Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 10, 2016

CLAIM NO. 201358420

MANCHESTER MEMORIAL HOSPITAL PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

STEVE SMITH
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
VACATING IN PART
AND REMANDING
* * * * * *

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

RECHTER, Member. Manchester Memorial Hospital ("MMH") appeals from the September 28, 2015 Opinion, Award and Order and the October 29, 2015 Order on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). The ALJ determined Steve Smith ("Smith") suffered a work-related injury to his left upper extremity resulting in a 7% whole person impairment rating, and awarded

temporary total disability and permanent partial disability benefits. On appeal, MMH argues there is insufficient evidence to support the award of temporary total disability ("TTD") benefits or permanent partial disability benefits based on a 7% impairment rating. For the reasons explained in this opinion, we must remand this claim to the ALJ for further analysis of Smith's entitlement to TTD benefits.

Smith worked as a housekeeping aid and maintenance worker at MMH. At his deposition, he testified he injured his left shoulder on October 28, 2013 when he was moving a table. He experienced a pop in his shoulder. At the formal hearing, he testified he had finished moving the furniture and was taking the trash to the dumpster when he experienced the pop.

Over the next several days, Smith's pain worsened and he eventually visited the emergency room, where he was administered an injection. He was referred to Medical Associates of Southeast Kentucky and was seen by Karen Cheek, APRN, who noted limited range of left shoulder motion due to pain. Nurse Cheek prescribed medication and physical therapy. He returned to work at light duty, though he missed two weeks of work in December, 2013 due to the work-related injury. At a follow-up appointment on

January 21, 2014, he was examined for lumbago and a muscle strain. He was released to return to work without restrictions on January 25, 2014.

Smith eventually returned to full duty until August 20, 2014. On that day, he was throwing trash overhead and his left shoulder popped again, which sent a sharp, severe pain down his arm and through his back. Smith treated again at the emergency room, and followed up with Nurse Cheek. X-rays revealed reduced acromiohumeral space. Nurse Cheek restricted Smith to light duty work. An MR arthrogram was conducted on December 9, 2014 which was negative. The source of Smith's pain was not identified.

Dr. Jeffrey Uzzle conducted an independent medical examination ("IME") on August 3, 2014, before Smith's second injury. He reviewed medical records and conducted a physical examination. Smith reported pain and stiffness in his left shoulder. Dr. Uzzle noted mild tenderness and limitation in the left shoulder, and mildly positive left shoulder impingement signs. He diagnosed left shoulder impingement and rotator cuff tendonitis, which he attributed to the 2013 work-related injury. Referencing the American Medical Association, Guides to the

Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Uzzle assigned a 4% whole person impairment rating and recommended restrictions against lifting over 25 pounds with the left shoulder.

Dr. Phillip Corbett conducted an IME on August 7, 2014, also before Smith's second injury. Dr. Corbett noted x-rays of the left shoulder showed slight narrowing of the subacromial space with significant bilateral AC joint arthrosis. Physical examination was limited by Smith's pain, though Dr. Corbett noted a pop with range of motion testing. Dr. Corbett diagnosed possible glenoid labrum tear and AC arthrosis, and recommended an MR arthrogram for a more certain diagnosis.

On April 24, 2015, Dr. Corbett reviewed additional records, including the December 9, 2014 MR arthrogram. He found no evidence of a rotator cuff or labral tear. Rather, he believed Smith suffered from normal, age-related degenerative changes. He did not believe Smith sustained a work-related injury on October 28, 2013 or August 20, 2014.

Dr. Patrice Beliveau examined Smith on March 16, 2015. He reported pain in his left shoulder. Dr. Beliveau noted full active and passive range of motion in the left

arm, and tenderness to palpitation. Dr. Beliveau's review of x-rays showed no evidence of fracture or dislocation. She diagnosed left pectoralis strain.

Dr. Arthur Hughes conducted an IME on June 24, 2015. On physical examination, Smith exhibited limited range of left shoulder motion and normal upper extremity strength. He diagnosed left shoulder pain and limitation of motion, and believed the work-related injuries caused Smith's complaints. He assigned a 7% impairment rating pursuant to the AMA Guides. He did not believe Smith was at maximum medical improvement ("MMI"), but if he did not receive further treatment, he was at MMI. He restricted Smith from lifting with the left arm or performing above-shoulder work.

Relying on the opinions of Drs. Uzzle and Hughes, the ALJ determined Smith suffered a work-related injury. He relied on Dr. Hughes' opinion to award permanent partial disability benefits based on a 7% impairment rating. The ALJ awarded TTD benefits from October 29, 2013 through March 16, 2015, the date at which Dr. Beliveau placed Smith at MMI. He also determined Smith was working light duty during this period.

MMH petitioned for reconsideration, raising the same arguments it makes herein. The petition was denied. On appeal, MMH argues Smith was not entitled to TTD benefits from October 29, 2013 through December 2, 2013 because he was working full duty. It also challenges the award of benefits from December 16, 2013 through January 24, 2014 when Smith was working light duty. Finally, MMH asserts Smith was again working full duty from January 26, 2014 through August 20, 2014, and therefore was not entitled to TTD benefits.

Until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court further explained that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." To be entitled to receive TTD, an injured worker must prove both that he is unable to return to his customary, pre-injury employment and that he has not reached MMI from his work-related injury.

The ALJ rendered his decision prior to the Kentucky Supreme Court's recent decision in Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). In Tipton, the Court clarified when TTD is appropriate in cases where the employee returns to modified duty:

> As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." Central Kentucky Steel v. Wise, 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.

Though MMH has only argued on appeal that the award of TTD benefits is not based on substantial evidence, we believe the more prudent resolution is to remand this claim for additional findings of fact. The ALJ is requested to examine Smith's entitlement to TTD benefits during his periods of light duty work, employing the analysis set forth in Tipton. This analysis includes a comparison of Smith's pre-injury duties and his light duty work, and whether his light duty work constitutes customary work; that is, work within his physical restrictions and for which he has the experience, training, and education.

MMH also argues the ALJ erred in relying upon Dr. Hughes' impairment rating. It argues the ALJ improperly ignored the diagnostic MR arthrogram and the opinions of Drs. Beliveau and Corbett. Though the ALJ acknowledged and summarized the MR arthrogram results, MMH asserts he was obligated to more thoroughly discuss how the study impacted his final conclusion.

As the 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 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 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). In order to reverse the decision of the ALJ, 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).

Dr. Hughes' opinion constitutes substantial evidence upon which the ALJ was free to rely. Dr. Hughes reviewed the MR arthrogram and noted the negative results

in his report. Relying on his physical examination, he reached the conclusion Smith suffered a work-related injury resulting in a 7% impairment rating. He cited the sections of the AMA Guides which he referenced in reaching his conclusion. The ALJ was entitled to rely upon this evidence, and this Board is without authority to re-weigh the proof to reach a contrary result.

For the foregoing reasons, the September 28, 2015 Opinion, Award and Order and the October 29, 2015 Order on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, is hereby **AFFIRMED IN PART, VACATED IN PART, and REMANDED**. The award of temporary total disability benefits is vacated and this claim is remanded for further findings of fact consistent with this opinion.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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