OPINION ENTERED: March 22, 2013

CLAIM NO. 200978724

GONZALO SALAZAR PETITIONER

VS. **APPEAL FROM HON. J. LANDON OVERFIELD, CHIEF ADMINISTRATIVE LAW JUDGE**

DEPENDABLE ROOFING, INC.,
SUK KI KIM, M.D.,
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Gonzalo Salazar ("Salazar") seeks review of the decision rendered September 17, 2012 by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical

benefits, but denying the request for assessment of a safety penalty for injuries he sustained on September 3, 2009 while working for Dependable Roofing, Inc. ("Dependable"). Salazar also appeals from the order entered October 19, 2012 denying his petition for reconsideration.

On appeal, Salazar argues the CALJ erred in 1) Rejecting the allegation of a safety violation; 2) Relying upon the opinion of Dr. Arias; 3) Finding the testimony of Salazar and his brother not to be credible; and, 4) Failing to include Salazar's lack of education in the computation of his award of PPD benefits. Because the evidence does not compel a contrary result, we affirm.

Salazar sustained multiple injuries on September 3, 2009, when he fell from a roof he was repairing, striking an air conditioner unit during the fall. TTD benefits and medical benefits were paid by Dependable. On January 16, 2012, Salazar filed a Form 101 alleging numerous injuries sustained in the fall including multiple lumbar fractures, a scalp hematoma, lacerations, a left scapular fracture, a non-depressed skull fracture, and a hematoma to the right psoas muscle.

Salazar testified by deposition on March 15 2012, and again at the hearing held July 18, 2012. Salazar was born in Mexico and currently resides in Ft. Myers, Florida.

At the time of the accident, he was residing in Owensboro, Kentucky. He drives by himself to Kentucky for medical appointments. Salazar completed the ninth grade in Mexico, and came to the United States in 1992. He has no specialized vocational training. He has worked as a migrant laborer, masonry laborer, and roofer.

Regarding the date of the accident, Salazar recalls arriving at the jobsite, but does not remember the fall. He recalls the crew climbed on top of a house in the rain to cover the roof with mats and tarps. His boss was present at the time. He testified no safety equipment was present at the worksite. He spent three days in the hospital in Owensboro. He could not remember if Dr. Jose Arias, his treating neurosurgeon, had ever released him to return to work.

Salazar is not working, nor has he sought work since the accident. He testified he does not believe he can return to roofing work due to the physical demands. He stated he continues to experience pain in his head, upper back and left shoulder. He also testified prolonged walking or staying in one position for an extended period of time causes discomfort. He also indicated he has difficulty with memory.

Salazar's brother, Rigoberto Salazar ("Rigoberto") also testified at the hearing. He and Salazar came to Kentucky on May 10, 2009 to work for Dependable. He and his brother were assisting in tarping a roof when the fall occurred. Rigoberto did not witness Salazar's fall. The accident occurred approximately twenty minutes after they arrived at the jobsite. He did not recall his boss telling them not to climb onto the roof. Rigoberto indicated his brother fell ten to twelve feet, and further stated the section of the roof he fell from was flat.

Brent Williamson ("Williamson"), Dependable's owner, also testified at the hearing. He stated the crew began working on the roof the day before the accident. He advised Salazar, Rigoberto and the rest of the crew not to climb onto the roof. Williamson testified safety equipment was present, but not required on that particular job. He also testified safety briefings were frequently held on various topics, including fall protection. He stated the roof was six to eight feet in height at the location where Salazar fell.

In support of the Form 101, Salazar filed records from Owensboro Medical Health System ("OMHS"). Those records reflect treatment by Dr. Christopher McCoy, Dr. Geoffrey Hulse, and Dr. Arias. The records further reflect

Salazar's injuries outlined in the Form 101. Specifically, the lumbar fractures were listed as a left facet fracture at L5, and fractures of the transverse process from L1-L5. X-rays revealed no fractures to the thoracic spine. Salazar also filed various physical therapy progress notes from OMHS physical therapy.

Dr. Jules Barefoot evaluated Salazar on June 13, 2011. In his report of that date, he noted Salazar complained of ongoing low back pain which did not radiate into his legs. He also complained of intermittent left shoulder pain, recurring headaches, and difficulty with memory. Dr. Barefoot diagnosed a comminuted fracture to the body of the left scapula, right posterior parietal non-depressed skull fracture, facture of the right transverse processes from L1-L5, and a non-displaced fracture of the left interior facet of L5, all due to the work accident. He assessed a 36% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides"), and recommended Salazar avoid repetitive heavy lifting, crouching, crawling, kneeling, climbing ladders or scaffolding, and unprotected work at heights. In his supplemental report dated May 28, 2012, Dr. Barefoot disagreed with Dr. Denis O'Keefe's assessment of a 13% impairment rating.

Salazar also filed generally illegible medical records of Dr. Suk Ki Kim for pain management treatment provided from May 21, 2010 through July 12, 2012. In addition to prescribing pain medication, Dr. Kim administered multiple lumbar injections. Dr. Kim noted Salazar has lingering back pain due to his fractures from L1-L5 and bilateral sacroiliac joint disease.

Treatment records from Dr. Arias were filed by both Salazar and Dependable outlining the treatment he provided beginning September 3, 2009. In a note dated May 24, 2010, Dr. Arias stated Salazar had reached maximum medical improvement ("MMI") on April 19, 2010. He assessed an 8% impairment rating pursuant to the AMA Guides. Dr. Arias recommended pain management treatment. In a note dated March 15, 2011, Dr. Arias noted Salazar had no abnormality requiring surgical repair. He also noted Salazar has no structural basis preventing him from working, although he may experience some pain.

Dr. Denis O'Keefe, a neurologist, evaluated Salazar on May 1, 2012. Dr. O'Keefe noted Salazar's fall from the roof, and the injuries he sustained. Dr. O'Keefe diagnosed Salazar as status post fracture of the transverse processes from L1-L5 on the right, and a non-displaced fracture of the inferior L5 facet on the left. He also

diagnosed a scalp laceration measuring sixteen centimeters, closed and healed without incident. Other diagnoses resulting from the September 3, 2009 accident included a healed non-displaced right parietal skull fracture, a healed fracture of the left scapula, and a healed contusion of the left elbow. Dr. O'Keefe opined Salazar had reached MMI, and assessed a 13% impairment rating pursuant to the AMA Guides. Dr. O'Keefe stated he would not impose any restrictions upon Salazar's activities, and opined he may require treatment with over-the-counter medications only.

Dependable challenged a referral to Dr. Eric Weisman, a neurologist, by Dr. Arias. In support of the challenge, Dependable attached the May 4, 2010 utilization review report prepared by Dr. Bart Olash, who determined such referral was not medically necessary. On the same date, Dr. Olash agreed with the referral to Dr. Kim for a course of pain management treatment. On March 15, 2011, Dr. Olash determined additional pain management treatment provided by Dr. Kim was not medically necessary.

In addition to the lay and medical evidence, Salazar filed several pages of safety regulations from the Code of Federal Regulations ("CFR").

A Benefit Review Conference was held on June 12, 2012. It was agreed Dependable had paid TTD benefits from

September 4, 2009 through March 23, 2010 at the rate of $469.34 per week for a total of $13,476.67, and medical benefits in the amount of $18,785.25. The issues preserved for determination were benefits pursuant to KRS 342.730 (including the application of multipliers), work-relatedness/causation, correct calculation of the average weekly wage, unpaid/contested medical bills/treatment, credit for overpayment of TTD benefits, correct period of entitlement to TTD benefits, and the application of KRS 342.165 for safety violations alleged by both Salazar and Dependable.

In the opinion, award and order issued September 17, 2012, the CALJ found as follows:

> I did not find Plaintiff and his brother to be credible witnesses. I am convinced both would testify in whatever manner they thought necessary in order to obtain an award for Plaintiff. Plaintiff complains mightily of significant symptomatology, none of which is confirmed by any of the physicians who treated him for his acute injuries. Yes, Plaintiff suffered a scalp laceration, a non-depressed skull fracture, a scapular fracture and fractures of all five lumbar vertebrae. However, according to the physicians who have cared for him, he has recovered from all of those injuries without clinical evidence of any impaired conditions. Plaintiff complained that, due to his low back pain, he cannot sit for long periods of time. However, he continues to drive

himself from Florida to Kentucky stopping only when he needs gas.

Plaintiff relies on Dr. Barefoot who does an excellent job of advocating for Plaintiff's position. However, Dr. Barefoot's functional impairment rating and opinions concerning Plaintiff's impaired condition are based on Plaintiff's subjective complaints and upon the manner in which Plaintiff performed the range of motion examination, also a matter which requires a finding of credibility in Plaintiff. I did not find Plaintiff to be credible and I am not convinced that he is experiencing the pain and dysfunction of which he complains.

On the other hand, I did find Mr. Williamson to be an extremely credible witness. I am convinced, based on his testimony, that he had instructed Plaintiff and his brothers not to climb the ladders to the roof to engage in the activity which resulted in Plaintiff's fall. I am further convinced that Mr. Williamson, when seeing Plaintiff and his brothers on the roof, instructed them to come down. Therefore, I find no credibility at all in Plaintiff's claim that Defendant Employer is guilty of a safety violation. Plaintiff's injury was caused by his failure to follow the instructions of his employer, not because of any safety violation committed by Defendant Employer.

Some discussion concerning the *AMA Guides* is in order. Three different medical experts have given three different functional impairment ratings under *the Guides*. Dr. Barefoot goes into great detail explaining why his is the only competent rating. Unfortunately, Dr. Barefoot's quote

which he attributes to dispositive instructions in *the Guides* is far from accurate. His quote attributed to *the Guides* was as follows:

> As previously stated, the ROM method should be used if multi-level involvement and/or alteration of motion segment integrity has occurred in the same spinal region.

That is not accurate. The actual quote taken, in part, from paragraph 15.8 at page 398 is as follows:

> *As previously stated (Section 15.2) the ROM method should be* ***used only****… (3) if multilevel involvement and/or alteration of motion segment integrity has occurred in the same spinal region;…* (Italics original, bold added.)

This language appears to be restrictive rather than mandatory.

The quote from Dr. Arias relating to the sections of *the Guides* he used appears to be accurate. It must also be noted that, using the DRE methodology, fractures of transverse processes warrant impairment **ONLY** if the fracture is accompanied by displacement. None of Plaintiff's fractures were accompanied by any displacement.

Concerning Plaintiff's permanent condition and functional impairment rating for his lumbar spine injuries, I find the opinions of Dr. Arias to be the most credible and convincing medical evidence in the record. Based on the opinions of Dr. Arias, I find that Plaintiff has an 8% functional impairment to the body as a whole but

has no need for restrictions on his physical activity.

Concerning Plaintiff's claim for impairment due to a cognitive condition caused by the work-related fall, I find the most credible and convincing evidence in the record to be that of Dr. O'Keefe. Based on his opinions, I find that Plaintiff has no cognitive impairment, memory loss, or continuing headaches caused by the injury.

As it was stipulated that Plaintiff's average weekly wage was $585.00, his TTD benefits should have been paid at the rate of $390.00 per week. In addition, based on the opinions of Dr. Arias, Plaintiff did not reach maximum medical improvement until April 19, 2010. I therefore find that Plaintiff’s TTD benefits should have been paid at the rate of $390.00 per week from September 4, 2009 through April 19, 2010.

Defendant Employer has raised the issue of entitlement to credit for overpayment of Plaintiff’s TTD benefits. Plaintiff has raised the issue of entitlement to an additional period. Plaintiff was overpaid $79.34 per week. He was entitled to TTD benefits from September 4, 2009 through April 19, 2010, a period of 32.5714 weeks. Plaintiff was entitled to a total payment of TTD benefits of $12,702.85. ($390.00 x 32.5714 = $12,702.85.) It is stipulated that Plaintiff received TTD benefits in the total amount of $13,476.67. Therefore, according to the stipulation relating to TTD benefits voluntarily paid and a finding concerning the amount to which he was entitled, Plaintiff has received an overpayment of TTD benefits in the amount $773.82. It is therefore found

that Plaintiff is not entitled to additional payments of TTD benefits and Defendant Employer is entitled to a credit of $773.82 for overpayment of TTD benefits, and that credit can apply only against past due and unpaid installments of compensation awarded herein.

Based on the opinions of Dr. O'Keefe and Dr. Olash, the medical dispute shall be resolved in favor of Defendant Employer. I find that continued pain management treatment by Dr. Kim, including the medication prescribed by Dr. Kim, is neither reasonable nor necessary for the cure and relief from the effects of Plaintiff’s work-related injury. Therefore, the medical expenses charged by Dr. Kim, the charges for prescription medication, and Plaintiff's request for reimbursement for his 1,900 mile round-trips from Fort Myers, Florida to Owensboro, Kentucky for office visits with Dr. Kim are not compensable pursuant to KRS 342.020.

FINDINGS AND CONCLUSIONS

1. The facts as stipulated and as discussed above.

2. As a result of the stipulated September 3, 2009 injury, Plaintiff was temporarily totally occupationally disabled for the period from September 4, 2009 through April 19, 2010. In making this finding, I have relied on the stipulations and the opinions of Dr. Arias.

3. During the time he was temporarily totally disabled, Plaintiff was entitled to TTD benefits paid at the rate of $390.00 per week. This is

calculated as follows: $585.00 x 66-2/3% = $390.00.

4. As a result of the injury, Plaintiff has a permanent injury for which he has an 8% functional impairment to the body as a whole. In making this finding, I have relied on the opinions of Dr. Arias. Pursuant to KRS 342.730(1)(b), Plaintiff's 8% functional impairment rating is converted to a 6.8% permanent partial disability (PPD).

5. Plaintiff has no need for restrictions as a result of his injuries and is capable of returning to work performing the same duties he was performing at the time of his injury. In making this finding, I have relied on the opinions of Dr. Arias and Dr. O'Keefe. Therefore, I find that Plaintiff is not permanently totally occupationally disabled and is not entitled to enhancement of his PPD awarded herein pursuant to KRS 342.730(1)(c)1.

6. Plaintiff has no cognitive problems caused by or in any way related to the subject injury. In making this finding, I have relied on the opinions of Dr. O'Keefe.

7. Plaintiff is not entitled to additional TTD benefits other than those voluntarily paid by Defendant Employer and Defendant Employer is entitled to a credit for overpayment of TTD benefits in the amount of $773.82. This credit can be applied only against past due and unpaid installments of compensation awarded herein.

8. Plaintiff's PPD benefits shall be paid at the rate of $26.52 per week beginning April 20, 2010. This is

> calculated as follows: $390.00 x 6.8% = $26.52.
>
> 9. Based on the opinions of Dr. O'Keefe and Dr. Olash, I find that the medical expenses after March 16, 2011 for treatment by Dr. Kim, medication prescribed by Dr. Kim, and Plaintiff's out-of-pocket expenses relating to treatment by Dr. Kim, are not reasonable and necessary for the cure and relief from the effects of Plaintiff's work-related injury, and Defendant Employer shall be absolved of the responsibility for payment those medical expenses.

Salazar filed a petition for reconsideration on October 3, 2012, requesting additional findings of fact regarding the CALJ's refusal to assess a safety penalty against Dependable pursuant to KRS 342.165. Salazar also requested additional findings regarding why the CALJ relied upon the impairment rating assessed by Dr. Arias.

In an order issued October, 19, 2012, the CALJ outlined his reasoning in both refusing to assess a safety penalty against Dependable pursuant to KRS 342.165, and in relying upon the impairment rating assessed by Dr. Arias. Specifically, the CALJ found as follows:

> Concerning the first alleged error, the CALJ would point out that KRS 342.165(1) provides for enhancement of benefits payable "if an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful

administrative regulation… relative to installation or maintenance of safety appliances or methods". Based on the testimony of Brett Williamson, the owner of Defendant Employer, which testimony was fully summarized, the CALJ found that Plaintiff's work-related accident was NOT caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation… relative to installation or maintenance of safety appliances or methods. The CALJ is of the opinion that that[sic] evidence from Mr. Williamson and findings based on the evidence submitted through him were adequate.

Plaintiff next complains that the CALJ did not make adequate findings concerning the functional impairment rating assigned by Dr. Arias. The details concerning the three different functional impairment ratings assigned by Dr. Arias, Dr. Barefoot and Dr. O'Keefe were set forth with the summarization of the medical evidence. In addition, the CALJ quoted from the *AMA Guides* and gave a full explanation as to why he found the opinion of Dr. Arias to be the most credible and convincing concerning the functional impairment rating. The CALJ believes there is no error for failing to make adequate findings concerning his decision finding the functional impairment rating assigned by Dr. Arias to be most credible.

Review pursuant to a petition for reconsideration is limited by KRS 342.281 and 803 KAR 25:010§19 to the correction of errors patently appearing on the face of an award, order, or decision, and does not allow reconsideration of the merits of a

> claim or defense. A review of the above order indicates no error patently appearing on the face thereof.
>
> Accordingly, the petition for reconsideration shall be and is hereby **DENIED**.

As the claimant in a workers' compensation proceeding, Salazar had the burden of proving each of the essential elements of his cause of action, including the assessment of a safety violation, and penalty pursuant to KRS 342.165. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Salazar was unsuccessful before the ALJ, the question on appeal is whether the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence 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).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

We cannot say the CALJ's reliance upon the impairment rating assessed by Dr. Arias is so unreasonable based upon the evidence it must be reversed as a matter of law. The parties filed reports and records from three different physicians assessing different impairment ratings. The CALJ could have relied upon any of the three in determining the extent of Salazar's impairment. *See* Jones v.

Brasch-Berry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). He found most credible the impairment rating assessed by Dr. Arias, the treating physician. It was within his discretion to do so, and we find no contrary result was compelled. Therefore, the CALJ's determination will not be disturbed.

Next, we find Salazar's argument the ALJ erred in failing to consider his ninth grade education in his award of PPD benefits to be without merit. Here the CALJ determined the three-multiplier pursuant to KRS 342.730(1)(c)1 is not applicable. KRS 342.730(1)(c)3 clearly states, "[r]ecognizing that limited education and advancing age impact and employee's post-injury earning capacity, an education and age factor, when applicable, shall be added to the income benefit multiplier set forth in paragraph (c)1." Because the CALJ determined Salazar was not entitled to an enhancement of his PPD award by the three-multiplier, he was correct in excluding an education factor in determining the award of PPD benefits.

Finally, we determine the CALJ's refusal to assess a safety penalty against Dependable pursuant to KRS 342.165 is supported by the evidence. KRS 342.165(1) provides in pertinent part as follows:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

The purpose of KRS 342.165 is to reduce the frequency of industrial accidents by penalizing those who intentionally fail to comply with known safety regulations. Apex Mining v. Blankenship, 918 S.W.2d 225 (Ky. 1996). The burden is on the claimant to demonstrate an employer's intentional violation of a safety statute or regulation. Cabinet for Workforce Development v. Cummins, 950 S.W.2d 834 (Ky. 1997).

The application of the safety penalty requires proof of two elements. Apex Mining v. Blankenship, supra. First, the record must contain evidence of the existence of a violation of a specific safety provision, whether state or federal. Second, evidence of "intent" to violate a specific safety provision must also be present. Enhanced benefits do not automatically flow from a showing of a violation of a specific safety regulation followed by a compensable injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002).

The worker also has the burden to demonstrate the employer intentionally failed to comply with a specific statute or lawful regulation. Intent to violate a regulation, however, can be inferred from an employer's failure to comply because employers are presumed to know what state and federal regulations require. Chaney v. Dags Branch Coal Co., 244 S.W.3d 95, 101 (Ky. 2008).

Salazar filed multiple regulations from the CFR, but failed to introduce specific evidence of violations, other than the testimony of Salazar and Rigoberto, who the CALJ did not find credible. The CALJ relied upon the testimony of Williamson who testified regarding safety equipment, requirements for usage, and safety training. The determination of credibility was solely with the discretion of the ALJ. Because he determined Williamson to have provided the most credible testimony, and further because no additional evidence of a safety violation was introduced, the CALJ's determination regarding the application of KRS 342.165 is supported by substantial evidence, and a contrary result is not compelled.

Accordingly, the decision rendered September 17, 2012, by Hon. J. Landon Overfield, Chief Administrative Law Judge, and the October 19, 2012 order overruling Salazar's petition for reconsideration are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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