shoulder pain following a strain in 2010 distinguishes this case from Cepero. This is especially true in light of the ALJ's specific factual finding that Hicks' cervical and shoulder conditions were not both symptomatic and impairment ratable prior to the work injuries.

Similarly, the MVA which occurred after the evaluations of all physicians, with the exception of Dr.

Corbett, cannot be a basis to challenge their opinions pursuant to Cepero. Their evaluations accurately speak to Hicks' condition at the time of those evaluations.

AAK is correct that Dr. Bilkey assigned a 3% impairment rating for Hicks' left shoulder. However, it appears the additional 3% was assigned for pain related to the left shoulder condition. Dr. Bilkey assigned the impairment rating pursuant to the AMA Guides, and the ALJ was well within his role as fact-finder in accepting Dr. Bilkey's rating. The ALJ clearly adopted the entirety of the impairment ratings assessed by Dr. Bilkey for the cervical and shoulder conditions. Any failure in summarizing the components of the rating is, at most, harmless error.

Finally, AAK argues the ALJ erred in applying any multiplier to the 2013 award. AAK notes Hicks returned to work following the 2013 injury, performing the same light duty work she performed following the 2011 injury. AAK further contends Dr. Bilkey's restrictions are no longer valid because he indicated they were provisional because Hicks was not at maximum medical improvement. Additionally, the 3% impairment assessed for pain is not appropriate.

We find no error in the ALJ's application of a multiplier to the 2013 injury. KRS 342.730(1)(c)1 permits enhancement of an award where the employee does not retain the physical capacity to return to the type of work performed at the time of the injury. Again, we note Hicks testified to an inability to perform even the light duty work on an ongoing basis, eventually causing her termination. She indicated she last worked in November 2013, and called in every day for four months to report her pain would not allow her to return to the light duty job.

While Dr. Bilkey stated his rating and restrictions were provisional, any need for re-visitation would be based upon Hicks receiving additional care. Hicks apparently did not receive additional care, thus the ALJ could reasonably infer Dr. Bilkey would not have changed his rating or restrictions. Based upon her testimony regarding her inability to perform the light duty work and Dr. Bilkey's opinions, the ALJ could reasonably conclude Hicks lacked the physical capacity to return to the work she was performing at the time of the 2013 injury.

Accordingly, the December 2, 2014 Opinion, Order and Award, the January 1, 2015 Second Amended Opinion, Order and Award and the January 15, 2015 orders overruling

petitions for reconsideration rendered by Hon. R. Scott Borders, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER/CROSS-RESPONDENT:

HON MICHAEL THOMAS KUNJOO
300 E MAIN ST #400
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT/CROSS-PETITIONER:

HON WALTER HARDING
400 WEST MARKET STREET STE. 2300
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON WAYNE C DAUB
600 W MAIN ST #300
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON. R. SCOTT BORDERS
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601