OPINION ENTERED: February 8, 2013

CLAIM NO. 201091098

HYDRO ALUMINUM NORTH AMERICA PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

MELISSA GREENWELL
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Hydro Aluminum North America ("Hydro Aluminum") seeks review of the opinion, award and order rendered September 4, 2012 by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ"), awarding Melissa Greenwell ("Greenwell") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits,

and medical benefits. Hydro Aluminum also appeals from the order entered October 19, 2012 denying its petition for reconsideration.

On appeal, Hydro Aluminum argues the 16% impairment rating upon which the ALJ based the PPD award is not supported by substantial evidence. Hydro Aluminum also argues the only valid impairment rating of record is the 2% assigned by Dr. Timothy Kriss. Hydro Aluminum next argues ulnar neuritis does not prevent Greenwell from returning to full employment. Finally, Hydro Aluminum argues since Greenwell is not precluded from a return to full duty work, vocational rehabilitation pursuant to KRS 342.710 is not warranted. Because the ALJ's decision is supported by substantial evidence, we affirm.

Greenwell filed a Form 101 on October 14, 2011 alleging she sustained injuries to her right shoulder, right arm, and neck on May 14, 2009 when using a heavy air wand while working for Hydro Aluminum. She supported her claim with the March 16, 2010 office note of Dr. Judith Canlas, a physical medicine and rehabilitation physician in Henderson, Kentucky, who noted complaints of right shoulder pain and arm paresthesias, accompanied by migraine headaches. Dr. Canlas determined the conditions were due

to Greenwell using a fifty to sixty pound nozzle with her arms outstretched.

Greenwell testified by deposition on December 14, 2010, and at hearings held May 9, 2011; November 15, 2011; and July 25, 2012. Greenwell was born on April 12, 1980, and is a resident of Henderson County, Kentucky. Her previous work experience includes working as a hostess in a restaurant, and various factory jobs including assembler, press operator, and caster.

She began working for Hydro Aluminum in 2008, which she described as a re-melt facility for recycling scrap metal and aluminum. She stated her job consisted of cleaning the casting area by raking excess metal after it has been cast, and utilizing a heavy air hose to remove water from the casting process. She was also required to lift a heavy dam utilized to control the flow of molten metal. On May 14, 2009, she was using the air hose when she developed pain in her right shoulder blade radiating into her neck and down her arm into her fingers. She stated she later developed migraine headaches due to the work injury. Her subsequent treatment consisted of medications, physical therapy and injections. She has also had diagnostic testing. Dr. Erdogan Atasoy diagnosed

thoracic outlet compression and recommended decompression surgery.

Greenwell returned to light duty work with Hydro Aluminum for a period of time, and subsequently received unemployment benefits. She has not worked anywhere since her light duty employment ended. She stated she continues to have difficulty with raising her right arm overhead, and experiences pain from her right elbow into her fingers. She stated she could not return to any of her past work. She has begun coursework at Henderson Community and Technical College, and hopes to earn a certification as an echocardiogramer.

Greenwell previously experienced problems between her shoulder blades and in her neck in 2002 while working for another employer. She received treatment for two to three years, but it eventually resolved. She settled a worker's compensation claim for that condition with her previous employer.

Greenwell submitted the September 17, 2010 report of Dr. Amitava Gupta, a Louisville hand surgeon, who diagnosed thoracic outlet compression and discogenic neck pain. He stated she needs a referral to a neurosurgeon.

Greenwell submitted Dr. Atasoy's February 9, 2011 report. Dr. Atasoy diagnosed thoracic outlet compression,

and associated upper back and pectoral myofascitis. Dr. Atasoy recommended decompression surgery, and assessed a 12% impairment rating pursuant to the American Medical Association Guides to Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Greenwell also filed the August 8, 2011 report of Dr. Satish Shah, a neurologist from Owensboro, Kentucky. Dr. Shah noted complaints of right shoulder and right upper extremity pain, along with complaints of pain in the right side of her neck and right scapula, stemming from the May 2009 work injury. He also diagnosed thoracic outlet compression, and recommended an MRI, EMG testing, and vascular studies.

Greenwell was evaluated by Dr. Kriss at Hydro Aluminum's request on November 29, 2011. Hydro Aluminum filed multiple reports prepared by Dr. Kriss on November 29, 2010; January 13, 2011; July 12, 2011; and, October 31, 2011. Hydro Aluminum also deposed Dr. Kriss on January 18, 2011, and July 23, 2012. Dr. Kriss opined Greenwell has an "unusual" musculoliagmentous sprain complicated by "some" right ulnar irritation. He assessed a 2% impairment rating pursuant to the AMA Guides, of which he found 25% was attributable to the previous injury she sustained in 2002. He opined she does not have thoracic outlet compression,

does not need surgery, and no restrictions should be imposed. Dr. Kriss further stated he disagreed with Dr. Atasoy's opinions, and did not believe Dr. Craig Roberts' report contained sufficient information to diagnose thoracic outlet compression.

Hydro Aluminum submitted treatment records and evaluation reports stemming from Greenwell's previous injury while working for a different employer. Those records include Dr. Stephen Rupert, Dr. James Donley, Dr. Debra Wallace, Dr. William Clapp, Dr. Douglas Johnson, and Dr. Stuart Lockstadt, D.C., outlining her previous treatment for the 2002 injury. Hydro Aluminum also deposed Mr. William Moyer Plahn, human resource and safety director for Trelleborg, where Greenwell was injured in 2002.

Dr. Roberts, an orthopedic surgeon, performed a university evaluation pursuant to KRS 342.315 on March 15, 2012, and was deposed by Hydro Aluminum on June 14, 2012. He diagnosed thoracic outlet compression and noted her presentation was more neurogenic than vascular. He noted Greenwell demonstrated decreased sensation and grip strength loss. He further noted she had maximized non-operative treatment and he would recommend an evaluation for operative intervention. Dr. Roberts assessed a 16% impairment rating pursuant to the AMA Guides.

The ALJ issued two interlocutory opinions. In the first, issued July 1, 2011, he determined Hydro Aluminum failed to sustain its burden of proving Greenwell's injury was caused by failure to follow reasonable medical advice. The ALJ declined to award TTD benefits at that time, but found Greenwell sustained work-related injuries on May 14, 2009. He awarded medical benefits including an evaluation with a neurologist.

In the second interlocutory opinion issued December 12, 2011, the ALJ noted he had previously found the claim compensable in the July 1, 2011 opinion. He found Hydro Aluminum is not responsible for payment for vascular studies. He also determined the evidence did not support a diagnosis of thoracic outlet compression. He resolved a medical dispute in Hydro Aluminum's favor.

In the opinion, award and order rendered September 4, 2012, the ALJ found as follows:

> The interesting aspect of this claim is that a decision on the Defendant's chief argument – that Greenwell does not have thoracic outlet syndrome – does not affect the outcome of the primary issue preserved for ruling – the calculation of her PPD benefits – because her impairment is 16% regardless. As to Greenwell's diagnosis, the ALJ finds that she has not proven she has thoracic outlet syndrome.

In the initial Interlocutory Opinion, the ALJ found that the medical evidence submitted at that time did not support a thoracic outlet syndrome diagnosis. Of course, given the interlocutory nature of that finding, such can be revisited now upon final submission of the claim. Dr. Roberts' university evaluation occurred after the interlocutory opinions, and he diagnosed thoracic outlet syndrome. That opinion of Dr. Roberts is afforded presumptive weight pursuant to KRS 342.315(2). But the presumption afforded by the statute neither shifts the risk of nonpersuasion to the Employer nor raises the bar with regard to Greenwell's burden of proof. *Magic Coal Co. v. Fox,* 19 S.W.3d 88 (Ky. 2000). If the university evaluator's opinion is rejected, the ALJ "shall specifically state … the reasons for rejecting that evidence." KRS 342.315(2).

The ALJ agrees with the Defendant that Dr. Roberts' thoracic outlet diagnosis could not have been more weakly supported by his testimony. Dr. Roberts failed to substantiate the diagnosis with any specificity, suggesting the diagnosis was applicable simply because "it's really a composite of all the data if you want to call it evidence, what have you, that we use. And, you know, I can't tell you there is any, you know, set criteria." (p. 7). The ALJ found Dr. Kriss' testimony more convincing that Greenwell's work related medical diagnosis is ulnar neuritis.

As noted above, the finding on Greenwell's diagnosis does not affect the calculation of her PPD benefits. Even though Dr. Kriss said Dr. Roberts got it wrong on the diagnosis, he said Dr. Roberts got it right on impairment. Even though Dr. Roberts diagnosed

thoracic outlet syndrome, Dr. Kriss conceded that Dr. Roberts had assigned impairment based on the nerve injury and not thoracic outlet syndrome. (Kriss, p. 9, 18). The Defendant also conceded this fact in its Brief (pp. 7-8), and did not argue for relief contrary to an award of PPD with a 16% impairment rating.

On the issue of multipliers, the ALJ relies on Dr. Roberts, Greenwell's highly credible testimony, and certain portions of Dr. Kriss' evidence to find that Greenwell lacks the physical capacity to return to her preinjury work, and is therefore entitled to the 3.0 multiplier of KRS 342.730(1)(c)1.

Greenwell's PPD award is calculated as follows: AWW of $821.79 x 2/3 = $547.86 x 16% x 1.0 x. 3.0 = $262.97 per week for 425 weeks. Pursuant to *Sweasy v. Wal-Mart Stores Inc.,* 295 S.W.3d 835 (Ky. 2009), the PPD award shall begin on the date of injury, with the duration of the award interrupted by the weeks on which TTD was paid.

The other issue preserved for ruling was the claim for vocational rehabilitation. KRS 342.710(3) provides in part: "When as a result of the injury he is unable to perform work for which he has previous training or experience, he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment."

In *Wilson vs. SKW Alloys,* Ky., 893 S.W.2d 800 (1995), the court held that the phrase "work for which an [employee] has previous training or experience" means suitable employment. It goes on to define "suitable employment" as

> meaning work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, her age and education, her income level and earning capacity, her vocational aptitude, her mental and physical abilities and other relevant factors both at the time of the injury and after reaching his post-injury maximum level of medical improvement. The ALJ finds that Greenwell does not retain the physical abilities to do work which is of the same status as the work she was performing at the time of the injury, and thus awards vocational rehabilitation.

Hydro Aluminum filed a petition for reconsideration on September 12, 2012, arguing Dr. Kriss did not concede an impairment rating of 16%, and the only valid impairment rating upon which the ALJ could rely is 2%. Hydro Aluminum also argued Greenwell's mild sensory deficits do not preclude a return to full duty employment. Finally, Hydro Aluminum argued Greenwell was not entitled to an award of vocational rehabilitation benefits.

In the order entered October 19, 2012 overruling Hydro Aluminum's petition for reconsideration, the ALJ stated the following:

> The Administrative Law Judge issued a third and final Opinion in this case on September 4, 2012. The ALJ found that Plaintiff's work related diagnosis was ulnar neuritis, and not thoracic

outlet syndrome. Even though the ALJ had rejected the thoracic outlet diagnosis from the university evaluator, Dr. Roberts, he accepted Dr. Roberts' opinion of 16% impairment. In doing so, the ALJ noted that even though Dr. Kriss disputed Dr. Roberts' diagnosis, he did not reject Dr. Roberts' opinion that Plaintiff's impairment was still 16% for the ulnar neuritis condition. In its Petition for Reconsideration, the Defendant takes issue with the ALJ's statement that Dr. Kriss agreed with Dr. Roberts' opinion on impairment, notwithstanding the diagnosis on which that impairment was based. The Defendant argues in the Petition that Greenwell's PPD should have been calculated based on the 2% impairment rating Dr. Kriss assigned in the first of his four reports (although no reference to such was made in Dr. Kriss' deposition 18 months later, nor was any argument for such made in the Brief).

The specific language at page four of the ALJ's Opinion that the Defendant takes issue with is the following: "Even though Dr. Kriss said Dr. Roberts got it wrong on the diagnosis, he said Dr. Roberts got it right on impairment. Even though Dr. Roberts diagnosed thoracic outlet syndrome, Dr. Kriss conceded that Dr. Roberts had assigned impairment based on the nerve injury and not thoracic outlet syndrome." Having again reviewed the record carefully, the ALJ stands by that statement. On page nine of his deposition, Dr. Kriss was asked if he had observed from Dr. Roberts' report any testing targeting the ulnar nerve; he responded, "Yes. This is strange because he has actually assigned ulnar nerve, peripheral nerve impairment to this lady, even though he diagnosed

> thoracic outlet." He went on to say, "Dr. Roberts has made a diagnosis of thoracic outlet syndrome, but he has then done an ulnar peripheral nerve rating … And his impairment rating actually agrees with my diagnosis of ulnar neuritis …" (p. 17-18). Contrary to the Defendant's argument in this Petition, it acknowledged this testimony from Dr. Kriss in its Brief while arguing against the thoracic outlet diagnosis, at pages seven and eight: "Dr. Roberts assigned a 16% whole person impairment rating based exclusively on sensory and motor deficits of the ulnar nerve. (Id., p. 9) An impairment rating based solely on the ulnar nerve is consistent with ulnar neuritis, but entirely inconsistent with thoracic outlet syndrome. (Id.)."
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> The remainder of the Petition continues to be a reargument of the merits of the claim, contrary to KRS 342.281, and as such must be overruled.

The crux of this appeal is whether the ALJ erred in awarding PPD benefits based upon the 16% impairment rating assessed by Dr. Roberts and awarding vocational rehabilitation benefits. We find he did not.

As the claimant in a workers' compensation proceeding, Greenwell had the burden of proving each of the essential elements of her cause of action, including the extent and duration of any disability caused by the work-related injury and entitlement to vocational rehabilitation benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d

276 (Ky. App. 1979). Since Greenwell was successful in her burden, the question on appeal is whether there was substantial evidence of record 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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). Rather, 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that 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).

Here, the ALJ explained his basis for adopting the 16% impairment rating assessed by Dr. Roberts. Hydro Aluminum's assertion the ALJ rejected Dr. Roberts' opinion is incorrect. While the ALJ determined Greenwell does not have thoracic outlet syndrome, he did not reject Dr. Roberts' 16% impairment rating. It is well established the ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

In addition, KRS 342.315(2) generally requires presumptive weight to be afforded the clinical findings and opinions of the university evaluator. However, the ALJ has the discretion to reject such testimony where it is determined the presumption has been overcome by other evidence and he expressly states his reasons for doing so within the body of his decision. Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 891 (Ky. 2007); Morrison v. Home Depot, 197 S.W.3d 531, 534 (Ky. 2006); Magic Coal Co. v. Fox, supra. Whether a party overcomes the presumption established under KRS 342.315(2) is not an issue of law, but rather a question of fact at all times subject to the ALJ's discretion as fact-finder to pick and choose from the evidence. Magic Coal Co. v. Fox, supra.

In this instance, Hydro Aluminum incorrectly asserts the ALJ rejected Dr. Roberts' opinion in its entirety. The ALJ clearly explained what he did and did not reject. The rationale provided by the ALJ is sufficient to support his findings, and the award of benefits will not be disturbed.

Regarding the award of vocational rehabilitation benefits, we likewise affirm the ALJ's determination. KRS 342.710 provides an employee, who is unable to perform work for which he has previous training or experience, shall be

entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment. Suitable employment has been defined as work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of the injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors, both at the time of injury and after reaching his post-injury maximum level of medical improvement. Wilson v. SKW Alloys, 893 S.W.2d 800 (Ky. App. 1995).

Here, the ALJ determined Greenwell lacks the physical capacity to return to the work she performed at the time of her injury. Her past employment consisted primarily of factory labor which she testified she can no longer do. This is supported by the medical evidence. Since Greenwell has limited vocational experience, does not have specialized or vocational training, and does not have a college degree, the ALJ could reasonably conclude she needs vocational rehabilitation to secure suitable employment. We cannot say the ALJ's award of vocational rehabilitation benefits is therefore unreasonable.

Accordingly, the decision rendered September 4, 2012, by Hon. Douglas W. Gott, Administrative Law Judge, as well as the order ruling on the petition for reconsideration entered October 19, 2012, are hereby **AFFIRMED**.

ALL CONCUR.

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