Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 27, 2013

CLAIM NO. 200981456

HARLAN CUMBERLAND COAL PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

JOSHUA REEVES
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Harlan Cumberland Coal ("Harlan") appeals from the May 14, 2013, Opinion, Award, and Order, the July 15, 2013, order ruling on Harlan's petition for reconsideration, and the August 13, 2013, order ruling on Harlan's second petition for reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). In the May 14, 2013, Opinion, Award, and Order, the ALJ awarded Joshua

Reeves ("Reeves") increased permanent partial disability ("PPD") as well as medical benefits for the care and relief of Reeves' right shoulder injury.[1]

A Form 110, Settlement Agreement was entered into between Reeves and Harlan and approved by order dated June 8, 2010. The nature of the injury as indicated in the Form 110 is "right shoulder," and a description of the injury is as follows: "Cleaning out near the belt when he was trying to get a rock unstuck and felt a pull in his shoulder." The Form 110 indicates Reeves underwent a right shoulder arthroscopy performed by Dr. Ben Kibler, and Dr. Kibler assessed a 10% impairment rating on May 1, 2010.

On September 24, 2012, Reeves filed a Motion to Reopen in which he alleged a worsening of condition and an increase in whole body impairment. Reeves asserted as follows:

> The Plaintiff's position is that his condition has now worsened to the extent that his whole body impairment has increased. Upon examination by Dr. David Muffly, he found the Plaintiff to have failed right shoulder resurfacing; there is concern for a tear of the rotator cuff tendon; he has chronic right shoulder pain; this is related to the 08/03/09 work injury. He did not have an active pre-existing problem

[1] Although entitlement to medical benefits for treatment of the right shoulder injury was not a contested issue, the opinion, award, and order contains a general award of medical benefits.

> with [sic] right shoulder prior to 08/03/09. Dr. Muffly assigned a 25% whole person impairment related to [sic]

The November 16, 2012, Form 111 Notice of Claim Denial or Acceptance indicates Harlan accepted the claim as compensable but disputed the amount of compensation owed to Reeves.

The March 13, 2013, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730. Under "other" is the following: "This is a Motion to Re-Open alleging a worsening of condition, as shown through a work-related increase in impairment rating and/or occupational disability."

On appeal, Harlan argues the ALJ erred by awarding PPD benefits based upon the 22% impairment rating assessed by Dr. David Jenkinson which Dr. Jenkinson later corrected.

Reeves filed the June 6, 2012, Independent Medical Examination (“IME”) report of Dr. Jenkinson, which provided the following Summary and Conclusions:

> Joshua Reeves is a twenty-nine year old man with [sic] long history of shoulder difficulty beginning with a high school football injury. He had three surgeries at that time but claims to have had no difficulty between 2001 until the work related injury in August 2009. He had a sprain or strain type injury to the

right shoulder and was subsequently diagnosed as having a labral tear with arthritic changes in the shoulder. He had [sic] arthroscopic surgical procedure with labral repair and debridement which did not improve his symptoms. He then had a hemi-arthroplasty of the right shoulder which likewise has not reduced his complaints.

He now presents with very marked decreased range of motion of his right shoulder and continued complaints of pain. He has been advised against any further surgical procedure. He presents for this evaluation to obtain a permanent partial disability rating.

I agree that there is no further surgical treatment [sic] appropriate for this gentleman at this time. He qualifies for [sic] impairment rating due to the fact that he has had an implant arthroplasty of his right shoulder. He also has impairment due to the decreased range of motion. For decreased range of motion from figure 16-40 of the AMA Guides he has 6% impairment of the upper extremity as the result of flexion limited to 90 degrees. For extension to 30 degrees he has 1%. From figure 16-43 he has 6% impairment of the upper extremity for abduction limited to 60 degrees. From figure 16-46 he has 4% impairment for internal rotation to 30 degrees and 8% for external rotation to 40 degrees. This is a total of 25% impairment of the upper extremity. From table 16.3 25% impairment of the upper extremity equals 15% impairment of the whole person.

He also has impairment due to the fact of having an implant arthroplasty of the right shoulder. Utilizing table 16-

> 18 and table 16-27 this impairment for the arthroplasty is calculated as follows:
>
> From table 16-27 implant arthroplasty gives him 24% impairment of the upper extremity. This number should then be multiplied by the total value for gleno-humeral joint obtained from table 16-18. 24% multiplied by 60% equals 14% impairment of the upper extremity. In the combined values chart 25% combined with 14% gives a total 36% impairment of the upper extremity. From table 16-3 36% impairment of the upper extremity equals 22% impairment of the whole person. It is therefore my opinion that Mr. Reeves has 22% impairment of the whole person due to the combination of implant arthroplasty right shoulder and the associated decreased range of motion.

An "Addendum to IME" by Dr. Jenkinson, dated February 25, 2013, was filed in the record. In this addendum, Dr. Jenkinson stated as follows:

> I reviewed my evaluation and you are absolutely correct. I am not sure where the eight (8%) percent came from for external rotation. As you pointed out the correct value is One (1%) percent and the remainder of your calculation is correct. Having corrected that error I would amend my report to read that Mr. Reeves had Eighteen (18%) Percent Impairment of the Upper Extremity for decreased range of motion combined with Fourteen (14%) Percent for the arthroplasty which combines for Twenty-Nine (29%) Percent Impairment of the Upper Extremity which converts to Seventeen (17%) Percent Impairment of the Whole Person.

> I must apologize for this error and thank you for pointing this out.

Attached to Reeves' September 24, 2012, Motion to Reopen is the August 23, 2012, report of Dr. David Muffly. In this report, Dr. Muffly opined as follows regarding an impairment rating: "He has 25% whole person impairment which is related to the 8-3-2009 work injury. Table 16-27 and Figures 16-40, 16-43 and 16-46 are used." Regarding Dr. Jenkinson's impairment rating, Dr. Muffly opined as follows:

> I have reviewed the evaluation report of Dr. Jenkinson dated 6-6-2012. He noted reduced motion of the shoulder with weakness of the shoulder and assigned 22% impairment. He multiplied the athroplasty value of the right shoulder from Table 16-27 with the shoulder joint impairment from Table 16-18 and I do not understand [the] reason that was done. In my opinion Table 16-18 should not be used.

Dr. Muffly’s January 9, 2013, deposition was introduced in which he testified as follows regarding the methodology utilized by Dr. Jenkinson in calculating Reeves' impairment rating:

> Q: Okay. My reading of that paragraph makes it sound if you have implant arthroplasty then Table 16-18 could and should be used to multiply the impairment you receive from that

> procedure. Are you familiar with that, the AMA Guides saying that, or...
>
> A: I've got that. I've got the Guidelines. And you've actually read the table, and I guess I'm a little confused by the instructions on it as to the appropriate way to handle it.
>
> Q: But do you agree that it's possible the way this reads that Dr. Jenkinson assessed it correctly by also including Table 16-18 in association with 16-27?
>
> A: Yes, after reading that, he may have actually done it correctly. I may have been in error. And I realize he assigned 22 percent impairment which is slightly lower than the 25 percent that I assigned.

In the May 14, 2013, Opinion, Award, and Order, the ALJ determined Reeves had an 11% impairment rating at the time of settlement and made the following findings of fact and conclusions of law regarding Reeves' current impairment rating:

> The next question is, then, what is his current work-related impairment rating and physical capacity. On the issue of impairment rating the Administrative Law Judge is presented with a 25% rating assigned by Dr. Muffly, which he concedes may have been calculated incorrectly, a 22% rating assigned by Dr. Jenkinson which Dr. Muffly believes may be correct but Dr. Jenkinson repudiated, and a 17% rating assigned by Dr. Jenkinson, subsequent to the 22% he assigned, which he stands by. Both physicians and the record supported a finding that the Plaintiff continues to

> lack the capacity to return to the type of work done on the date of injury.
>
> The 25% rating assigned by Dr. Muffly is rejected precisely because Dr. Muffly himself testified it may have been calculated incorrectly. However, the 22% assigned by Dr. Jenkinson, and which was reviewed by Dr. Muffly, is usable even though it was repudiated by Dr. Jenkinson.
>
> That is the rating that is selected. It is important to note that in choosing to rely upon that rating the undersigned recognizes the fact that Dr. Muffly did not question his physical findings regarding the Plaintiff and that he testified that the findings recorded by Dr. Jenkinson were similar. Dr. Muffly also testified that the findings recorded by Dr. Jenkinson were similar. Dr. Muffly also testified that the 22% more accurately reflected those physical findings. These admissions and analysis do not diminish Dr. Muffly's credibility, but rather enhances it.
>
> The 17% assigned by Dr. Jenkinson is too much of an outlier and contradicts the weight of the medical evidence.

In the July 15, 2013, order on reconsideration, the ALJ set forth the following additional findings:

> This matter comes before the Administrative Law Judge on the Defendant’s Petition for Reconsideration. The Administrative Law Judge having reviewed the pleadings and being otherwise sufficiently advised the following findings and Orders are made.

> 1. The Defendant has provided accepted proof that the range of motion calculations made by Dr. Muffly and Dr. Jenkinson are substantially the same. The undersigned notes, in fact, that the impairment ratings the two assigned, the 22% and the 25% are close.
>
> However, it is the responsibility and the purview of physicians, not attorneys or judges, to translate findings into impairment ratings.
>
> 2. Dr. Muffly, on page 11 of his deposition, indicated he believed Dr. Jenkinson may have calculated the impairment rating incorrectly. On page 14 of his deposition Dr. Muffly states he is confused by the Guides instructions and concedes it is "possible" Dr. Jenkinson may have used the Guides correctly.
>
> 3. At no point does Dr. Muffly repudiate the rating he assigned. Therefore, it remains substantial evidence herein and the undersigned confirms his reliance on it.
>
> 4. The Petition for Reconsideration is OVERRULED.
>
> . . .

Consequently, in awarding increased PPD benefits, the ALJ relied upon Dr. Jenkinson's original 22% impairment rating as set forth in the June 6, 2012, IME report. While the Board recognizes that in his February 25, 2013, addendum, Dr. Jenkinson repudiated the 22% impairment he previously assessed, this impairment rating was

sufficiently rehabilitated by Dr. Muffly in his January 9, 2013, deposition when he testified Dr. Jenkinson "may have actually done it correctly."

Dr. Jenkinson's initial impairment rating of 22% does not fall within the purview of Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006) as there is no indication Dr. Jenkinson disregarded the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides") and that the 22% impairment rating is not based on the AMA Guides. In Jones, supra, Dr. Reasor found the claimant's injuries fit within DRE lumbar Category III yet chose an impairment rating that did not fall within the range clearly specified in the Guides. *See* Jones, supra, at 151-152. In the case *sub judice*, however, Dr. Muffly clearly testified that Dr. Jenkinson "may have actually" calculated the impairment rating correctly. Therefore, pursuant to Dr. Muffly's testimony, the ALJ was permitted to conclude Dr. Jenkinson's 22% impairment rating is consistent with and in conformity with the AMA Guides. That being the case, the ALJ's decision is supported by substantial evidence and must be affirmed.

Accordingly, the May 14, 2013, Opinion, Award, and Order, the July 15, 2013, Order on Reconsideration, and the August 13, 2013, Order are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON SARAH MCGUIRE
P O BOX 351
PIKEVILLE KY 41502

COUNSEL FOR RESPONDENT:

HON JOHNNIE TURNER
P O BOX 351
HARLAN KY 40831

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
410 WEST CHESTNUT ST STE 700
LOUISVILLE KY 40202