OPINION ENTERED: October 5, 2012

CLAIM NO. 200977450

MICHAEL GOODE PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

SCOTT-GROSS CO. INC.
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Michael Goode ("Goode") seeks review of the April 23, 2012, opinion, order, and award of Hon. R. Scott Borders, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits as a result of an injury occurring on September 21, 2009, while in the employ of Scott-Gross Co. Inc. ("Scott-

Gross”). Goode also appeals from the May 10, 2012, order overruling his petition for reconsideration.

Goode’s Form 101 alleges he was injured on September 21, 2009, as a result of a motor vehicle accident (“MVA”) occurring while in the scope and course of his employment with Scott-Gross. Goode’s Form 101 alleges as a result of the MVA he developed headaches and injured his left shoulder and foot.

The sole issue on appeal relates to the ALJ’s determination Goode was not entitled to enhanced benefits pursuant to KRS 342.730(1)(c)1. Goode testified at his June 10, 2011, deposition and at the February 21, 2012, hearing. Goode testified that before the MVA, his job title changed and as a result he was involved more in product development and sales.[1] He explained his job involved traveling and visiting clients and increased lifting. His territory ranged from Florida to Maine and he had between 400 and 600 clients.

Goode’s immediate supervisor was Thomas Thorburn (“Thorburn”).[2] He testified he puts together a weekly schedule so his supervisor is aware of his work schedule

[1] Testimony revealed Scott-Gross is a medical and industrial gas distributor that distributes propane, oxygen, acetylene, and helium.
[2] In his deposition, Goode identified his supervisor as Tom Thornbird.

throughout the week. Goode was to file a follow-up report after he completed his "missions." He used the laptop computer Scott-Gross provided to prepare those reports. Goode did not remember all of the locations he visited on the date of the injury. He knows he went to Morehead and visited a customer and was on his way back to the office when he was involved in the MVA. Goode testified while driving in rain on I-64 his vehicle began to hydroplane. As a result, the back of Goode's vehicle hit the wall separating the east and west bound lanes of I-64. He declined medical treatment.

Goode testified as a result of the MVA he later developed problems with his left shoulder, left foot, and severe headaches. He wears orthotic shoes because he has problems walking. He takes Tramadol and Robaxin prescribed by Dr. Kibler. Goode also has hip pain which he surmised may be due to the change in his gait. Goode testified he does not believe he can do his pre-injury job because he cannot lift and move the cylinders.[3] He would also have trouble traveling because of the medication he takes. Goode testified his pre-injury job required him to spend quite a bit of time in the warehouse meeting with different

[3] The cylinders contain the gases Scott-Gross sells.

company representatives and discussing ideas for “packaging and that kind of thing.” He also spends time traveling seeing clients. Goode testified his job includes lifting cylinders some of which weighed in excess of 200 pounds. He also did a lot of bending and twisting. He performed these tasks at the warehouse and at customer’s businesses. Because of his restrictions and limitations, Goode believes he cannot return to his pre-injury work activities.

After determining Goode’s injuries were work-related, the ALJ defined the injured body parts stating:

> The next issue for determination is what specific body parts were injured as a result of the motor vehicle accident. Mr. Goode he [sic] claims that as a result of the accident he suffered injury [sic] consisting of post concussive syndrome, a cervical strain, an injury to his left shoulder, and an injury to his left foot. He supports his position with medical evidence from Dr. Bilkey, who so opines, Dr. Harrod, Dr. Scott, and Dr. Kibler.
>
> The Defendant Employer, Scott Gross Company argues that Mr. Goode has only proven that he suffered work-related injuries to his left shoulder and that his other injuries consisting of injuries to his left foot, cervical spine, and post concussive syndrome, have all resolved. They support this argument with testimony from Dr. Primm and Dr. Corbett.
>
> In the specific instance, the Administrative Law Judge finds persuasive and relies upon the testimony

> of Dr. Bilkey, who opined that as a result of the motor vehicle accident that Mr. Goode suffered post concussive headaches; whiplash injury to his cervical strain, left shoulder strain, labrum tear, adhesive capsulitis, and left foot contusion/strain injury involving the lisfranc joint complex. The Administrative Law Judge did not find persuasive the opinions of Dr. Corbett and Dr. Primm.

The ALJ also determined the medical benefits to which Goode was entitled and there was no pre-existing impairment. Concerning the extent of Goode's permanent impairment, the ALJ determined as follows:

> The last issue for determination is entitlement to benefits per KRS 342.730. In this regard there have been three physicians who testified in this claim and have assessed functional impairment ratings. Dr. Corbett, who evaluated Mr. Goode at the request of the Defendant Employer assesses him [sic] a 5% functional impairment rating for his cervical spine condition that he felt was pre-existing and active. He assesses him [sic] a 5% functional impairment rating for his left shoulder condition attributable to the September 2009 motor vehicle accident and assesses him [sic] a 0% functional impairment rating for his left foot condition, all in accordance with the Fifth Edition of the AMA Guides. Dr. Primm, who evaluated Mr. Goode at the request of the Employer, assesses him [sic] a 3% functional impairment rating for his left shoulder condition and 0% functional impairment ratings for his post concussive syndrome, cervical spine condition, and left foot injury, all in accordance with the Fifth Edition of the AMA Guides. Dr.

> Bilkey who evaluated Mr. Goode at his request, assesses him [sic] a 5% functional impairment rating for his left shoulder condition, a 5% functional impairment rating for his cervical spine condition, 3% functional impairment rating for his chronic headaches, and a 2% functional impairment rating for his left foot injury for combined 15% functional impairment rating pursuant to the Fifth Edition of the AMA Guides.

Relying upon Dr. Daniel Primm's opinions and Thorburn's testimony, the ALJ concluded Goode was not entitled to enhanced benefits pursuant to KRS 342.730(1)(c)1 finding as follows:

> In addition, the Administrative Law Judge finds persuasive the opinion of Dr. Primm and finds that Mr. Goode does retain the physical capacity to return to the type of work he was performing at the time of his injury, which consisted of primarily making sales calls, which according to his supervisor the main physical requirement for performing his job is the ability to drive. Therefore, Mr. Goode, shall not be entitled to application of the three-time [sic] statutory multiplier pursuant to KRS 342.730 (1)(c)(1).

Goode filed a petition for reconsideration asserting the ALJ committed patent error by not awarding the three multiplier. He maintained the ALJ's analysis was very limited and did not provide sufficient basis for meaningful appellate review and requested additional findings and analysis. Goode asserted the ALJ erred by

relying upon the opinion of one medical specialist in determining the extent of his injuries and the opinion of another medical specialist in determining his restrictions. Goode asserted that to be consistent, the ALJ should have adopted Dr. Warren Bilkey's opinion that he is "medically disqualified from returning to his pre-injury work activities." He argued even if Goode's primary job duties consisted only of making customer calls and driving, driving "would not be presently permitted based upon his current levels of medications and continuing pain management." Goode pointed out Thorburn acknowledged Dr. Bilkey's restriction disqualified him from performing his pre-injury work duties in sales and product development.

Finding Goode's petition was a re-argument of the merits of the claim, the ALJ overruled Goode's petition for reconsideration.

On appeal, Goode asserts "consistency and logic should require findings by the ALJ of the same medical specialist for the extent of injury and restrictions." After relying upon the opinions of Dr. Bilkey in determining he had a 15% impairment, Goode argues the ALJ erred in rejecting Dr. Bilkey's restrictions and in relying upon Dr. Primm's restrictions in determining he was not entitled to enhanced benefits. Goode argues "Dr. Primm did

not address all of the 'injuries' and/or consider the extent of the restrictions/limitations for all his 'injuries'."

As argued in his petition for reconsideration, Goode asserts even though the ALJ found his primary job duties were making customer calls and driving, he is unable to drive because of his current level of medication and continuing pain management. Goode argues Dr. Bilkey's restrictions disqualify him from returning to work as a salesman. Goode asserts Thorburn's testimony establishes Goode's restrictions physically disqualify him from performing his pre-injury work duties in sales and product development. Goode posits regardless of whether he lifts or rolls the canisters, his work activities as a salesman require some physical abilities. In addition, because the ALJ's findings do not permit meaningful review, Goode requests the matter be reversed and remanded for additional findings and analysis regarding the three multiplier.

As the claimant in a workers' compensation proceeding, Goode had the burden of proving each of the essential elements of his cause of action, including enhancement of his benefits pursuant to KRS 342.730(1)(c)1. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Goode was unsuccessful in proving entitlement to enhanced

benefits, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ 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).

As 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 that would have supported a different outcome than

that 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). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Thorburn, Goode's supervisor, testified at a June 27, 2011, deposition and at the hearing. At the time of the injury, Thorburn was the director of marketing and Goode's direct supervisor. He testified that in August 2009, Goode's job duties changed to selling and distributing products. Goode had a short-term goal of seeing all Scott-Gross' products within the eastern region which extended from Florida to Maine. Scott-Gross wanted to know if its customers were happy with its program and if the program could be enhanced. Thorburn testified Goode was to call on "existing customers" and needed "to have six or seven quality calls a day."

At the time of Goode's injury he had just started his visits which had not extended beyond Kentucky. Goode was required to prepare and submit three reports. The first report consisted of a three to four week plan setting out where Goode would be traveling including the customers he would see. The second report would reflect "who [he] actually saw" and the third report would discuss who he "made cold calls to and try to develop new business." Goode was to spend time on the road making sales calls and developing accounts. He was not delivering goods.

Thorburn testified Goode's job involved minimal physical work and did not include lifting cylinders. He testified Goode's job was a sales position which involved no moving or transporting. He stated no one in the company is required to lift 200 pounds and Goode has no responsibility to "go out and move things." Thorburn did not believe there was enough time for Goode to "start adjusting shelves or do anything like that." Thorburn acknowledged a restriction of performing only sedentary work would disqualify Goode from performing sales activities; however, he believed if Goode was limited to occasional lifting of fifteen pounds he could perform a sales job. Thorburn testified Goode's job did not involve any lifting activities.

Thorburn's testimony constitutes substantial evidence supporting the ALJ's determination that the "main physical requirement" of Goode's job involved the ability to drive.

Consequently, Thorburn's testimony in conjunction with Dr. Primm's opinions constitute substantial evidence supporting the ALJ's determination Goode retains "the physical capacity to return to the type of work he was performing at the time of the injury."

In his September 28, 2010, report, generated as a result of conducting an independent medical evaluation ("IME"), concerning Goode's ability to return to work, permanent restrictions, and continued need to take medication, Dr. Primm stated as follows:

> **Q5. With regards [sic] to his work-related diagnosis(es), can Mr. Goode be released to return to work?**
>
> A5. At this point, however, I do feel that he can be released back to his work.
>
> **Q6. If he is released to return to work, are there any permanent restrictions for his work-related diagnosis(es)? If so, please list the permanent restrictions.**
>
> A6. The only restriction I would recommend would be regarding his left arm. I would recommend that he not lift more than 10-15 pounds on a frequent regular basis with that arm

> and also that he not be required to perform above-shoulder or overhead lifting restrictions, but at least at this point in time, based on his subjective symptoms and exam, I would recommend those restrictions.
>
> **Q7. Please provide your recommended treatment for the work-related diagnosis(es) and any additional comments would be appreciated.**
>
> A7. I do not feel he needs any further formal treatment or prescription medication. I am concerned that he is still taking OxyContin as well as oxycodone for his headaches. I would recommend that he be tapered off any narcotic pain medications. The only other recommendation I would have would be to encourage him to work harder on range of motion and strengthening exercises for the left shoulder.

In his July 29, 2011, report, generated after conducting another examination of Goode, with respect to Goode's work restrictions, ability to perform the work he was performing at the time of the injury, and continued need for medication, Dr. Primm stated as follows:

> **What permanent work restrictions would be reasonable, necessary, and causally related to the work injury?**
>
> At this point in time, the only work restriction I recommend is simply that he not be required to lift and reach above shoulder level with his left arm. However, I really cannot say with certainty in terms of medical probability based on the objective findings that this should, or will be, a permanent restriction.

> **Is Mr. Goode physically capable of performing the type of work that was performed at the time of the work injury?**
>
> I do feel he is physically capable of performing the type of work that he performed at the time of his work injury.
>
> **What future medical treatment would be reasonable, necessary, and causally related to the work injury?**
>
> At this point in time, I really do not feel that any additional medical treatment, further diagnostic testing, or medication is reasonable or necessary or causally related to his original work injury.

Contrary to Goode's assertions, Dr. Primm's opinions constitute substantial evidence upon which the ALJ was free to rely in determining Goode retains the capacity to return to the work he performed at the time of the injury.

In the case *sub judice*, relying upon Thorburn's testimony, the ALJ determined the nature of the work Goode was performing at the time of the injury. After determining the nature of the work Goode was performing at the time of the injury, the ALJ relied upon the opinions of Dr. Primm in determining Goode retains the physical capacity to return to the type of work he was performing at the time of the injury. Dr. Bilkey's opinions could have

been relied upon by the ALJ to support a different outcome in Goode's favor. However, in light of the remaining record the views articulated by Dr. Bilkey represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). As previously stated, where the evidence with regard to an issue is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Furthermore, the ALJ may rely upon Dr. Bilkey's opinions in determining the nature and extent of Goode's physical injuries and his impairment rating, but reject his opinions in determining the physical restrictions caused by the work-related injuries. Likewise, even though he rejected Dr. Primm's opinions regarding the nature and extent of the injuries and the impairment rating, the ALJ may rely upon Dr. Primm's opinions in determining Goode retains the physical capacity to return to the work he was performing at the time of the injury.

Although Goode argues his ability to drive is impaired because of his medication, in his July 29, 2011, report Dr. Primm expressed the opinion Goode no longer needs medication.

Dr. Bilkey's physical restrictions do not unequivocally endorse Goode's position he does not retain the physical capacity to return to the type of work performed at the time of injury. Dr. Bilkey stated, in relevant part, as follows:

> According to the job description provided, these restrictions did not interfere with return to the usual work duties carried out prior to the 9/21/09 work injury. With respect to the medical history, given that Mr. Goode states that he has to lift gas canisters that weigh up to 200 lbs, in my opinion he is not capable of returning to the full scope of work activities that he successfully carried out prior to the 9/21/09 work injury.

As long as Goode refrained from lifting gas canisters, Dr. Bilkey clearly believed he could return to the work duties performed at the time of the injury.

Because the decision of the ALJ not to enhance Goode's PPD benefits by the three multiplier is supported by the testimony of Thorburn and Dr. Primm's opinions, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

Further, remand for additional findings of fact is unnecessary because the ALJ sufficiently stated his reasons for determining KRS 342.730(1)(c)1 was not applicable. The ALJ cited to Thorburn's testimony in

determining the physical requirements of Goode's job and Dr. Primm's opinions in determining Goode retains the physical capacity to return to the type of work he was performing at the time of his injury as explained by Thorburn.

Accordingly, the April 23, 2012, opinion, order, and award and the May 10, 2012, order overruling Goode's petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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