**OPINION ENTERED: September 13, 2012**

CLAIM NO. 200981345

JERRY GRIFFEY PETITIONER

VS. **APPEAL FROM HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE**

HIGHLANDS DRILLING
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**
* * * * * *

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

**STIVERS, Member.** Jerry Griffey ("Griffey") seeks review of the March 13, 2012, opinion, award, and order of Hon. Joseph W. Justice, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits for a physical injury and permanent partial disability ("PPD") benefits for a psychological injury occurring on July 30, 2009, in the course of his employment with Highlands

Drilling ("Highlands"). The ALJ dismissed Griffey's claim for permanent income benefits for the physical injury, and awarded medical benefits for the physical and psychological injury. Griffey did not file a petition for reconsideration.

Griffey's Form 101 alleges on July 30, 2009, during the course of his employment with Highlands, a nail went through his right hand. He also alleged he developed "anxiety and depression" as a result of the injury.

During his October 7, 2010, deposition, Griffey described his injury as follows:

> A: I was working on the pump on the rig to get water to the pump, and so that Derrick King could use the wash-down hose, and what happened was I was putting the nail in the top of like a little piece of steel, and you had to align the hose up to stick the nail in there, and kind of just bend it so that it can pump, and what I was doing was I had my right hand on the piece of steel, and had it pushed down to align the hose up so I could stick the nail in, and by the time I had the nail halfway in, somebody turned the pump on manually on the controls, and it just broke the nail in half and the piece of steel went through my glove, and punctured my hand.
>
> . . .
>
> Q: Okay, and so this piece of steel went into your hand, right?
>
> A: Yes.

> Q: How deep did this piece of steel go in your hand, do you know?
>
> A: Maybe a quarter of an inch.
>
> Q: Okay. Did you – Who pulled it out?
>
> A: It wasn't stuck in my hand. It just punctured it, and it just come straight out.
>
> Q: Okay. Alright, and so it didn't get lodged in there?
>
> A: No.
>
> Q: It just punctured, and released?
>
> A: Yeah.
>
> Q: Alright, and at that time did you go straight home or to the emergency room?
>
> A: Yes.
>
> Q: Okay, and how far away was the emergency room?
>
> A: Maybe an hour.

Griffey was subsequently treated at the University of Kentucky Medical Center, Department of Orthopedic Surgery for right thenar space infection. Surgery consisting of "incision and drainage of abscess right thenar space" was performed at the University of Kentucky Medical Center on August 3, 2009.

Regarding the physical injury, Griffey relied upon Dr. William T. Fannin's Form 107- medical report in which he assessed a 9% impairment. Regarding the

psychological injury, Griffey submitted the report of Dr. Robert Granacher who assessed a 15% whole body impairment due to major depression resulting from the July 30, 2009, injury.

Regarding the physical injury, Highlands relied upon the reports of Dr. Thomas F. Scott, an orthopedic surgeon, and Dr. Joseph Zerga, a neurologist, both of whom assessed no impairment for the physical injury. Regarding the psychological injury, Highlands submitted the report of Dr. Douglas D. Ruth, a board certified psychiatrist, who assessed a 4% impairment, one-half of which is attributable to a pre-existing non-work-related condition.

In the March 13, 2012, opinion, award, and order the ALJ determined Griffey did not have a permanent impairment to his right hand as a result of the injury finding as follows:

> In making a decision in this claim, the ALJ has carefully reviewed the medical evidence relating to Plaintiff [sic] thumb injury. Even though Plaintiff has made persistent complaints regarding his hand and thumb, the ALJ has concluded that the medical evidence does not support his complains [sic] on a physiological basis. First, there is no evidence in the record that Plaintiff's injury involved any tendons or major nerves. His hand was sutured at PMC, but Plaintiff must have developed a staph infection and was referred to UKMC for

treatment of the infection. He was treated there by hand specialists, who basically drained the wound, placed him on antibiotics, and debrided necrotic tissue. He was discharged on August 6, 2009. He returned for two follow-up visits and on August 31, 2009, he was discharged to follow up on a p.r.n. basis, and was released to return to work in two weeks.

Rather than returning to UKMC for follow-up, he began treating with Dr. Fannin on September 10, 2009. Without any medical reports from PMC and UKMC, Dr. Fannin diagnosed tendon injury with secondary infection; peripheral neuropathy secondary to above; and the possible early RSD. Dr. Fannin continued to make these assessments. First, the orthopedic and hand surgeons at UK just nine days previously did not indicate any such findings. In his November 10, 2009, report, Dr. Fannin stated that he was referring Plaintiff to Dr. Gutti for a neurological consultation for the possible RSD. There is nothing in the record indicating whether this consultation was done and whether Dr. Gutti performed an EMG/NCV. Drs. Scott and Zerga said there were no signs of RSD. The ALJ is also at a loss to understand why Dr. Fannin thought that a tendon was involved in Plaintiff's injury. Also, the ALJ does not understand why Dr. Fannin did not refer Plaintiff back to the UK hand surgeons if Plaintiff presented to him with the conditions that he diagnosed. If the UK physicians had discharged Plaintiff to return to work, and Plaintiff presented to Dr. Fannin with loss of range of motion in the thumb, neurological deficits, loss all grip strength in the right-hand, mottling and mild pallor, and hypersensitivity to touch, it seems

almost incredible that Dr. Fannin would not have returned him to UK and their specialists.

Following Dr. Scott's initial examination, his findings were much different than Dr. Fannin's. He said there was some tenderness to palpation at the base of the thenar eminence. Plaintiff made a complete fist. He was able to extend his thumb, and he was able to oppose his thumb to all fingers. He said testing suggested normal functioning of the sensory exam of the tip of his thumb. His pinch and grip scores suggest considerable weakness; however, the circumference of his forearm, wrist, and of the hand itself is essentially the same on both sides. There was nothing to suggest atrophy of the musculature of his hand. He said the 'functioning of his neural structures and motor structures seems to be normal, with the exception of his lack of strength.' In a supplemental report, following the report of Dr. Zerga, he then said that Plaintiff had reached MMI in September 2010, and he found no evidence of a permanent impairment related to the work injury of July 30, 2009. He again emphasized that Plaintiff should be withdrawn from narcotics.

The ALJ was persuaded by the reports of Drs. Scott and Zerga, and he finds that Plaintiff has failed to prove that he has residual physiological permanent impairment of the right hand and thumb.

. . .

The ALJ finds that Plaintiff reached MMI on September 30, 2010, as Dr. Scott said Plaintiff would have

> reached MMI in September 2010. Dr. Zerga said October 2010.
>
> Even though Plaintiff has no permanent ratable impairment for his right hand, the ALJ finds that Plaintiff sustained significant injury to his right hand and he still has impairment although not a ratable impairment under the AMA Guides.

The ALJ concluded Griffey has a 15% impairment as a result of the psychological injury and "does not retain the psychological capacity to return to the type of work that he was performing prior to his injury." Consequently, Griffey's PPD benefits were enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ awarded TTD benefits as a result of the physical injury for the period spanning from July 30, 2009, through September 30, 2010. PPD benefits for the psychiatric impairment commenced on October 1, 2010. The ALJ also ordered Griffey undergo a vocational rehabilitation evaluation.

Highlands filed a petition for reconsideration. In a May 14, 2012, corrected order the ALJ overruled the petition for reconsideration stating, in relevant part, as follows:

> 1. Defendant states that in Dr. Scott's report of September 13, 2010, he 'was withholding his opinion on permanent functional impairment of sensory function until he was able to confirm sensory loss with neurodiagnostics.'

The ALJ does not draw the same conclusions as Defendant. Dr. Scott had reached his opinion as set out in the last paragraph of the report. He suggested studies to 'confirm the fact that he does not have any impairment of nerve function to his hand.' His report was based on the fact that Plaintiff did not, but he suggested that it be confirmed. He did not indicate that he was waiting on any EMG/NCV testing. He said Plaintiff was unable to work in his present condition. Dr. Zerga is a neurologist. He is not an orthopedist. Dr. Scott could accept the EMG/NCV studies, but he does not mention any specific thing in his report that would be changes [sic] by any of Dr. Zerga's reported findings. The ALJ rejected this supplemental report as reliable. He does not mention that he reviewed Dr. Fannin's report, much of which the ALJ rejected, but some of which comported with Dr. Scott's earlier report.

By accepting the 0% WPI of Drs. Scott and Zerga, the ALJ does not find that the supplemental report of Dr. Scott is credible or reliable. By accepting Dr. Zerga's 0% impairment, the ALJ does not find all of his report credible. The ALJ found parts of Dr. Fannin's report credible in that Plaintiff had some residual condition of the hand, but not to the extent that Dr. Fannin reported. The ALJ found Dr. Scott's report of 9/13/10 more credible.

In any event, the ALJ concluded that Plaintiff had a 0% WPI based on the fact that the ALJ could not wholly accept Dr. Fannin's report of WPI.

2. The ALJ was in error in stating that 'Plaintiff has failed to prove

> that he has residual physiological impairment of the right hand and thumb.' That should have read: 'Plaintiff has failed to prove that he has a **ratable** residual physiological impairment of the right hand and thumb.' The ALJ did not mean to find that Plaintiff had nothing wrong with his hand, but the choice was 0% or 9%. The 9% was completely unreasonable. The ALJ found the three-multiplier on the basis of minimal impairment of Dr. Granacher and his 15% psychological impairment.

On appeal, Griffey challenges the ALJ's decision on two grounds. First, Griffey argues the ALJ's determination he reached maximum medical improvement ("MMI") on September 10, 2010, is clearly erroneous. Griffey contends in a September 13, 2010, report, Dr. Scott stated he could not predict when Griffey would be ready to return to his normal work activities, and he was unable to work in his present condition. Griffey also relies upon the statement of Dr. Zerga that "with gentle range of motion exercises and prescription regiment change [Griffey] should reach MMI." Griffey insists that on April 7, 2011, Dr. Scott changed his opinion stating that he had attained MMI on September 10, 2010. Griffey asserts as of September 10, 2010, he was not at MMI and no MMI date could be predicted according to Dr. Scott. Further, as of February 21, 2011, when Griffey was seen by Dr. Zerga he was not at

MMI. Accordingly, Griffey argues the ALJ's determination of the MMI date must be reversed.

Next, Griffey asserts the ALJ's determination he has no permanent physical impairment based on the opinions of Drs. Scott and Zerga is clearly erroneous. Griffey asserts since both Drs. Scott and Zerga assessed an impairment prior to him attaining MMI, their opinions do not comply with the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Consequently, their opinions cannot constitute substantial evidence in support of the ALJ's determination he did not have a permanent physical impairment due to the work injury. Griffey also observes Dr. Scott initially assessed his impairment rating pursuant to the 4th Edition of the AMA Guides. Griffey argues Dr. Fannin's opinion is the only impairment rating which complies with the AMA Guides and is the only medical evidence in the record upon which a determination of permanent impairment can be made. He maintains this matter should be reversed and remanded with instructions to "apply Dr. Fannin's impairment rating" and enter an award of disability benefits for the physical injury.

As the claimant in a workers' compensation proceeding, Griffey had the burden of proving each of the

essential elements of his cause of action including establishing he sustained a permanent impairment as a result of the physical injury. Further, Griffey bore the burden of establishing entitlement to an award of TTD benefits which includes, in part, the date he attained MMI. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Griffey 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 that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As 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 that would have supported a different outcome than that 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). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Furthermore, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, and incomplete, or even

inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is identifiable evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Therefore, our task on appeal is to determine whether substantial evidence supports the ALJ's decision with respect to the issues raised on appeal.

In this case, identifiable substantial evidence in the record supports the ALJ's finding Griffey failed in his burden of showing he sustained a permanent impairment of his right hand sufficient to justify the award of income benefits. Further, substantial evidence supports the ALJ's determination of the date Griffey attained MMI.

In the September 13, 2010, report of Dr. Scott generated as a result of an independent medical examination ("IME"), Dr. Scott stated Griffey had "residual pain at the base of his left thumb following a wound infection." He did not find any suggestion of reflex sympathetic dystrophy. Dr. Scott noted the function of Griffey's neural structures and motor structures seemed to be normal with the exception of lack of strength. He noted Griffey seems to be taking a great deal of narcotic pain medication in excess of what one would anticipate from the objective

findings noted on examination. Dr. Scott stated as follows:

> I would suggest that he undergo diagnostic studies to confirm the fact that he does not have any impairment of nerve function to his hand. I would recommend vigorous assistance in an attempt to withdraw him from narcotic medication. I cannot predict when he will would [sic] be ready to return to his normal work activities. He is unable to work in his present situation. He may have some minimal permanent impairment of sensory function to the tip of his thumb, and some persistent tenderness with use of his thumb and hand with heavy gripping activities.

Significantly, Dr. Scott did not offer an opinion regarding when Griffey attained MMI. However, in his second April 7, 2011, letter, Dr. Scott stated as follows[1]:

> In response to your recent communication I have reviewed this man's previous medical records, my previous report and examination of him dated September 13, 2010 and an evaluation of Mr. Griffey by Dr. Joseph Zerga.
>
> After review of this information, it is my opinion that:
>
> 1. Mr. Griffey has reached maximum medical improvement and he had reached maximum medical improvement at the time

[1] In the first letter dated April 7, 2011, Dr. Scott stated Griffey had no permanent impairment based on the 4th Edition of the AMA Guides. The second letter reads the same as the first letter except for the insertion of the "fifth edition" of the AMA Guides in place of the 4th Edition of the AMA Guides.

> of my initial examination in September 2010.
>
> 2. Based on the fifth edition of AMA's guide to permanent impairment, I find no evidence of a permanent impairment related to the work injury of July 30, 2009.
>
> 3. My opinion concerning his withdrawal from narcotic medication is unchanged.
>
> . . .

The April 7, 2011, letter contains the only opinion of Dr. Scott regarding when Griffey attained MMI. Contrary to Griffey's assertion, Dr. Scott did not change his opinion regarding the date of MMI. In the September 13, 2010, report, Dr. Scott stated at the time he saw Griffey he was unable to return to work. Dr. Scott did not offer an opinion regarding MMI. The issue of the ability to return to work is completely different from the issue of when MMI is attained. KRS 342.0011(a) states as follows:

> 'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment;

To be temporarily totally disabled the above definition requires the claimant to satisfy two criteria; i.e. the failure to obtain MMI <u>and</u> the failure to reach a level of improvement that would permit a return to work. When

Griffey attained MMI from the injury is completely different than reaching a level of improvement that would permit a return to employment. On September 13, 2010, Dr. Scott merely offered his opinion regarding Griffey's ability to return to his normal work activities and did not express an opinion regarding MMI. Consequently, Dr. Scott did not offer conflicting opinions as to when Griffey attained MMI. Dr. Scott's opinion expressed in the April 7, 2011, letter that Griffey attained MMI on September 13, 2010, constitutes substantial evidence supporting the ALJ's determination of MMI.

Dr. Zerga's opinion does not conflict with Dr. Scott's opinion regarding MMI. In his February 21, 2011, report, Dr. Zerga stated as follows:

> He needs encouragement. If he was my patient I would get him off all narcotics and pain medications and put him on anti-inflammatory, make sure he is sleeping well, and suggest gentle range of motion exercises. With this regimen he should reach maximum medical improvement. If his symptoms persist, then he should have a bone scan to see if there is any evidence of reactive arthritis from the infection. Again, there is no evidence of any neurological impairment. From a neurological point of view, he has reached maximum medical improvement.

Regarding MMI, the above language is somewhat confusing. However, in the last sentence of the paragraph Dr. Zerga

states from a neurological point of view Griffey had reached MMI. The April 14, 2011, letter reflects Dr. Zerga had been asked to review the records of Drs. Scott and Ruth in light of his previous report. In that letter, Dr. Zerga stated he agreed with certain conclusions reached by Dr. Scott. Significantly, Dr. Zerga did not disagree with Dr. Scott's opinion that Griffey had attained MMI at the time of Dr. Scott's initial examination on September 13, 2010. Therefore, we believe the ALJ's reliance upon Dr. Scott in determining Griffey attained MMI as of September 30, 2010, was appropriate.

Since Drs. Scott and Zerga offered opinions regarding Griffey's impairment rating on or after the date Griffey attained MMI, we find no merit in Griffey's argument the ALJ erroneously relied upon the impairment ratings of Drs. Scott and Zerga. In his second April 7, 2011, letter, Dr. Scott stated based on the Fifth Edition of the AMA Guides he found no evidence of permanent impairment related to the work injury sustained in 2009. He stated Griffey had reached MMI at the time of his initial examination on September 13, 2010. Consequently, Dr. Scott's assessment of no permanent physical impairment due to the injury occurring on July 30, 2009, is not inconsistent with the AMA Guides. Dr. Scott's opinion

constitutes substantial evidence which supports the ALJ's determination Griffey did not sustain a permanent impairment of his right hand.

Likewise, Dr. Zerga's February 21, 2011, report also constitutes substantial evidence supporting the ALJ's determination Griffey did not sustain a permanent impairment as a result of the injury to his right hand on July 30, 2009. Dr. Zerga stated with the appropriate encouragement Griffey should completely recover from his injury. He saw no evidence of neurological injury and no evidence of complex regional pain syndrome. Consequently, Dr. Zerga stated there was no neurological impairment as a result of the July 30, 2009, injury. Dr. Zerga also stated "[Griffey] has no permanent impairment." As previously noted, although paragraph six of his report contains conflicting statements regarding when Griffey reached MMI, the ALJ was free to rely upon the last sentence in paragraph six in which Dr. Zerga stated "[F]rom a neurological standpoint, [Griffey] has reached maximum medical improvement." Further, in his April 14, 2011, report, Dr. Zerga stated Griffey has no orthopedic and neurological impairments. The reports of Drs. Scott and Zerga standing alone or in concert constitute substantial evidence supporting the ALJ's determination Griffey did not

have a permanent physical impairment as a result of the July 30, 2009, injury. Because the outcome selected by the ALJ regarding the issues raised by Griffey on appeal is supported by substantial evidence, we cannot disturb the ALJ's decision on appeal. Special Fund v. Francis, supra.

Accordingly, the March 13, 2012, opinion, award, and order of Hon. Joseph W. Justice, Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

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