OPINION ENTERED: MARCH 1, 2013

CLAIM NO. 201186160

QHT ENTERPRISES, INC. PETITIONER

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

KEITH MCHENRY
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

SMITH, Member. QHT Enterprises, Inc. ("QHT") appeals from the September 18, 2012 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"), and from the October 9, 2012 order ruling on its petition for reconsideration. QHT's sole argument on appeal is the ALJ erred in relying on the impairment rating assessed by Dr. Warren Bilkey.

Keith McHenry ("McHenry"), age 58, resides in Bardstown, Kentucky. He filed a Form 101, Application for Resolution of Injury Claim, on February 24, 2012, alleging he injured his right shoulder on May 23, 2011 while strapping a load on his trailer. McHenry experienced a pop and tearing in his shoulder and ultimately surgery was performed.

McHenry submitted medical records from Dr. Sanjiv Mehta, who initially examined McHenry on June 6, 2011. Dr. Mehta's clinical examination was consistent with a torn rotator cuff. An MRI revealed a full thickness rotator cuff tear and acromioclavicular ("AC") joint arthritis with impingement syndrome. Dr. Mehta performed a right shoulder arthroscopy with Mumford resection of the lateral end of the clavicle with open repair of the rotator cuff on August 4, 2011. He estimated McHenry would not reach maximum medical improvement ("MMI") until one year following surgery.

Dr. Mehta evaluated McHenry on January 17, 2012, determining McHenry could not return to work and should not lift over ten pounds, abduct his upper extremity in an overhead position, shift gears, or climb in and out of his truck.

In a July 6, 2012 supplemental report, Dr. Mehta indicated he had reviewed Dr. Warren Bilkey's report and

agreed with his 13% impairment rating. Dr. Mehta stated, "I also agree with the method of evaluation by Dr. Bilkey where he has disagreed with Dr. Jenkinson, and his thought process is more aligned with my own decision–making."

Dr. Bilkey evaluated McHenry on February 8, 2012. He found loss of strength, tenderness over the right shoulder joint capsule and AC joint, significant loss of active range of motion, and residual rotator cuff weakness. Dr. Bilkey concluded McHenry sustained a right shoulder strain, large rotator cuff tear, and an aggravation of AC joint arthritis. He did not believe McHenry had reached MMI. He agreed with the restrictions assigned by Dr. Mehta. Dr. Bilkey assigned a 10% impairment rating due to loss of right shoulder motion, an additional 2% impairment rating for internal rotation weakness, and 2% for external rotation weakness for a combined 13% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Bilkey disagreed with Dr. David Jenkinson's assessment and explained as follows:

> The permanent partial impairment rating that is issued is at variance from that of Dr. Jenkinson. Although Dr. Jenkinson found substantial loss in flexion and abduction active range of motion, I have noted as well that there is loss of internal rotation motion and

> extension. The big difference however in our impairment ratings has to do with inclusion of impairment for the distal clavicle resection component of the surgery that Mr. McHenry had, and impairment for residual weakness of the rotator cuff. I differ from Dr. Jenkinson. I think there is significant residual rotator cuff weakness and that is why Dr. Mehta has recommended continued strengthening. My physical exam findings are more in keeping with the findings of Dr. Mehta and are different than the findings of Dr. Jenkinson.
>
> In my opinion, the distal clavicle resection component of the surgery that Mr. McHenry had was work injury related. Mr. McHenry was being treated for shoulder pain. A component of this was the rotator cuff tear. A component of this was further irritation to an arthritic AC joint. The entirety of the surgical procedure that Mr. McHenry had was therefore fully work injury related.

Dr. Jenkinson evaluated McHenry on January 6, 2012. He noted vague generalized tenderness on the lateral aspect of the deltoid, not localized to any anatomic location. McHenry had normal internal and external rotation. He had 135° of active abduction and 170° of passive abduction. Strength testing above the shoulder level did not reveal significant weakness. Dr. Jenkinson found McHenry's hands were equally calloused. Dr. Jenkinson indicated there were signs of self-limiting behavior. He diagnosed acute right rotator cuff tear superimposed on pre-existing degenerative

rotator cuff pathology. Dr. Jenkinson placed McHenry at MMI noting he could return to the type of work he was doing at the time of his injury. Dr. Jenkinson assigned a 4% impairment rating pursuant to the AMA Guides.

In a June 14, 2012 letter, Dr. Jenkinson was critical of Dr. Bilkey's examination and findings and disagreed with his methodology of rating impairment. Dr. Jenkinson stated the impairment for the joint resection needed to be multiplied by the maximum value noted in Table 16-18 which in this case would reduce the impairment from 10% to 2.5%. He did not believe rating muscle weakness was appropriate. Dr. Jenkinson indicated he did not have a strenuous objection to an additional impairment rating for the distal clavicle resection. He indicated including that impairment would increase his impairment rating to 5%.

In the Opinion, Order and Award rendered September 18, 2012, the ALJ's findings relevant to this appeal are as follows:

> While I do have respect for Dr. Jenkinson and his expertise and opinions I am, in this claim, inclined to rely upon Dr. Bilkey.
>
> The reasons for this are as follows. First, I find nothing in this matter that would imply, to me, that the Plaintiff is not credible and is not being honest. Therefore, to the extent that Dr. Jenkinson does not credit the

> Plaintiff's subjective complaints and Dr. Bilkey does, I would rely on Dr. Bilkey.
>
> Second, although the Defendant argues that Dr. Mehta's findings more closely approximate Dr. Jenkinson's findings in fact Dr. Mehta has specifically stated that he and Dr. Bilkey are in agreement as to the conclusions herein. He is a treating doctor. He has had the opportunity to follow and examine the Plaintiff on multiple occasions. He has no demonstrated or implied bias.
>
> Third and finally, Dr. Bilkey is just as respected as Dr. Jenkinson.
>
> Based on the foregoing the opinions of Dr. Bilkey are adopted in their entirety. This includes an MMI date of June 12, 2012, a 13% impairment rating and restrictions. Based on those restrictions, the direct statement of Dr. Bilkey and the Plaintiff's testimony regarding his job duties and capabilities, the Plaintiff does not retain the capacity to return to the type of work done on the date of injury. As noted these conclusions are supported by Dr. Mehta.

On October 1, 2012, QHT filed a petition for reconsideration including the same arguments regarding Dr. Bilkey's impairment rating as it now raises on appeal. By order dated October 9, 2012, the ALJ denied the petition as it relates to Dr. Bilkey's rating.

On appeal, QHT contends Dr. Bilkey's assessment is not an impairment rating "as determined by" the AMA Guides. QHT

asserts the AMA Guides only allows for the combination of two impairments when assessing an individual who has undergone a distal clavicle resection. However, Dr. Bilkey also combined impairment for weakness with the other impairments. QHT cites directives in section 16.7b of the AMA Guides indicating the impairment for motion impairment is to be combined with the arthroplasty impairment. QHT also contends the 10% impairment assessed by Dr. Bilkey for the distal clavicle resection is incomplete and incorrect. QHT notes Dr. Jenkinson stated the 10% impairment must be reduced pursuant to Table 16-18 of the AMA Guides. Thus, QHT contends Dr. Bilkey's assessment is inconsistent with the AMA Guides and does not constitute substantial evidence. QHT asks the Board to reverse the ALJ's award based upon Dr. Bilkey's 13% rating and direct the ALJ to award benefits based upon the 5% rating assessed by Dr. Jenkinson.

The authority to select an impairment rating assigned by expert medical testimony rests solely with the ALJ. *See* KRS 342.0011(35) and (36); Staples v. Konvelski, 56 S.W.3d 412 (Ky. 2001). Except under compelling circumstances, where it is obvious even to a lay person that a gross misapplication of the AMA Guides has occurred, the issue of which physician's AMA rating is most credible is a matter of

discretion for the ALJ. *See* REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

We find no merit in QHT's argument Dr. Bilkey's opinion regarding permanent impairment has no probative value because it does not conform to the AMA Guides. In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003), the Kentucky Supreme Court explained the assessment of impairment ratings and the proper interpretation of the AMA Guides are medical questions solely within the province of medical experts. *See also* KRS 342.0011(11)(a), (35) and (36); and KRS 342.730(1)(b). 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 Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

In the case *sub judice*, two physicians provided opinions regarding the appropriate permanent impairment. Although Dr. Jenkinson criticized Dr. Bilkey's methodology,

such an opinion is not necessarily legally determinative or binding. Staples, Inc. v. Konvelski, supra; Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ specifically concluded Dr. Bilkey was more credible since his findings were in agreement with those of Dr. Mehta, McHenry's treating physician, who had the opportunity to follow and examine McHenry on multiple occasions. The ALJ observed there was nothing to indicate McHenry was not credible or honest. The ALJ found Dr. Bilkey more persuasive since he credited McHenry's subjective complaints while Dr. Jenkinson did not. The ALJ considered and rejected Dr. Jenkinson's opinion regarding impairment. A review of the medical evidence reveals nothing more than conflicting evidence regarding the appropriate impairment rating. Since the ALJ has authority to pick and choose from the evidence, he was free to rely on Dr. Bilkey's impairment rating as more credible and this Board is not authorized to disturb his finding on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the September 18, 2012 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge and the October 9, 2012 order ruling on QHT's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON R CHRISTION HUTSON
PO BOX 995
PADUCAH, KY 42002

COUNSEL FOR RESPONDENT:

HON AUDREY HAYDON
PO BOX 1155
BARDSTOWN, KY 40004

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS
410 W. CHESTNUT ST, 7TH FLOOR
LOUISVILLE, KY 40202