Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 13, 2015

CLAIM NO. 201200140

KENTUCKY DEPARTMENT OF PARKS PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

WESLEY PERKINS
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART, & REMANDING

* * * * * *

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

ALVEY, Chairman. Kentucky Department of Parks ("KDP") seeks review of the Opinion, Order and Award rendered September 18, 2014 by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"), awarding Wesley Perkins ("Perkins") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by

the multipliers contained in KRS 342.730(1)(c)1 & 3, and medical benefits for neck, right shoulder and right upper extremity injuries stemming from a June 24, 2011 work incident. KDP also appeals from the October 21, 2014 order denying its petition for reconsideration.

On appeal, KDP argues the ALJ erred in assigning an impairment rating based upon a category assessed by a medical examiner. KDP next argues the ALJ erred in finding KRS 342.730(1)(c)1 & 3 applicable. KDP next argues the ALJ's finding of work-related cervical and shoulder injuries is not supported by substantial evidence. Regarding the ALJ's finding the cervical and shoulder injuries are work-related, and the multipliers contained in KRS 342.730(1)(c)1 & 3 are applicable, we affirm. Regarding the ALJ's award of benefits based upon a 15% impairment rating, we vacate and remand for additional findings.

Perkins filed a Form 101 on February 2, 2012 alleging he injured his neck, head, right arm, and back on June 24, 2011 while working for KDP. At all times relevant, Perkins has worked as a Maintenance Worker II for KDP. Perkins' employment history includes working as a manager of a special needs facility, security supervisor at a metal manufacturing facility, assistant in the foaling barn of a horse farm and as a state park maintenance worker.

Perkins testified by deposition on May 31, 2012 and at hearings held on June 28, 2012 and July 24, 2014. Perkins was born on March 21, 1960 and is a resident of Carroll County, Kentucky. He is a high school graduate and a certified swimming pool operator. He began working for KDP in 1995 as a Maintenance Worker II, which requires him to mow, clean, paint, and operate equipment. He stated prior to the accident he was required to move furniture, empty garbage cans, and lift over fifty pounds. He is now restricted from lifting over twenty-five pounds and cannot engage in overhead lifting, although he still has the same job classification. He is right hand dominant, but now primarily uses his left hand, and has some difficulty driving. He stated he has been a diabetic for several years, and has treated for cardiac problems.

On June 24, 2011, Perkins was operating a John Deere zero radius mower. He was mowing around a tree when a limb became entangled on the roll bar. When the limb released from the roll bar, it struck him in the back of the head causing him to lose consciousness. When he regained consciousness he was still on the mower, and his head was bleeding. He was taken to the emergency room at the Carroll County Hospital. The next day he saw a doctor and had some numbness between his shoulder blades and in his right

shoulder. He was primarily concerned with difficulties in both his vision and hearing which resolved shortly after the accident. In addition to the hearing loss, he experienced ringing in the ears, which has also resolved. However, the pain between his shoulders continued to worsen and he developed pain in his fingertips. He stated he treated with Oxycodone, then Lortab, neither of which helped. He was then placed on Gabapentin which provides some relief. He was referred to Dr. John Guarnaschelli, but had difficulty securing an appointment.

Perkins eventually saw Dr. Joseph Finizio who recommended a cervical fusion. However, this was not done because it was denied by the workers' compensation insurer, and he was not cleared for surgery by his cardiologist.

Perkins later developed a right hand tremor. He stated he has constant neck pain and problems in this right shoulder and right upper extremity. He also reported he has trouble gripping with his right hand, and has no fine motor skills. He denied experiencing any previous problems with his right hand or neck.

Subsequent to the June 2011 accident, Perkins missed six months of work and received TTD benefits. He returned to work in November 2011, to the same job classification, however he stated his restrictions have been

accommodated. He earns $11.60 per hour for a thirty-seven and a half hour work week. This is the same number of hours and pay rate he has had for a number of years. He plans to continue to work for KDP, but does not believe he will be able to do so indefinitely. He stated all employees have been advised KDP may eliminate full time jobs. He stated he is also concerned about his job security after a recent performance evaluation.

In support of his claim, Perkins filed the July 15, 2011 progress note of Dr. Mark Miller. Dr. Miller noted Perkins sustained a work-related concussion three weeks prior, and continued to complain of tinnitus and hazy vision. He noted the concussion had resolved.

Perkins filed records from Dr. Raj Kakarlapudi who diagnosed right arm radiculopathy. Dr. Kakarlapudi referred Perkins to Dr. Michael Greiwe.

Dr. Greiwe of Commonwealth Orthopaedics treated Perkins from September 2, 2011 through December 29, 2011. Dr. Greiwe treated Perkins for neck pain with right arm radiculopathy and numbness. He eventually referred Perkins to a neurologist.

Perkins filed the records of Dr. Sherrell Nunelly, many of which were handwritten and illegible. Those records reflect treatment administered for the neck, right upper

extremity and right hand from August 3, 2011 through September 21, 2011.

Perkins was evaluated by Dr. Warren Bilkey on May 22, 2012. Dr. Bilkey stated the history of injury consisted of Perkins being struck in the right side of the back of the head by a tree branch while mowing. He noted Perkins lost consciousness, later returned to work and had a gradual onset of neck pain radiating into the right upper extremity. Dr. Bilkey diagnosed a work injury contusion to Perkin's posterior neck and head, cervical strain and neuropathic pain in the right upper limb due to a work injury occurring on June 29, 2011. He noted Perkins has myofascial pain affecting the neck and scapular musculature. He stated Perkins' current complaints are due to his work-related injury. He stated Perkins had reached maximum medical improvement ("MMI"), and he assessed a 10% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He suggested Perkins avoid lifting over twenty pounds occasionally or ten pounds with the right upper extremity. He also recommended Perkins avoid overhead work and repetitive activities with the right upper extremity.

Perkins filed records from Dr. Finizio for treatment from March 30, 2013 through August 7, 2013. Dr. Finizio noted Perkins' complaints of neck pain radiating into the right hand. He diagnosed cervical stenosis. He stated Perkins could have physical therapy, epidural blocks or surgery. He ordered a full course of physical therapy. He ultimately ordered a diskectomy and fusion at C5-C6.

Dr. Guarnaschelli examined Perkins on June 4, 2014. Dr. Guarnaschelli noted the history of injury and treatment, including the surgery recommended by Dr. Finizio. He noted Perkins had not been cleared for surgery by his cardiologist. He stated without co-morbidities of the cardiac condition and diabetes, he would recommend surgery. However, he stated Perkins is a poor candidate for a cervical fusion, and he would not recommend it. He stated Perkins has not reached MMI. Dr. Guarnaschelli did not specifically provide a functional impairment rating, but stated Perkins met the criteria for a DRE category three at Table 15-5, Page 392 of the AMA Guides. He stated he would restrict Perkins to limited overhead work, limited bending, and no repetitive lifting over twenty-five pounds. He stated Perkins does not have the capacity to return to the job performed at the date of injury.

KDP filed records from CT & Open MRI of LaGrange and from the Carroll County Memorial Hospital. A cervical MRI from August 25, 2011 demonstrated no fracture, offset or disc herniation. A right shoulder MRI dated January 20, 2012 revealed severe degenerative arthritis in the AC joint with mild impingement, and moderate degenerative arthritis at the glenohumeral joint. X-rays taken June 30, 2011 showed mild chronic degenerative changes in the cervical spine. A CT-scan of the head taken June 29, 2011 was normal.

Dr. Ellen Ballard evaluated Perkins on May 14, 2012. She diagnosed a blow to the head with a concussion. She assessed a 3% impairment rating pursuant to the AMA Guides for headaches. She opined the neck and shoulder complaints were unrelated to the work injury. She assessed no restrictions, and stated Perkins does not need treatment or medications for his work injury. In a supplemental note dated June 19, 2012, Dr. Ballard stated she had reviewed Dr. Bilkey's report. She reiterated the shoulder problem is not work-related. She generally disagreed with Dr. Bilkey, and stated there is no evidence supporting the assessment of an impairment rating for the cervical condition.

KDP filed the report of Dr. Ronald Podoll dated November 23, 2013. Dr. Podoll stated physical therapy

ordered by Dr. Finizio for cervical stenosis is not related to the June 29, 2011 work accident.

KDP filed the August 28, 2013 utilization review report of Dr. Ronald Fadel. Dr. Fadel opined the surgery proposed by Dr. Finizio was not reasonable, necessary nor related to the June 2011 work event.

Dr. Henry Tutt examined Perkins on March 6, 2014 at KDP's request. He noted the history of accident, and opined Perkins had sustained a cerebral concussion, with fairly typical post-concussive syndromes which completely resolved. He stated there is no indication for an anterior diskectomy and fusion at C5-C6, especially due to the June 2011 work event. He stated Perkins was at MMI, and he assessed 0% impairment. He stated Perkins may have sustained a mild cerebral concussion which has resolved. He assessed no restrictions, and stated Perkins has the capacity to return to his work with the KDP. In an addendum dated March 20, 2014, Dr. Tutt stated he had reviewed the August 25, 2011 MRI which reinforced his previous opinion.

Multiple benefit review conferences ("BRC") were held. The claim was initially assigned to Hon. Edward D. Hays, Administrative Law Judge ("ALJ Hays"). ALJ Hays held a BRC on June 13, 2012. He noted the issues were benefits per KRS 342.730 (including multipliers); work-relatedness/

causation; injury as defined by the ACT; TTD (duration); and whether Perkins had reached MMI. A hearing was held on June 28, 2012.

On August 24, 2012, ALJ Hays rendered an Interlocutory Opinion, Award and Order. ALJ Hays noted Perkins had been prevented from being evaluated by Dr. Guarnaschelli. ALJ Hays placed the claim in abeyance, and ordered KDP to authorize a consultation with Dr. Guarnaschelli, to be followed by a reasonable treatment regimen. ALJ Hays further ordered KDP to pay TTD benefits if Perkins was taken off work by Dr. Guarnaschelli.

Dr. Guarnaschelli declined to see Perkins. Perkins then saw Dr. Finizio who recommended surgery. KDP filed a medical dispute and requested Dr. Finizio be joined as a party. ALJ Hays issued an order on May 13, 2013 joining Dr. Finizio as a party. In May 2013, KDP requested the ALJ order a university evaluation pursuant to KRS 342.315, which the ALJ overruled. On July 8, 2013, ALJ Hays determined Dr. Finizio was a reasonable substitute for Dr. Guarnaschelli, and he ordered KDP to pay for the recommended treatment.

On March 17, 2014, an order was entered reassigning the claim to the ALJ. A BRC was held on July 11, 2014. The issues preserved at the BRC included the same

as those listed at the previous BRC held June 13, 2012, in addition to unpaid or contested medical expenses, sanctions for failure to abide by the interlocutory order, and Perkins' capacity to return to work. At the hearing held August 14, 2014, the parties additionally listed as an issue the surgery recommended by Dr. Finizio, and preserved all issues decided by the interlocutory opinion.

The ALJ rendered a decision on September 18, 2014 awarding TTD benefits, PPD benefits based upon a 15% impairment rating with the application of multipliers pursuant to KRS 342.730(1)(c)1 & 3, and medical benefits. The ALJ denied Perkins' request for sanctions pursuant to KRS 342.310.

KDP filed a petition for reconsideration arguing the ALJ erred in her application of the test set forth in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). KDP argued to satisfy the third prong of the Fawbush analysis, the ALJ must satisfy the test set forth in Adkins v. Pike County Bd. Of Educ., 141 S.W.3d 387 (Ky. 2004), that is, whether Perkins will likely continue to work earning an equal or greater wage for the indefinite future.

On October 14, 2014, the ALJ entered an order denying the petition for reconsideration. The ALJ provided an analysis setting forth the requirements enunciated in

Adkins, supra. She additionally outlined the factors she considered in determining Perkins was entitled to have his award of PPD benefits enhanced by the multipliers provided in KRS 342.730(1)(c)1 & 3.

On appeal KDP argues the record does not support a finding of neck and right upper extremity injuries, the ALJ erred in basing Perkins' benefits on a 15% impairment rating attributed to Dr. Guarnaschelli, and erred in enhancing the PPD benefits pursuant to KRS 342.730 (1)(c) 1 & 3.

As the claimant in a workers' compensation proceeding, Perkins had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Perkins was successful in that 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). In that regard, the ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). 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).

With that standard in mind, we find the ALJ's determination Perkins sustained work-related injuries to his neck radiating into his right upper extremity on June 24, 2011 while mowing is supported by substantial evidence. Likewise, we find the ALJ performed the proper analysis pursuant to Fawbush, supra, and Adkins, supra. The ALJ provided the basis for her analysis, and in particular provided an appropriate basis for her determination Perkins will be unable to perform his job into the indefinite future. She specifically referenced Perkins' concerns regarding job elimination which had been communicated to him, and a recent job performance evaluation. This explanation, in addition to Perkins' concerns, sufficiently support the ALJ's determination regarding application of the multipliers, and her findings will not be disturbed.

That said, we note the ALJ based the award on a 15% impairment rating assessed by Dr. Guarnaschelli. However, Dr. Guarnaschelli did not assess a 15% impairment rating. He stated as follows:

> Although this patient is not a candidate for surgery due to his significant comorbidities, I believe that a category 3 DRE cervical, Table 15-5, p. 392, based on the definition of his significant signs of radiculopathy such as pain or sensory loss in a dermatomal distribution, although this has not been verified by electrical physiologic studies, there is evidence of a preexisting disk osteophyte formation that has been aggravated by that of a whiplash-related disorder and with intractable right arm pain.

A review of the table referenced by Dr. Guarnaschelli reveals the range of impairment for category III impairment is 15-18%. Certainly the finding of a 15% impairment rating, the lowest in the range of the category referenced by Dr. Guarnaschelli, may be appropriate; however, the ALJ must specifically make such finding, and provide her basis for doing so. Generally, the ALJ's authority to use the AMA Guides is limited to essentially mechanical applications. An ALJ is however authorized to use the combined values chart, *see* Thomas v. UPS, 58 S.W. 3d 455 (Ky. 2001); select an impairment rating within a class of impairment stated by a physician, *see* Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002); or use the AMA Guides in other instances where medical expertise is not required. It is presumed the ALJ, relying upon Dr. Guarnaschelli's opinion, assessed the lowest impairment

rating in the category; however, her opinion does not specifically reflect this was in fact done. On remand, the ALJ is directed to make a specific determination of the impairment rating, and provide the basis for her determination. We are prohibited from making a finding of fact and do not direct any particular result.

Accordingly, the decision rendered September 18, 2014 by Hon. Jeanie Owen Miller, Administrative Law Judge, and the order on reconsideration issued October 21, 2014 are hereby **AFFIRMED in PART, VACATED in PART, and REMANDED** for a decision consistent with the instructions set forth above.

ALL CONCUR.

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