OPINION ENTERED: July 30, 2012

CLAIM NO. 200873193

KOBE ALUMINUM USA, INC. PETITIONER

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

KEVIN A. WATKINS
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING IN PART, AND REMANDING
* * * * * *

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

STIVERS, Member. Kobe Aluminum USA, Inc. ("Kobe") appeals from the March 1, 2012, opinion, award, and order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. Kobe filed a petition for reconsideration which was overruled by order dated March 26, 2012, from which Kobe also appeals.

Kevin Watkins' ("Watkins") Form 101 alleges on September 29, 2010, and May 5, 2010, he sustained work-related injuries to his back and left hip. Watkins also alleges a psychological component. The description of the work-related incidents is as follows:

> 9/29/2008- Plaintiff was lifting a 180 pound lid on a water tank and felt pain in his lower back and left hip.
>
> 5/5/2010- Plaintiff was crawling on his hands and knees working on machinery and had pain in his lower back and left hip.

The December 7, 2011, Benefit Review Conference ("BRC") order indicates the following contested issues: work-relatedness/causation, benefits per KRS 342.730, "injury" as defined by the Act, limitations ["08 claim" is handwritten], TTD ["underpayment" is underlined and "rate" is handwritten], and vocational rehabilitation.

On appeal, Kobe asserts the ALJ's award of PPD benefits, based upon the 20% impairment rating assessed by Dr. Colin Looney, is not supported by substantial evidence.

The ALJ summarized Dr. Looney's findings and opinions as follows:

> 3. Plaintiff filed evidence from **Dr. Colin Looney**, an orthopedic surgeon in Nashville who first saw Watkins on September 13, 2010. History was left hip pain from a work injury in 2008. He read an MRI as showing “an extensive labral

> tear." On November 11, 2010, he performed a left hip labral repair, osteoplasty, chondroplasty, and synovectomy. He assigned maximum medical improvement on May 6, 2011, with a 20-pound lifting restriction and no bending or squatting. He assigned 20% impairment.

Regarding the existence of an injury as defined by the Act and causation, the ALJ determined as follows:

> It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers compensation claim. *Young v. Burgett, 483 S.W.2d 450 (Ky. 1972)*. In order for that burden to be sustained, no less than substantial evidence of each element of the claim must be introduced. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986)*.
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> The Administrative Law Judge relies on Dr. Malmquist, Dr. Sheridan, and Dr. Looney to find that Watkins suffered a permanent left hip injury on September 29, 2008. The ALJ considered all of the Defendant's contrary arguments on causation and impairment. The Defendant's causation argument relied on Dr. Stanton's opinions concerning nonwork-related arthritis, but that ignored the opinion of its first evaluator, Dr. Sheridan, who said the work injury caused a "permanent aggravation of arthritis in the left hip." The Defendant argued that the impairment rating assigned by the treating physician, Dr. Looney, was too high, but its other evaluator, Dr.

> Stanton, provided no alternative in a case where impairment clearly results from the injury; he curiously ignored the prospect of impairment from the surgery for the work related labral tear.

The ALJ determined as follows regarding PPD benefits:

> The ALJ relies on Watkins' testimony, and the medical evidence from Dr. Looney to find that Watkins lacks the physical capacity to return to his pre-injury work and is entitled to the 3.0 multiplier of KRS 342.730(1)(c)1. His permanent partial disability benefits are calculated as follows: AWW of $1,051.09 x 2/3 = $700.73, subject to maximum for 2008 injuries of $502.51 x 20% x 1.0 x 3.0 = $301.51 per week for 425 weeks. Because Watkins was paid TTD immediately after his injury, his PPD benefits shall begin on November 4, 2008 pursuant to *Sweasy v. Wal-Mart Stores Inc., 295 S.W.3d 835 (Ky. 2009)*. The 425-week award period shall be interrupted by the second period of TTD.

In its petition for reconsideration, Kobe asserted as follows:

> The plaintiff was awarded permanent partial disability benefits based upon Dr. Looney's 20% whole person impairment rating. In its brief to the Administrative Law Judge, the defendant argued Dr. Looney's suggestion of impairment was not supported by the 5th Edition of the AMA *Guides to the Evaluation of Permanent Impairment*, and that plaintiff had failed in his burden to present evidence of impairment 'as determined by' the *Guides*.
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> The Administrative Law Judge mischaracterized defendant's argument by stating that Kobe Aluminum contended Dr.

> Looney's rating was 'too high.' *Opinion*, p. 6. Defendant did not argue Dr. Looney's rating was 'too high,' but instead argued Dr. Looney's rating was not 'as determined by' the *Guides*.'
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> Dr. Looney referenced two tables from the 5th Edition of the *Guides* when offering his assessment of impairment. The first table (Table 17-3) does not provide a method by which impairment is assessed, but instead is a conversion table which facilitates the translation of whole person impairment from lower extremity impairment.
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> The other table relied upon by Dr. Looney was Table 17-5. As stated in defendant's brief, 'percentages (for impairment) given in Table 17-5 are for full-time gait derangements of persons who are dependent on assistive devices.' *AMA Guides*, p. 529 (attached).
>
> Table 17-5 provides a 20% whole person impairment for one with a condition which 'requires routine use of cane, crutch or long leg brace (knee-ankle-foot arthosis [sic] [KAFO]).' There was no evidence in the record, either from testimony of the plaintiff, or from Dr. Looney, or from any other physician, which supported a finding that plaintiff Watkins 'requires routine use of cane, crutch or long leg brace.'

In the ALJ's March 26, 2012, order on reconsideration, the ALJ determined as follows:

> This matter is before the Administrative Law Judge on the Defendant's Petition for Reconsideration. The Petition is a reargument of the case contrary to KRS 342.281 and therefore overruled. The Defendant argues that the ALJ erred in relying on Dr. Looney for his evidence on

impairment because such was contrary to the AMA Guides. This was the same argument presented in the Defendant's Brief. The Defendant objects to the ALJ's characterization of its argument as being that Dr. Looney's rating was 'too high.' In making that generalization, the ALJ was clearly aware of the nature of the Defendant's evidence and its argument as to the accuracy of Dr. Looney's impairment. However, the ALJ believed, and continues to believe that Dr. Looney's opinion on impairment is more credible than that of Dr. Stanton, for the reasons stated in the Opinion. Among the bases [sic] for that conclusion was that Dr. Stanton's opinion that no work related injury had occurred- an opinion contrary to that of the Defendant's first evaluator- had a negative impact on the persuasiveness of his opinion on impairment.

On appeal, Kobe argues as follows:

Dr. Looney relied upon two tables from the 5th Edition of the AMA *Guides* in support of his assessment of 20%. The first table (Table 17-3) is not one which provides a method by which impairment is assessed, but instead is a conversion table, translating whole person impairment from lower extremity impairment. Table 17-3 did not explain the 20% whole person impairment offered by Dr. Looney because he did not make reference to a lower extremity impairment.

Dr. Looney relied on Table 17-5 for his assessment of 20% impairment. Regarding this table, Dr. Looney stated 'but the gait derangement [sic] a higher rating is given based upon Table 17.5 [sic] where he has significant gait disturbance and pain secondary to his hip.' Table 17-5 is found on page

529 on the 5th Edition of the AMA *Guides*, and is under the subheading '17.2(c) Gait Derangement.' Under that subheading, the following is stated:

> An impairment rating due to a gait derangement should be supported by pathologic findings, such as x-rays. Except as otherwise noted, the percentages given in Table 17-5 are for full-time gait derangements of persons who are dependent on **assistive devices**. (original emphasis).

Pursuant to Table 17-5 of the 5th Edition of the AMA Guides, 20% whole person impairment is properly assessed for a condition 'which requires routine use of cane, crutch or long leg brace (knee-ankle-foot arthrosis [KAFO]).' In the case before the Administrative Law Judge, there was no evidence Dr. Looney, or any other physician, prescribed for Watkins a cane, crutch or long leg brace, or required Watkins to routinely use those assistive devices. There was no evidence Watkins had 'self-prescribed' a cane, crutch or long leg brace.

In addition to his misplaced reliance upon Table 17-5, Dr. Looney suggested a 20% whole person impairment rating based upon the following:

> This (referring to his assessment of impairment) also takes into account as hip continues to deteriorate he (Watkins) may need a total hip arthroplasty in the future. Based on this, I have arrived at a whole

> person impairment of 20 percent. (Emphasis supplied).

> Dr. Looney assessed a 20% whole person impairment 'based' on the possibility Watkins 'may need' a total hip arthroplasty. Thus, Dr. Looney did not assess impairment of Watkins' present condition, but instead suggested impairment for a possible future condition which may or may not develop.

> Dr. Looney's suggestion of a 20% whole person impairment rating was not supported by Table 17-5 of the 5th Edition of the AMA *Guides*, given the fact Watkins is not dependent on an assistive device. Further, Dr. Looney's assessment accounted for a future condition which may or may not develop, and a future surgical procedure which may or may not be required.

This is the same argument Kobe made in its petition for reconsideration and its brief to the ALJ.

The record contains several records generated by Dr. Looney. A record dated May 6, 2011, states as follows under "Plan":

> The patient has significant hip pathology which will certainly be activity limiting. My hope is with this procedure we can buy him about three to four years before we have to proceed toward arthroplasty. I suspect that we can get this and he is in agreement, but nonetheless he has significant changes throughout his hip and he has a labral tear as well. What I have suggested is at [sic] this [sic] is [sic] that we have reached our impairment rating and to conclude the postoperative evaluation

> with an impairment rating. I also suggested that he should at this point avoid any work that involves bending, squatting, ladders, picking up objects heavier than 20 pounds, repetitive deep hip flexion as I think this will aggravate his condition. A more sedentary job would be appropriate for him and I have recommended this. We have talked about vocational training, but it does not sound like we have made much headway in this regard. Because he is from Kentucky, we will use the Fifth Edition of the AMA Guides to Permanent Impairment and based on the information in this edition I made my assessment of impairment based on page 529 of the Guide to Evaluation of Permanent Impairment, Fifth Edition. This was largely due to a lower limb impairment due to gait derangement as well as early arthritis. His impairment rating of the whole person is 20 percent. The early arthritic change would result in an impairment of 3 percent of whole person and that is according to table 17.3 noted on page 527, but the gait derangement a higher rating is given based on table 17.5 where he has significant gait disturbance and pain secondary to his hip. This also takes into account [sic] as [sic] hip continues to deteriorate he may need a total hip arthroplasty in the future. Based on this, I have arrived at a whole person impairment of 20 percent.

Kobe filed the report of Dr. John Stanton who performed an independent medical examination on November 4, 2011, and offered the following criticisms of Dr. Looney's impairment rating:

> • Dr. Looney felt that in another three or four years, the patient would

> probably need to have hip replacement. He gave the patient [sic] impairment rating of 20% whole person based on gait derangement. However, he does not indicate if the patient was using any type of assistive device or what kind of gait abnormality the patient has in the records.
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> • By May of 2011, Dr. Looney has completed his treatment with the patient and recommended [sic] sedentary type job, and a 20% impairment based on gait abnormality, although the gait abnormality is not actually documented.
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> • The impairment rating is questionable since there is no evidence that the patient had a gait deformity since this is not recorded in the paperwork from Dr. Looney at the time of the impairment rating. Furthermore, the patient does not have a gait abnormality on examination today and does not require the use of assistive devices. The impairment therefore would be based on arthritis of the left hip, which is not work related.

We vacate the March 1, 2012, opinion, award, and order and the March 26, 2012, order ruling on Kobe's petition for reconsideration relating to the ALJ's determination Kobe has a 20% impairment and the award of PPD benefits based on that impairment rating and remand to the ALJ for further findings. Kobe is entitled to have its argument Dr. Looney's impairment rating is inconsistent with the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA

Guides") addressed. Kobe asserted its arguments regarding Dr. Looney's impairment rating through the opinions of Dr. Stanton and in its brief to the ALJ. However, the ALJ did not address that argument in the March 1, 2012, opinion, award, and order. The ALJ merely stated: "The ALJ considered all of the Defendant's contrary arguments on causation and impairment." The ALJ mischaracterized Kobe's objections to Dr. Looney's impairment rating as centering on the impairment being "too high." Kobe once again, in its March 12, 2012, petition for reconsideration raised its objections to Dr. Looney's impairment rating and requested the ALJ to reconsider his award of PPD benefits. While Kobe did not specifically ask for additional fact-finding, it clearly set forth its objections to Dr. Looney's impairment rating, previously stated in its brief to the ALJ, and asked the ALJ to reconsider his award of benefits based on its objections. In the March 26, 2012, order, the ALJ merely acknowledged Kobe's argument, but failed to directly address and resolve it. In the March 26, 2012, order, the ALJ dismissed Kobe's argument by stating as follows: "This was the same argument presented in the Defendant's Brief." The ALJ then articulated his belief Dr. Looney's opinions are more credible than Dr. Stanton's opinions; however, this fails to directly acknowledge

Kobe's specific argument and objections regarding Dr. Looney's impairment rating as being inconsistent with the AMA Guides.

While "the proper interpretation of the Guides and the proper assessment of an impairment rating are medical questions," an ALJ is not permitted to rely upon an impairment rating inconsistent or incompatible with the AMA Guides. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003). Although George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004) is not directly on point, it does provide some insight into this issue. The Kentucky Supreme Court held in the event a physician derives his or her impairment rating from an incorrect version of the AMA Guides, the ALJ is not permitted to rely upon such an impairment rating. The Court instructed as follows:

> [W]e are convinced that although an ALJ is free to choose among impairments that were assigned under the latest edition available at the closing of proof, an ALJ is not free to rely upon an impairment that was assigned under an earlier edition.

Id. at 294.

The Court warned any impairment rating derived from an incorrect edition of the AMA Guides "is not a proper basis for calculating an income benefit under KRS 342.730(1)(b)

absent a stipulation of the parties," and such a calculation would be subject to this Board's review *sua sponte* as it is not in conformity with Chapter 342. Id. at 294. Further, in Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006), the Court of Appeals held the ALJ could not rely upon Dr. Reasor's impairment rating, as it did not fall within the range of impairment in DRE lumbar Category III, the injury category in which Dr. Reasor placed the claimant. The Court of Appeals stated as follows:

> [A]n ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides. In other words, a physician's latitude in the field of workers' compensation litigation extends only to the assessment of a disability rating percentage within that called for under the appropriate section of the AMA Guides. The fact-finder may not give credence to an impairment rating double that called for in the AMA Guides based upon the physician's disagreement with the disability percentages called for in the AMA Guides, which is precisely what Dr. Reasor did in the case at hand.
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> Under our law, the AMA Guides are an integral tool for assessing a claimant's disability rating and monetary award. So to be useful for the fact-finder, a physician's opinion must be grounded in the AMA Guides, meaning that a physician's personal antagonism toward the AMA Guides, such as that demonstrated by Dr. Reasor in this

> case, is legally irrelevant. And any assessment that disregards the express terms of the AMA Guides cannot constitute substantial evidence to support an award of workers' compensation benefits.

Id. at 153-154.

As set forth in the May 6, 2011, report, Dr. Looney cited to Table 17-3 of the AMA Guides, "Whole Person Impairment Values Calculated From Lower Extremity Impairment," to assess a 3% whole person impairment. However, Dr. Looney did not assess a lower extremity impairment rating in the May 6, 2011, report. Additionally, it appears Dr. Looney exclusively relied upon Table 17-5, "Lower Limb Impairment Due to Gait Derangement," to assess a 20% whole person impairment. This is unclear from Dr. Looney's report, as he never directly states the 20% impairment rating is derived exclusively from Table 17-5. Nevertheless, we assume the 20% whole person impairment rating is based on Table 17-5. As noted in the Guides, "[e]xcept as otherwise noted, the percentages given in Table 17-5 are for full-time gait derangements of persons who are dependent on **assistive devices**." (emphasis in original). An assessment of a 20% whole person impairment pursuant to Table 17-5 "[r]equires routine use of [a] can, crutch, or long leg brace (knee-

ankle-foot orthosis [KAFO])." However, a review of Watkins' deposition and hearing testimony reveals no testimony regarding Watkins' use of an assistive device. Additionally, there is no recommendation of assistive devices within Dr. Looney's May 6, 2011, report.

Because it is not this Board's function to evaluate the evidence and determine which impairment rating is most appropriate, the ALJ must provide an explanation for his decision to rely on Dr. Looney's impairment rating given the lack of evidence regarding the need for an assistive device. While it appears Dr. Looney believed Watkins had a significant injury, he makes no reference to Watkins' need for an assistive device in walking. The ALJ may have inferred, because of Watkins' knee condition, Dr. Looney believed Watkins would need a cane, crutch, or brace. If that is the case, the ALJ must state the basis for his finding the assessment of 20% impairment by Dr. Looney pursuant to Table 17-5 of the AMA Guides is appropriate. The fact remains the record does not directly establish Watkins needs any type of assistive device in walking; thus, the ALJ must sufficiently inform the parties of the basis of his decision. *See* Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). We can only speculate the ALJ may have concluded Dr. Looney

believed Watkins would need a cane, crutch, or leg brace. However, we cannot engage in speculation. Based on the record, we are unable to determine why the ALJ determined the 20% impairment is appropriate. For this reason, the ALJ must provide more information.

Kobe is entitled to have its argument fully addressed by the ALJ. The ALJ has been presented with objections to Dr. Looney's 20% impairment rating through the opinions of Dr. Stanton, in Kobe's brief to the ALJ, and again in its petition for reconsideration. On remand, the ALJ must determine whether Dr. Looney correctly assessed a 20% impairment rating. This includes addressing with specificity Kobe's concerns with Dr. Looney's reliance upon Table 17-5 and, if applicable, Table 17-3 of the AMA Guides. Should the ALJ determine Dr. Looney's 20% impairment rating is inconsistent with the AMA Guides, it cannot be relied upon.

Accordingly, the ALJ’s determination Watkins has a 20% impairment and the award of PPD benefits based on the impairment rating as set forth in the March 1, 2012, opinion, award, and the March 26, 2012, order ruling on the petition for reconsideration are **VACATED** and this claim is **REMANDED** for additional findings consistent with the views set forth in this opinion.

ALL CONCUR.

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