Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 1, 2013

CLAIM NO. 201200313

RENE HAYES PETITIONER

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

AMERICAN SYNTHETIC RUBBER
and HON CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Rene Hayes ("Hayes") appeals from the June 4, 2013 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"), and the July 15, 2013 Order on Reconsideration. The ALJ dismissed Hayes' claim as it relates to an alleged right shoulder

injury. On appeal, Hayes argues the ALJ erred in finding her shoulder injury is not work-related, and asserts that he should have awarded at least appropriate medical and temporary total disability ("TTD") benefits for a temporary injury. We disagree and affirm.

Hayes was employed by Respondent, American Synthetic Rubber, as a process dryer. At the time of her injury on March 12, 2011, Hayes was working along a conveyer belt when she noticed two bales placed closely together on the belt. Using a pole, she attempted to push one bale away from the other. As she did so, she felt a pull in her right forearm and a popping sensation in her right shoulder.

Hayes experienced immediate pain but was able to finish her shift. Over the following year, she was treated for symptoms in her right forearm and elbow, as well as her right shoulder. On April 13, 2012, she underwent a right pronator release surgery and, on May 1, 2012, a right shoulder surgery.

Of note, Hayes had problems with her right shoulder prior to the March 12, 2011 event. In July of 2006, she reported a popping sensation in her right shoulder and eventually underwent an arthrosopic right shoulder acromioplasty. Her physician, Dr. Mark Smith,

ultimately released Hayes to full duty work and assigned a 3% impairment rating in 2006.

As a result of the March 12, 2011 incident, Hayes alleged an injury to her right arm and right shoulder. The ALJ determined Hayes suffered a work-related injury to her right arm, and awarded TTD benefits and medical benefits. That award has not been appealed.

A primary issue before the ALJ, and now on appeal, was whether Hayes' right shoulder condition resulted from the March 12, 2011 incident. Ultimately, the ALJ found Hayes did not sustain a work-related injury to her right shoulder, relying upon the opinion of Dr. Bonnarens. Hayes filed a petition for reconsideration including the same arguments she now raises on appeal, which was denied.

On appeal, Hayes argues the overwhelming weight of the evidence establishes the ALJ erred in finding her right shoulder condition was not work-related. In addition to identifying evidence which supports a finding of work-relatedness, Hayes attacks the credibility of Dr. Bonnarens' opinion. Arguing it is uncontroverted she suffered a work-related event and has been symptomatic since that time, Hayes submits she "sustained at least a temporary injury" justifying an award of TTD benefits and

medical benefits related to the shoulder treatment and surgery.

As the claimant in a workers' compensation proceeding, Hayes had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Hayes was unsuccessful in her burden, 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). 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 they must be reversed as a matter of law. Ira A. Watson Dep't Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Contrary to Hayes' assertions, the opinions expressed by Dr. Bonnarens in his deposition and reports constitute substantial evidence upon which the ALJ was free to rely in reaching a decision on the merits. In his December 12, 2011 report, Dr. Bonnarens stated, in view of the history of previous rotator cuff problems and minimal findings on MRI, he felt the changes were far more consistent with age related changes than "anything that is posttraumatic." In his September 5, 2012 report, Dr. Bonnarens indicated it did not appear the March 2011

incident was the proximate cause of the right shoulder condition, nor did he believe any harmful change to the human organism had occurred. In his January 18, 2013 report, Dr. Bonnarens stated he did not believe Hayes sustained an injury to her shoulder from the 2011 incident. He again stated there was no evidence of a harmful change to the shoulder as a result of the incident and further opined the 2012 shoulder surgery was not proximately related to the 2011 injury.

In his deposition, Dr. Bonnarens testified an October 3, 2011, right shoulder MRI showed some early arthritis of the AC joint and rotator cuff tendonitis, but no evidence of acute findings. He attributed the changes to the normal aging process. In comparing her current condition with her condition in 2006, Dr. Bonnarens commented, “She had a 2006 surgery for exactly the same problem that she had, and the MRI findings and description of the operative report were virtually identical to what was found in 2006.” Dr. Bonnarens again attributed her current condition to the natural aging process. Regarding her activity at the time of the injury, Dr. Bonnarens stated “She’s working in a safe position as far as her shoulder is concerned. I don’t see that as accelerating the normal aging process.”

In addition to Dr. Bonnarens' reports and testimony, the ALJ also noted Dr. Smith had not provided a causation statement. Dr. Smith performed Hayes' 2006 shoulder surgery, as well as the March 1, 2012 surgery. He concluded Hayes suffered from symptomatic AC arthritis, symptomatic bicipital tendonitis, and rotator cuff tendonitis. Significantly, as the ALJ acknowledged, Dr. Smith did not state the 2012 surgery was necessitated by the 2011 work incident.

While Hayes correctly asserts there is evidence in the record upon which the ALJ could have relied to support an outcome in her favor, that evidence, in light of the remaining record, represents 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 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 Disc. Stores, 560 S.W.2d 15 (Ky. 1977). Consequently, we find no error in the ALJ's determination Hayes was not entitled to an award of income or medical benefits for the shoulder condition. Because the ALJ's decision is supported by substantial evidence, we are without authority

to disturb the decision on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Accordingly, the June 4, 2013 Opinion, Order and Award and the July 15, 2013 Order on Reconsideration of the Administrative Law Judge are **AFFIRMED**.

ALL CONCUR.

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