OPINION ENTERED: July 5, 2013

CLAIM NO. 201299651

LOUISVILLE ORAL SURGERY PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

JOY BANDURSKE
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Louisville Oral Surgery ("LOS") appeals from the February 15, 2013 Opinion, Award and Order rendered by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), awarding Joy Bandurske ("Bandurske") permanent partial disability benefits and medical benefits due to a December 28, 2011 shoulder injury. LOS also appeals from the March

8, 2013 Order denying its Petition for Reconsideration. LOS argues the ALJ erred in finding Bandurske sustained a work-related injury to her shoulder. Because we hold the ALJ's finding is supported by substantial evidence, we affirm.

Bandurske testified by deposition on July 2, 2012, and at the hearing held December 17, 2012. She worked as an oral surgical assistant until December 28, 2011, when she tripped over a power cord and fell with her right arm extended while walking around a chair during an oral surgery.

Immediately after the incident, Bandurske was taken to Jewish Hospital in Louisville where x-rays were performed. She was given medications and referred to Dr. Thomas Loeb, an orthopedic surgeon. Dr. Loeb referred her to Dr. Amitava Gupta, a sports injury physician specializing in joints and related surgical procedures. Dr. Gupta diagnosed a right radial neck fracture and performed an open reduction internal fixation on January 3, 2012.

Bandurske testified she consistently reported problems with her right shoulder following the accident, including her first visit with Dr. Gupta. She also testified Dr. Gupta attempted to refer her to a shoulder specialist, but no appointment was available for several weeks. She planned to move to northern Kentucky which

interfered with scheduling an appointment. Bandurske testified LOS's denial of the compensability of the right shoulder condition prevented appropriate diagnostic testing.

After moving to northern Kentucky, Bandurske treated with Dr. James Plettner at Wellington Orthopedic & Sports Medicine Group of Cincinnati, Ohio. Bandurske reported to Dr. Plettner she had experienced problems with her right arm, wrist, and shoulder since the incident occurred and had consistently reported difficulties with her right shoulder. LOS denied compensability for an MRI ordered to determine whether a second surgery was indicated.

Bandurske continues to complain of pain in her right arm, severe swelling in her forearm, and pain, stiffness, and swelling in her right hand and wrist. Her right shoulder pain interferes with her sleep. She complains of reduced motion in her shoulder, pain in the entire shoulder area, and, at times, a tingling and burning sensation with numbness. She noted a direct relationship between her symptoms and the level of physical use of her right hand, arm, and shoulder.

Dr. Kris Abeln examined Bandurske on December 29, 2011. His notes reflect she complained of tingling and pain in her elbow, and was known to have an angulated right elbow

fracture. Open reduction internal fixation was discussed, and he referred her to an orthopedic surgeon.

Dr. Jerry W. Morris performed an independent medical evaluation ("IME") at Bandurske's request on June 6, 2012. Dr. Morris assessed a 21% permanent impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Morris, in the causation section of his report, noted as follows:

> Please note that she has had intermittent discomfort with strong motion with her right shoulder since the injury that have been recorded by her treating physicians, and that even though she did not complain specifically of the right shoulder today, it is common in this type injury to have collateral damage in the shoulder and neck, which can remain indolent for a considerable time. For this reason, I suggest the treating doctors consider extending their diagnostic evaluation to look for subtle damage in both the right shoulder and neck.

Dr. Morris reviewed the medical report of Dr. Richard DuBou, but did not change his opinions.

Dr. DuBou performed an IME at the request of LOS on September 30, 2012. Dr. DuBou found a normal range of motion of the right shoulder and wrist and noted Bandurske's grip strength easily exceeded that for an average woman of her age. He diagnosed fracture of the elbow and right

radial neck. He opined Bandurske would not require ongoing treatment, and he did not think the injury would impact her ability to function. Dr. DuBou assigned a 2% impairment rating pursuant to the AMA Guides for her decreased range of motion in the right elbow.

Dr. John J. Larkin performed an IME at the request of LOS on November 19, 2012. He assessed a 0% impairment rating for the right shoulder, right wrist, and right hand, but assigned a 1% impairment rating pursuant to the AMA Guides due to Bandurske's range of motion deficit in the right elbow. Dr. Larkin noted Bandurske has mild cubital tunnel syndrome, which would likely resolve with ongoing conservative treatment.

LOS submitted voluminous medical records from Dr. David Changaris documenting treatment for her lumbar, cervical, and shoulder pain following an April 30, 2004 motor vehicle accident. Dr. Changaris diagnosed cervicobrachial syndrome, shoulder pain and headaches.

In the February 15, 2013 Opinion, Award and Order, the ALJ found Bandurske sustained a permanent partial disability due to the work injury and retained a 21% impairment rating pursuant to the AMA Guides. The ALJ made the following findings relevant to the issue on appeal:

A dispute exists as to whether the Plaintiff complained of her right shoulder to Dr. Gupta. His records do not reflect a complaint having been made. However, the Plaintiff has testified that she complained of shoulder pain on her first visit to Dr. Gupta. She also testified that Dr. Gupta had tried to refer her to a shoulder specialist, but that no appointment time could be had for several weeks. She was already making plans to move to northern Kentucky and the move would interfere with scheduling an appointment. The Defendant points to other inconsistent testimony from the Plaintiff in which she denied Dr. Gupta's having referred her for treatment to her shoulder.

After examining the evidence, the ALJ finds that Plaintiff did complain of shoulder pain, that an effort was made to refer Plaintiff for treatment of the shoulder, but that the appointment was not made due to the Plaintiff's prior decision to move her place of residence.

. . . .

Finally, we come to the issue of the compensability of future medical treatment, particularly to the right shoulder. The ALJ finds the right shoulder injury to be work-related and accepts the Plaintiff's testimony as being credible and accurate. The ALJ finds that Claimant consistently complained of pain in the right shoulder, but adequate diagnostic testing and treatment of the right shoulder has not yet occurred. Pursuant to KRS 342.020, the Claimant is entitled to all reasonable and necessary medical treatment, including treatment to the right shoulder. The ALJ finds that the shoulder was injured at the time of the

> fall; however, it is important to note that none of the permanent impairment herein found is attributable to the shoulder condition.

LOS filed a petition for reconsideration regarding the compensability of the shoulder condition. In the March 8, 2013 order denying LOS's petition, the ALJ found as follows:

> The Defendant's petition goes far beyond the authority granted the ALJ under KRS 342.281. The petition seeks a wholesale change of the ALJ's opinion. The argument presented by the Defendant is the same argument raised and considered at the time the Opinion was rendered herein.
>
> It is worth mentioning that the 21% impairment rating was not based upon any impairment found in the right shoulder. The ALJ relied upon the Plaintiff's testimony as to her complaints of pain in the shoulder made early during her treatment. However, due to the Defendant's refusal to permit diagnostic testing of the shoulder, an impairment rating has not been assigned thereto. At the very least, the Claimant suffers a temporary or transitory injury to the right shoulder and she is entitled to appropriate diagnostic testing and medical treatment pursuant to KRS 342.020 and *Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993).* It is disingenuous of the Defendant to deny diagnostic treatment while complaining that an "injury," as defined by the statute, has not been proven.

On appeal, LOS argues the record does not contain substantial evidence supporting the finding of a work-related shoulder injury. LOS notes the first report of injury does not document a shoulder injury, nor is a shoulder injury documented in the treatment records of Jewish Hospital, Dr. Abeln, Dr. Gupta or Dr. Morris. LOS contends the only mention of shoulder complaints is contained in Dr. Plettner's November 12, 2012 office note for which he made no specific diagnosis or treatment recommendation. LOS notes Dr. Plettner found full range of motion and only mild discomfort. LOS notes Dr. DuBou and Dr. Larkin did not believe Bandurske sustained a shoulder injury. Finally, LOS notes Bandurske treated for shoulder complaints with Dr. Changaris from 2004 through 2008. LOS argues Bandurske's testimony, standing alone, is insufficient to prove the shoulder condition is work-related.

Since Bandurske, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has sole authority to determine the weight, credibility, substance and inferences

to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has discretion to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same parties' total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to merely show some evidence supports a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In light of a fall on her extended arm forceful enough to fracture her arm, at least a temporary injury to the shoulder is foreseeable. As noted by Dr. Morris, injury to the shoulder and neck are common in this type of fall. The ALJ acted well within his role as fact-finder in accepting Bandurske's testimony she had shoulder symptoms following the accident which she complained of to her treating physicians. Likewise, the ALJ was free to accept Bandurske's testimony concerning the continuing effects of the shoulder injury. It is noted Dr. Gupta performed surgery to repair the fracture and follow-up after the surgery, not to treat shoulder complaints. Although Bandurske treated for a cervical condition and shoulder pain

following the 2004 motor vehicle accident, LOS identifies no evidence treatment continued after 2008.

Dr. Morris' opinion and Bandurske's testimony are sufficient to establish the occurrence of a work-related shoulder injury. Although no impairment rating was established for the shoulder injury, Bandurske's testimony is sufficient to establish impairment and disability entitling her to medical benefits. The Kentucky Court of Appeals, in Combs v. Kentucky River District Health Dept., 194 S.W.3d 823 (Ky. App. 2006), recognized there may be instances when a workers' compensation claimant is entitled to an award of future medical benefits after reaching maximum medical improvement, even in the absence of a finding of a permanent disability and resulting permanent functional impairment rating. In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. There being substantial evidence supporting the ALJ's decision, we may not reverse.

Accordingly, the February 15, 2013 Opinion, Award and Order rendered by Hon. Edward D. Hays, Administrative

Law Judge, and the March 8, 2013 Order on Petition for Reconsideration are **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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