

OPINION ENTERED: FEBRUARY 22, 2013

CLAIM NO. 200982230

JOHN FLOYD

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

REINHART FOOD SERVICE
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

ALVEY, Chairman. John Floyd ("Floyd") seeks review of the opinion and order rendered June 19, 2012 by Hon. John B. Coleman, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for a right wrist injury he sustained on February 11, 2009, while

working for Reinhart Food Services ("Reinhart"). Floyd also appeals from the July 10, 2012 order granting Reinhart's petition for reconsideration; the July 20, 2012 order denying his petition for reconsideration; and the August 10, 2012 order denying his motion to reopen, and motion to amend the Form 101.

On appeal, Floyd argues the ALJ erred in failing to enhance the award of PPD benefits by the two multiplier pursuant to KRS 342.730(1)(c)2. Floyd also argues the ALJ erred in refusing to allow him to amend the Form 101, and failing to reopen proof time subsequent to the issuance of the decision. Floyd also argues the ALJ erred in allowing Reinhart credit for short term disability ("STD") benefits. Floyd next argues the ALJ failed to address all issues raised in his petition for reconsideration. Finally, Floyd argues he was entitled to an award based upon a 7% impairment rating. We vacate and remand the ALJ's decision regarding the award of credit to Reinhart for STD benefits, and for a determination of whether Floyd set forth a *prima facie* claim for reopening pursuant to KRS 342.125. In all other respects, we affirm the ALJ's determinations since a contrary result is not compelled.

Floyd filed a Form 101 alleging he fell at work on February 11, 2009¹ when he tripped over a pallet, injuring his right hand and wrist when he attempted to break his fall. In support of the Form 101, Floyd attached the March 5, 2009 note of Dr. Michael Newkirk who diagnosed deQuervain's on the right, dorsal radial sensory neuritis, and right intersection syndrome. The note also reflects a right arm brace was prescribed, and Floyd was allowed to return to work with no restrictions.

Floyd testified by deposition on October 26, 2011, and at the hearing held April 20, 2012. Floyd, a resident of Shepherdsville, Kentucky, was born on November 30, 1979. He is a high school graduate with vocational training in printing. His work history consists of working as a kitchen helper, forklift operator, picker, packer, fabricator, and maintenance worker. He began working for Reinhart in April 2007 as an order selector, or picker, which entailed riding on a pallet jack, obtaining boxes of food, and stacking them on pallets. The weight of the boxes varied from one to fifty pounds.

On February 9, 2009, Floyd's foot became wedged in a pallet as he was picking an item to complete an order,

¹ Although the Form 101 alleged an injury date of February 11, 2009, at the hearing held April 20, 2012, the parties agreed the correct injury date was February 9, 2009.

causing him to fall. He attempted to break his fall with his right hand, which caused an immediate onset of pain in his right wrist. He reported the fall and continued to work. He first sought treatment at Baptistworx, where he was provided a splint, and returned to regular duty as a picker until he had surgery on July 31, 2009. He was subsequently allowed to work light duty, but was eventually released to regular duty with no restrictions. Floyd later had a second surgery to his right wrist on June 10, 2011. After each surgery, his physicians allowed him to return to work without restrictions, although he later stated he has continuing right wrist pain.

Floyd no longer works as a picker despite having been released to work without restrictions. He transferred to a sanitation position, then to maintenance on the first shift, at a lower pay rate, which permits him to spend more time with his family. He stated there are no picker jobs on the first shift. Floyd admitted he did not advise his supervisor he sought the transfer to first shift due to ongoing problems with right wrist pain.

Floyd filed records from Baptistworx from February 11, 2009 through February 25, 2009. Those records reflect he was allowed to work with no use of the right hand.

Dr. Warren Bilkey evaluated Floyd on September 27, 2011. Dr. Bilkey noted the history of a fall at work and subsequent treatment. He diagnosed a right wrist strain with deQuervain's, tenosynovitis and two surgeries. He determined Floyd had reached maximum medical improvement ("MMI"). He assessed a 7% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Bilkey opined no restrictions should be assessed, but indicated Floyd is incapable of returning to his pre-injury job.

In a supplemental report dated January 11, 2012, Dr. Bilkey disagreed with the assessment of Dr. Thomas Gabriel who evaluated Floyd at Reinhart's request. He further stated Floyd is incapable of repetitive lifting of fifty pounds which is required of an order selector, and is therefore precluded from returning to that job.

Both Floyd and Reinhart introduced records from Kleinert & Kutz. Those records reflect Floyd was prescribed a right wrist splint, but released to regular duty until his July 31, 2009 surgery. He was then allowed to return to work with varying degrees of modification, utilizing a splint, until September 10, 2009 when he was released to return to work with no restrictions.

Both Floyd and Reinhart also introduced records from Dr. Amitava Gupta with Louisville Arm and Hand. Dr. Gupta began treating Floyd in March 2011. After exhausting conservative treatment which included injections, he performed surgery on June 10, 2011 consisting of a release of the first compartment deQuervain's and exploration of the second compartment tendinitis. Dr. Gupta released Floyd to regular activities on August 1, 2011.

Dr. Gabriel, an orthopedic surgeon, evaluated Floyd at Reinhart's request on December 14, 2011. He diagnosed chronic pain and stiffness, and noted Floyd had undergone releases of both the first and second dorsal extensor compartments. He also diagnosed carpal tunnel syndrome which he determined was not work-related. Dr. Gabriel assessed a 2% impairment rating pursuant to the AMA Guides, and indicated Dr. Bilkey improperly included loss of grip strength in his assessment of impairment. Dr. Gabriel further noted Floyd needs no additional medical treatment or surgery.

In addition to the medical records, Reinhart filed wage records and the summary plan description for the Reyes Holdings LLC² short term disability program. Page two of

² Believed to be Reinhart's parent company.

the plan notes it is unnecessary for the employee to enroll and no contributions are required. The plan further states, "[t]he company pays 100% of the plan benefits and expense." On page 6, the plan summary states the plan will not pay for benefits for "[d]isability which is compensable under the Workers' Compensation Act or any other similar sources."

In the opinion and order rendered June 19, 2012, the ALJ found as follows:

2. The next issue to be discussed is the issue of appropriate temporary total disability and credit for short term disability benefits paid to the plaintiff. Temporary total disability is defined in KRS 342.0011(11)(a) as the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement which would permit a return to employment. In *W. L. Harper Const. Co., Inc., v. Baker*, 858 S.W. 2d 202 (Ky. App 1993), the Court explained that temporary total disability benefits are payable until medical evidence establishes that the recovery process, including any treatment reasonably rendered in an effort to improve claimant's condition is over, and the underlying condition is stabilized such that the workers' compensation claimant is capable of returning to his job, or to some other employment which he is capable, and which is available in the local labor market. Further, it would not be reasonable to terminate temporary total disability benefits for a claimant when he is released to perform minimal work, but not the type of work that was customary or that he

was performing at the time of his injury. *Central Kentucky Steel v. Wise*, 19 S.W. 3d 657 (Ky. 2000). A worker is entitled to temporary total disability during the performance of minimal work as long as the worker is unable to return to the employment performed at the time of injury. *Double L Construction, Inc. v. Mitchell*, 182 S.W. 3d 509 (Ky. 2006). Here, the plaintiff was off work in connection with his first surgery from July 30, 2009 through August 12, 2009. He was paid temporary total disability benefits at the rate of \$489.23 per week during this period of time after which he was released to return to light duty work and subsequently full duty work. Nevertheless, the plaintiff did return to work on August 13, 2009. Therefore, temporary total disability benefits were appropriately paid during this period of time. The evidence also establishes the plaintiff was off work in connection with the second surgery from June 10, 2011 through August 2, 2011. He was not paid temporary total disability benefits during this period of time, but was instead paid short term disability benefits. The defendant has established that the short term disability paid to the plaintiff during this period of time was exclusively employer funded and contains no internal offset provisions. Therefore, the plaintiff is entitled to payment of temporary total disability benefits during this period of time at the rate of \$489.23 per week which would equal a total temporary total disability amount of \$3,703.47. However, the defendant is entitled to credit for short term disability benefits paid to the plaintiff during this period of time in the amount of \$2,784.00 pursuant to KRS 342.730 (6).

3. The next issue which must be discussed is the issue of extent and duration of disability. The plaintiff argues for benefits to be based upon a 7% impairment along with the application of the three factor set forth at KRS 342.730 (1)(c) 1 or the two factor set forth at KRS 342.730 (1)(c) 2. On the other hand, the defendant argues the plaintiff is entitled to benefits based on only 2% impairment as assessed by Dr. Gabriel with no modifiers. The case presents an interesting set of facts. The first step which must be determined is the appropriate impairment under the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*. **Dr. Bilkey assessed a 7% impairment which included impairment for loss of grip strength.** On the other hand, Dr. Gabriel did not feel it was appropriate to assess impairment for loss of grip strength. He pointed to the *AMA Guides* indicating the loss of grip strength could not be used under certain circumstances. However, in Dr. Bilkey's supplemental report, he included the whole quote from the *Guides* and provided a reasonable explanation for his inclusion of grip strength in his impairment rating. **After reviewing the entirety of the testimony, I believe the conclusions of Dr. Gabriel were misleading and that Dr. Bilkey appropriately included loss of grip strength in the assessment of impairment.** I did not find this opinion to be outside the express terms of the *AMA Guides*. See *Jones v. Brash-Barry General Contractors*, 189 SW3d 149 (Ky. App. 2006). I further note that the impairment assessed at Kleinert & Kutz was done prior to the plaintiff's second surgery and is therefore disregarded as irrelevant in determining the plaintiff's current

impairment after reaching maximum medical improvement.

4. However, the analysis does not end there as the Administrative Law Judge must also determine whether the provisions of KRS 342.730 (1)(c) 1 or 2 apply. Subparagraph 1 applies when the plaintiff lacks the physical capacity to return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. If the plaintiff is earning same or greater wages a determination must be made as to whether the plaintiff will be able to continue doing so for the indefinite future. *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky. App. 2004). Here, the plaintiff's treating physicians have indicated that he can return to regular work. The plaintiff argues that the release by Dr. Gupta to return to regular work should be taken to mean the regular duty work he was performing at the time of his second surgery which was lighter in nature than the job he was performing at the time of his original injury. However, this overlooks the fact that Dr. Gupta did not place any restrictions on the plaintiff's work activities. As such, I have not been convinced the plaintiff lacks the physical capacity to return to the type of work earning same or greater wages that he was performing at the time of his injury. He is not entitled to the three multiplier set forth at KRS 342.730(1)(c)1. Subparagraph 2 applies only in the limited instance where the plaintiff returns to work earning same or greater wages, but then ceases to do so by reason of the work injury. *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009). In this instance, the plaintiff has not returned to work

earning equal or greater wages. I am convinced the plaintiff does retain the physical capacity to return to the employment performed at the time of the injury. In making this determination, I note the opinions of the treating physicians who have not placed restrictions on the plaintiff's employability. Therefore, subparagraph 2 does not apply either. This is a disappointing result as the wage records do indicate that the plaintiff has not returned to earning same or greater wages at any time. His testimony indicates that one of the reasons he stopped performing his job as an order selector was due to the pain he was having from his injury. However, cross examination did make it clear that the lesser paying job which he now performs is also a more desirous dayshift job. Clearly his decision to change jobs was multifactorial and not simply related to the injury itself, especially in light of his release to perform regular duty work by his treating physicians.

. . .

ORDER

1. The plaintiff, John Floyd, shall, beginning on February 4, 2009, recover from the defendant-employer, Rinehart Food Service and/or its insurance carrier, permanent partial disability benefits in the amount of \$29.11 per week for a period not to exceed 425 weeks **for his 5.95% permanent partial disability.** This period of permanent partial disability is suspended and extended by the periods of temporary total disability benefits beginning on July 30, 2009 and continuing through August 12, 2009 and again from June 10, 2011 and continuing

through August 2, 2011 in the amount of \$489.23 per week. The benefits are payable together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation and are subject to the limitations set forth at KRS 342.730(4), (5), (6) and (7). The defendant-employer is given credit for temporary total disability benefits heretofore paid in the amount of \$978.46 as well as short term disability benefits paid in the amount of \$2,784.00. The credit shall be taken against past-due benefits awarded herein.

(Emphasis added).

Reinhart filed a petition for reconsideration arguing the ALJ incorrectly calculated TTD benefits and PPD benefits. On July 10, 2012, the ALJ entered an order granting Reinhart's petition and revising the award figures.

On July 6, 2012, Floyd also filed a petition for reconsideration arguing the ALJ erred in awarding PPD benefits based upon a 5.95% disability; failing to award vocational rehabilitation benefits; allowing Reinhart credit for payments made pursuant to its STD plan; failing to enhance the award of PPD benefits by the three multiplier pursuant to KRS 342.730(1)(c)1, or in the alternative, the two multiplier pursuant to KRS 342.730(1)(c)2.

The ALJ denied Floyd's petition for reconsideration in an order issued July 20, 2012, specifically stating as follows:

The ALJ is (sic) considered the arguments of the plaintiff as well as the response by the defendant. After considering same it is hereby determined that the petition is a re-argument of the evidence and is therefore DENIED.

On July 12, 2012, Floyd filed a motion to reopen proof and to reopen the claim. On July 17, 2012, he filed a motion to amend the Form 101 to include the allegation of injury to his left arm/wrist. In an order issued August 10, 2012, the ALJ overruled both motions.

On appeal, Floyd argues the ALJ erred in failing to enhance the award of PPD benefits by the two multiplier pursuant to KRS 342.730(1)(c)2. Floyd also argues the ALJ erred in failing to reopen proof time subsequent to the issuance of the decision. Floyd also argues the ALJ erred in allowing Reinhart credit for STD benefits. Floyd next argues the ALJ failed to address all issues raised in his petition for reconsideration. Finally, Floyd argues he was entitled to an award based upon a 7% impairment rating rather than a 5.95% rating.

We will first address Floyd's argument the ALJ erred by awarding PPD benefits based upon a "5.95% AMA rating". We do not believe an issue exists in this regard. The ALJ clearly stated in his decision he accepted the 7% impairment rating assessed by Dr. Bilkey pursuant to the

AMA Guides. Despite not explaining his calculations, it is clear the ALJ multiplied the 7% rating by the statutory factor of .85 found in KRS 342.730(1)(b) in arriving at the award of 5.95% PPD benefits. It is further noted the ALJ at no time made reference to a 5.95% AMA rating. Therefore, we find no justiciable issue regarding the ALJ's determination, and the award of PPD benefits will not be disturbed.

Regarding the applicability of the two multiplier pursuant to KRS 342.730(1)(c)2, we again find the ALJ committed no error. Floyd had the burden of proving each of the essential elements of his cause of action, including the application of any enhancing multipliers. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Floyd was unsuccessful before the ALJ regarding the application of the two multiplier, 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. 200). 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).

That said, we find the evidence does not compel the application of the two multiplier pursuant to KRS 342.730(1)(c)2 in the case *sub judice*. The ALJ determined,

based upon the medical evidence from all providers except Dr. Bilkey, Floyd was not restricted from performing any work. Likewise, the ALJ determined Floyd had not returned to equal or greater wages, and subsequently ceased doing so for reasons unrelated to his work injury as required by Chrysalis House, Inc. v. Tackett, 283 S.W.2d 671 (Ky. 2002); and Hogston v. Bell South Telecommunications, 325 S.W.3d 314 (Ky. 2010).

It was within the ALJ's discretion to determine whether Floyd had returned to work earning the same or greater wage, and whether any cessation of such employment was related to the injury. Here, the ALJ explained Floyd transferred to a first shift job to enable him to spend more time with his family. Likewise, Floyd testified he did not advise his supervisor his change to a first shift job was in any way related to his injury. The ALJ clearly explained his reasons for not enhancing the award of PPD benefits, and a contrary result is not compelled, therefore his decision will not be disturbed. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Floyd next argues the ALJ erred by allowing Reinhart credit for STD benefits he received. KRS 342.730(6) requires a three-part analysis. In the case of either STD or long term disability benefits, the plan must

be exclusively employer funded, it must extend income benefits for the same disability covered by workers' compensation, and it must not contain an internal offset provision for workers' compensation benefits. Specifically KRS 342.730(6) states as follows:

All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

While Floyd initially testified he paid the premium for the STD plan, he later admitted this was a benefit provided by Reinhart. Reinhart introduced the plan which confirmed STD was an employer provided benefit for which no contribution was made by employees. However, the plan is silent, and the record is devoid of evidence establishing whether there was an internal offset provision in the plan for workers' compensation benefits. In addition, the plan clearly states it will not pay benefits for "disability which is compensable under the Worker's Compensation Act or any other similar sources." Although the first prong of the statutory requirement was met, the

second and third prongs were not. Reinhart bore the burden of providing entitlement to a credit for STD benefits paid. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2005). In Dravo Lime Co., the Court stated:

The employer asserted that KRS 342.730(6) permitted it to credit the short-term disability benefits the claimant received against its liability for his workers' compensation award. Hence, it was the employer's burden to establish its entitlement.

Id. At 290.

Since Reinhart failed to provide any evidence establishing whether the STD benefits plan contains an internal offset provision, it is not entitled to credit. We therefore believe the ALJ erred in providing credit for the STD benefits paid. Simply put, Reinhart failed in its burden to establish its entitlement to credit for the payment of STD benefits. On remand, the ALJ shall determine Reinhart is not entitled to credit for STD benefits absent evidence of satisfying all elements required by KRS 342.730(6).

Next, Floyd argues the ALJ erred in refusing to allow him to amend the Form 101, and failing to reopen proof time subsequent to issuance of the decision and orders on petitions for reconsideration. We find no error with the ALJ's denial of Floyd's motion to amend the Form

101. At the time the motion was filed, the ALJ had already issued his decision and orders on reconsideration. Flour Construction International, Inc. v. Larry Kirtley, 103 S.W.3d 88 (Ky. 2003) is not applicable in this instance. As opposed to the case *sub judice*, in Kirtley, the Kentucky Supreme Court merely allowed the re-issuance of an order which had not been properly served. It did not allow the amendment of a claim subsequent to the issuance of a decision.

KRS 342.270(1) states as follows:

342.270 Application for resolution of claim - Joinder - Assignment to administrative law judge - Administrative regulations for procedures for resolution of claims.

(1) If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he or she shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him or her. **Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.**

(emphasis added)

Floyd has alleged a new injury or condition which arose subsequent to the submission of the claim for decision, and subsequent to the ALJ rendering his opinion, and his orders on reconsideration. He would not be precluded from filing a new claim for a subsequent injury pursuant to the recent decision from the Kentucky Court of Appeals in St. Joseph Hospital v. Angela Frye, --- S.W.3d ---, 2012 WL 4784255 (Ky. App. 2012), rendered October 5, 2012 (to be published).

Floyd's motion to reopen is another matter. On remand, the ALJ shall review the motion to reopen and determine if Floyd has met the *prima facie* requirements for reopening his claim pursuant to KRS 342.125. If so, the ALJ shall issue a scheduling order and conduct any proceedings necessary for full adjudication of the reopening.

Floyd next argues the ALJ failed to address all issues raised in his petition for reconsideration. We disagree. We believe the ALJ sufficiently considered all issues raised in the petition for reconsideration, and other than the STD credit issue, properly denied the motion as a re-argument of the merits of the claim.

Finally, Floyd requested oral arguments be held in this appeal. After having reviewed the record, it is determined an oral argument is unnecessary in arriving at a decision, and therefore the request is **DENIED**.

Accordingly, we **AFFIRM IN PART** the June 19, 2012 opinion and award and the July 10, 2012 and July 20, 2012 orders on petitions for reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge, and **VACATE IN PART, AND REMAND** for further determination consistent with the views expressed in this opinion.

ALL CONCUR.

MICHAEL W. ALVEY, CHAIRMAN
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