OPINION ENTERED: April 5, 2013

CLAIM NO. 201085340

NATIONAL TOBACCO PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

UNITA DUNBAR
and HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. National Tobacco seeks review of the opinion rendered November 15, 2012 by Hon. Stephen G. Bolton, Administrative Law Judge ("ALJ") awarding Unita Dunbar ("Dunbar") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the 3.2 multiplier pursuant to KRS

342.730(1)(c)1, medical benefits and vocational rehabilitation benefits. It also seeks review of the December 27, 2012 order denying, in part, its petition for reconsideration.

The sole issue on appeal is whether the ALJ erred in relying upon Dr. Jules Barefoot's report which National Tobacco argues does not constitute substantial evidence because his assessment of impairment does not comply with the American Medical Association, Guides to Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides"). We disagree and affirm.

Dunbar filed a Form 101 on April 30, 2012 alleging she injured her left knee on May 7, 2010 when she "lost balance on ladder and came down on my left knee and it popped." In support of the Form 101, Dunbar attached the June 14, 2010 record from BaptistWorx indicating she began complaining of left knee pain six weeks previously when she fell off a ladder at work. At BaptistWorx, she was diagnosed with left knee strain, physical therapy was ordered, a knee sleeve was prescribed and she was allowed to return to restricted work. Dunbar also attached the report of an October 27, 2010 left knee MRI ordered by Dr. Paul McKee demonstrating early medial compartment arthrosis with joint space narrowing and a two to three millimeter focus of

developing high grade chondromalacia in the central weight-bearing aspect of the medial femoral condyle, as well as prepatellar edema.

National Tobacco filed a special answer and a Form 111 on June 29, 2012 asserting, in part, the claim was barred due to horseplay engaged in by Dunbar. The September 4, 2012 Benefit Review Conference order identified the following issues: horseplay, benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, credit, exclusion for pre-existing disability, TTD, and vocational rehabilitation.

Dunbar testified by deposition on June 28, 2012 and at the hearing held September 17, 2012. Dunbar was born on May 15, 1957, and is a resident of Louisville, Kentucky. She graduated from high school and received a certification in early childhood development. Her work history primarily includes working with children at several day care centers. She began working for National Tobacco in April 1997. From 1997 through 2010 Dunbar worked as a machine operator cleaner. Dunbar testified she was then transferred to a can line operator, the position she held at the time of the May 7, 2010 incident. As a can line operator, she watched over the line to check for defective products, lifted fifty pound

boxes and loaded them onto pallets. When the line was shut down, Dunbar cleaned or worked another line. Dunbar testified at the time of her injury, she worked eight hours a day, five days a week, earning $16.42 per hour. Dunbar testified she did not return to work for National Tobacco following the May 7, 2010 incident, but was still considered an employee through September 2010, when the facility closed. Dunbar testified she received unemployment benefits from October 2010 through April 2012 and has not worked since the May 7, 2010 incident.

Dunbar testified on May 7, 2010, she was standing on a three or four step ladder cleaning tobacco out of a machine with a pitchfork. As she was descending the ladder while holding the pitchfork with both hands, she lost her balance. As a result, she felt her knee pop when her foot landed on the floor and the pitchfork fell from her hands. Dunbar testified she notified her supervisor of the incident. On cross-examination, Dunbar admitted she was subsequently suspended from work. Dunbar denied her supervisor's allegation she intentionally threw the pitchfork at another person.

Despite continuous left knee pain, Dunbar testified due to her lack of income she did not seek treatment until June 14, 2010. She initially treated at

BaptistWorx where she was prescribed a knee brace and sent to physical therapy. After completing three sessions of physical therapy, Dunbar treated with Dr. McKee on October 21, 2010, who ordered a left knee MRI and prescribed a topical gel. Dunbar testified he also recommended injection therapy but she has been unable to return to Dr. McKee or any other physician due to her financial circumstances.

Dunbar denies having left knee problems prior to the May 7, 2010 incident. Dunbar testified she currently experiences constant left knee pain radiating into her left hip. Dunbar testified she takes Tylenol, continues to use the knee brace, and applies the topical gel. Dunbar does not use a cane since she cannot afford one. Dunbar testified in her current condition, she cannot return to the position she held at National Tobacco at the time of the work injury.

Dunbar submitted Dr. Barefoot's June 21, 2012 report. He noted Dunbar felt a sudden left knee pain and a pop in May 2010 when she stepped from a ladder. Since the event, Dunbar has complained of ongoing left knee pain, popping and intermittent swelling. Upon physical examination, Dr. Barefoot noted significant crepitation and moderate effusion in the left knee. He also noted Dunbar had a loss of left knee mobility, was poorly able to squat

and her gait was antalgic. He also observed Dunbar was able to ambulate without the use of an assistive device.

Dr. Barefoot diagnosed degenerative joint disease in Dunbar's left knee. Pursuant to the AMA Guides, Dr. Barefoot assigned a 7% impairment rating on the basis of gait derangement, explaining as follows:

> From page #537 of the guides, table 17-10, knee impairments, flexion of less than 110 degrees equals a 4% whole-person impairment.
>
> From page #544 of the guides, table 17-31, arthritis impairments, Ms. Dunbar will be given a 3% impairment.
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> From page #529 of the guides, table 17-5, lower limb impairments due to gait derangement, Ms. Dunbar would be placed in a mild category in that she was noted to have antalgic limp with a shortened stance phase and documented moderate arthritic changes in her knee. She would be assigned a 7% whole-person impairment.
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> As noted on page #529, 'the lower limb impairment percent shown in table 17-5 stands alone and are not combined with any other impairment evaluation methods.'
>
> Also noted on page #529, 'the gait derangements result in a higher rating according to table 17-5 and the higher rating should be used when seen to more accurately represent the clinical situation.'

Dr. Barefoot stated the entirety of the 7% impairment is attributable to the May 2010 workplace injury. Although Dr.

Barefoot noted Dunbar appears to have reached maximum medical improvement ("MMI"), he also opined she would require ongoing medical treatment for her left knee condition. Dr. Barefoot opined Dunbar is unable to return to her previous position at National Tobacco and restricted her from several activities.

National Tobacco submitted the August 28, 2012 report of Dr. Thomas Loeb, who noted Dunbar reported her left knee popped and swelled following a fall from a ladder at work on May 7, 2010. Dunbar complained of pain, stiffness and grinding in her left knee and mild soreness and swelling in her right knee. Dr. Loeb noted Dunbar displayed symptom magnification, had a positive Waddell test and her physical examination was otherwise normal. He also noted Dunbar's gait pattern was normal and she was not using an assistive device.

Dr. Loeb opined the May 7, 2010 work incident caused a mild soft tissue strain or sprain of the left knee which resolved within two to four weeks. He further opined her current complaints are from medial compartment arthrosis of the left knee which pre-existed and was not caused or aggravated by her work injury. Dr. Loeb opined Dunbar reached MMI three to six weeks after the May 7, 2010 work incident, and she had a 0% impairment rating pursuant to the

AMA Guides. He further stated any future progressive degenerative changes in the medial compartment severe enough to cause an impairment rating would be entirely due to the pre-existing disease process. Dr. Loeb restricted Dunbar from repetitive climbing or stooping, and found she could return to her former occupation with National Tobacco. He also stated any further medical treatment would be based upon the pre-existing disease process for which he recommended anti-inflammatories, bracing, injections and possible arthroplasty. Dr. Loeb disagreed with Dr. Barefoot's impairment rating. When asked to comment on Dr. Barefoot's 7% impairment rating pursuant to Table 17-5, Lower Limb Impairments Due to Gait Derangement, Dr. Loeb stated "I did not appreciate any gait derangement and the patient is not using any assisted device. Therefore use of this section of the Guides in my opinion is not medically appropriate."

In his decision rendered November 15, 2012, the ALJ found Dunbar sustained a work-related injury on May 7, 2010 while in the employ of National Tobacco by relying upon Dunbar's own testimony, the records of BaptistWorx, Dr. McKee's records, and Dr. Barefoot's opinion. The ALJ rejected National Tobacco's affirmative defense of horseplay, noting no evidence of horseplay or violation of

its rules was presented. The ALJ also found no pre-existing active disability/impairment existed at the time of the May 7, 2010 incident. The ALJ provided the following analysis regarding the extent and duration of Dunbar's work-related left knee injury:

> As to the extent and duration of the work-related injury, the ALJ relies upon the IME and medical opinion of Dr. Jules Barefoot, who assigns a permanent whole body impairment of 7% to the Claimant pursuant to the *AMA Guidelines to the Evaluation of Permanent Impairment, 5th ed.* The ALJ further finds that the Plaintiff does not retain the physical capacity to perform the type of work performed on the date of injury and is therefore entitled a statutory modification by a 3.2 (age) factor.

The ALJ made the following findings of facts and conclusions of law regarding work-relatedness, causation, injury and extent and duration:

> 1. As to the issue of work-relatedness, causation or injury as defined by the Act, the Plaintiff's own testimony, Dr. McKee's records and BaptistWorx records supplemented by the opinion of Dr. Barefoot support a finding that Claimant had a work-related event. As argued by the Plaintiff, even Dr. Loeb stated she had a work-related injury, he just differed as to the extent of the injury. The ALJ finds that the Claimant suffered a work-related injury on May 7, 2010 while in the employ of the Defendant/Employer.
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> 2. As a result of her July 22, 2010 work-related injury, the Plaintiff has a whole person impairment rating of 7%

> according to the *AMA Guides, 5th ed.* In making this finding, I have relied upon the opinion of Dr. Jules Barefoot which, concerning Plaintiff's functional impairment rating as a result of the subject injury, I find to be the most credible and convincing evidence in the record.
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> 3. As opined by Dr. Barefoot, the Plaintiff does not retain the physical capacity to return to the type of work performed at the time of the injury. Further, it is undisputed that the Plaintiff is not currently working and therefore is earning less than she earned at the time of her work injury. She is also 55 years of age. The Plaintiff is therefore entitled to the statutory enhancement of a 3.2 multiplier pursuant to KRS 342.730 (1) (c) 1.
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> 4. Plaintiff is thus entitled to a weekly benefit calculated at $656.80 x 66 2/3% X 7% x 0.85 (grid factor, KRS 342.730 (1) (b) x 3.2 (multiplier) = $83.29 per week.

The ALJ found Dunbar reached MMI on November 20, 2010 and awarded TTD benefits from May 8, 2010 through November 4, 2010 at a rate of $437.87 per week for a total of 25.86 weeks. However, in the "Award & Order" section, the ALJ awarded Dunbar TTD benefits from February 4, 2010 through November 20, 2010. The ALJ found National Tobacco was entitled to a credit for unemployment benefits paid during any period TTD benefits were paid. The ALJ awarded medical and vocational rehabilitation benefits.

Dunbar filed a petition for reconsideration asserting there was a typographical error regarding the correct period of TTD benefits awarded. She also argued National Tobacco should only be allowed credit for the net amount paid in unemployment benefits rather than the gross amount.

National Tobacco filed a petition for reconsideration asserting several typographical errors in the ALJ's decision including the correct TTD period. It also raises the same argument on appeal regarding the ALJ's reliance upon Dr. Barefoot's assessment of an impairment rating.

In the order on reconsideration dated December 10, 2012, the ALJ corrected the award of TTD benefits to the extent the period ran from May 8, 2010 through November 4, 2010. He denied her petition regarding the credit issue.

In the order on National Tobacco's petition for reconsideration dated December 27, 2012, the ALJ corrected two typographical errors appearing in the November 15, 2012 decision. The ALJ denied National Tobacco's petition regarding Dr. Barefoot's impairment rating stating, "As to Defendant's argument concerning the use of Dr. Barefoot's

medical assessment, it does not seem to demonstrate that the same was patently erroneous."

On appeal, National Tobacco argues the ALJ erred, both in law and fact, in awarding PPD benefits based upon Dr. Barefoot's 7% impairment rating since it does not comply with the AMA Guides. It quotes the following sections from page 529 of the AMA Guides:

> The percentages given in Table 17-5 are for full-time gait derangements of persons who are dependent on assistive devices' and 'whenever possible, the evaluator should use a more specific method. When the gait method is used, a written rationale should be included in the report.

Based upon the above language, National Tobacco argues Dr. Barefoot's impairment rating is not compliant with the AMA Guides since Dunbar does not use an assistive device, a fact specifically noted in his June 21, 2012 medical report. Therefore, Dr. Barefoot's opinion cannot constitute substantial evidence pursuant to Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). National Tobacco also asserts Dr. Loeb is more qualified to address Dunbar's impairment given his expertise in orthopedic surgery. Likewise, he reviewed all relevant medical records, followed the mandates of the AMA Guides, and expressed his disagreement with Dr. Barefoot's

assessment of an impairment rating in his August 28, 2012 report.

As the claimant in a workers' compensation proceeding, Dunbar had the burden of proving each of the essential elements of her cause of action, including extent of injury. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Dunbar was successful in that burden, the question on appeal is whether there is 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). An 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). An 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). 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).

Contrary to National Tobacco's argument, the ALJ acted well within his authority in determining Dunbar sustained a 7% impairment based upon the June 21, 2012 opinion of Dr. Barefoot. In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court instructed the proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. *See also* KRS 342.0011(11)(a), (35) and (36); and KRS 342.730(1)(b). For that reason, an ALJ is not authorized to arrive at an impairment rating by independently interpreting the AMA Guides. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Rather, the proper interpretation of the AMA Guides and assessment of an impairment rating pursuant to the AMA Guides are medical questions reserved only to medical witnesses. Kentucky River Enterprises v. Elkins, supra. Lanter v. Kentucky State Police, 171 S.W.3d 45, 52 (Ky. 2005). Therefore, while an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be accorded an expert's impairment assessment, as finder of fact, he is never required to do so. George Humfleet, supra. Moreover, authority to select an impairment rating assigned by an expert medical witness rests with the ALJ.

See KRS 342.0011 (35) and (36); Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

In the case *sub judice*, two physicians provided opinions regarding the issue of permanent impairment, Dr. Barefoot and Dr. Loeb. Dr. Barefoot provided three possible impairments for Dunbar's knee condition: a 4% impairment based upon flexion, 3% based upon arthritis and 7% based upon gait derangement. For each impairment rating, Dr. Barefoot cited to the page number and/or tables in the AMA Guides upon which he relied. In ultimately assigning the 7% impairment rating, Dr. Barefoot explained the basis for his determination as previously outlined.

On the other hand, Dr. Loeb opined the work incident caused a left knee soft tissue strain or sprain, which resolved within two to four weeks of the incident, and assigned a 0% impairment rating pursuant to the AMA Guides. He also criticized Dr. Barefoot's assessment of an impairment rating. After reviewing the medical evidence, the ALJ found Dr. Barefoot's assessment the most credible and convincing, and assigned a 7% impairment rating.

Although Dr. Loeb criticized Dr. Barefoot's methodology of assessing an impairment, such opinion is not legally determinative or in any way binding. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001); Pruitt v. Bugg

Brothers, 547 S.W.2d 123 (Ky. 1977). Dr. Barefoot stated his assessment was made pursuant to the AMA Guides and explained his methodology. Although there exists conflicting evidence regarding the appropriate impairment rating, the ALJ has the authority to pick and choose from the evidence, and is free to rely on Dr. Barefoot's impairment rating as more credible. Special Fund v. Francis, supra. The ALJ's determination will not be disturbed on appeal.

Accordingly, the November 15, 2012 Opinion and Order and the December 27, 2012 Order on reconsideration rendered by Hon. Stephen G. Bolton, Administrative Law Judge, are hereby **AFFIRMED.**

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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