OPINION ENTERED: March 22, 2013

CLAIM NO. 200973745

ROBERT FRANKLIN — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

BRYANT HEATING & COOLING, INC./
TOP QUALITY SERVICE INCORPORATED — RESPONDENT/ CROSS-PETITIONER

and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE — RESPONDENT

and

BRYANT HEATING & COOLING, INC./
TOP QUALITY SERVICE, INCORPORATED — CROSS-PETITIONER/ RESPONDENT

VS.

ROBERT FRANKLIN — CROSS-RESPONDENT

and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Robert Franklin ("Franklin") appeals and Bryant Heating & Cooling, Inc./Top Quality Service Incorporated ("Bryant") cross-appeals from the July 30, 2012, opinion and award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits as a result of a right shoulder injury sustained by Franklin on November 4, 2009. Franklin also appeals from the September 7, 2012, order overruling his petition for reconsideration.

At the time of his injury, Franklin had worked for Bryant for approximately twenty-three weeks earning $11.00 an hour. Franklin installed HVAC equipment in homes and delivered parts to other installers. In the course of retrieving boxes of duct work from a shelf while on a ladder, Franklin fell approximately eight to ten feet onto the ladder and a concrete floor. Franklin injured both arms as a result of the fall. He immediately reported the injury and was taken to Occupational Physician Services who referred him to Dr. Navin R. Kilambi, an orthopedic surgeon. Dr. Kilambi's records reflect x-rays revealed Franklin sustained a "nondisplaced greater tuberosity fracture" in the right shoulder. Franklin was treated by

Dr. Mark Barrett until February 1, 2010. Franklin was off work from November 5, 2009, through November 20, 2009, and received TTD benefits. Franklin returned to work on November 21, 2009, with light duty restrictions. Dr. Barrett released him to return to full duty on February 1, 2010. Franklin was terminated by Bryant shortly thereafter.

Franklin relied upon the medical records of Dr. Barrett which included a March 2, 2012, letter in which he assessed a 3% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). In response to a subsequent questionnaire, Dr. Barrett increased the impairment rating to 6%. Franklin also relied upon the 6% impairment rating assessed by Dr. Warren Bilkey.

Bryant relied upon the March 8, 2012, independent medical examination ("IME") report of Dr. Martin G. Schiller in which he assessed a 3% impairment due to a loss of range of motion. Bryant also relied upon a May 3, 2012, letter from Dr. Schiller which critiqued the methodology of Drs. Barrett and Bilkey in assessing an impairment rating.

Relying upon the impairment rating of Dr. Schiller and the initial impairment rating of Dr. Barrett,

the ALJ determined Franklin's right shoulder injury resulted in a 3% impairment and the three multiplier was not applicable. Based upon Dr. Schiller's opinion, the ALJ also determined the subacromial bursitis and/or impingement condition in the right shoulder, diagnosed by Dr. Schiller, was not an injury as defined by the Act. Regarding Franklin's average weekly wage ("AWW"), the ALJ determined as follows:

> **Average Weekly Wage and TTD**
>
> 17. KRS 342.140(1)(d) provides in relevant part:
>
> > the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;
>
> 18. The Plaintiff worked for a total of twenty-three weeks prior to the injury for the Defendant, the average weekly wage derived from the thirteen weeks immediately prior to the injury is $372.94. This is the only complete thirteen-week period of time that exists in the Plaintiff's employment, however, the ten-week period prior to that, if divided by thirteen, yields a higher average

> weekly wage of $452.06 and is thus determined to be the average weekly wage of the Plaintiff herein as it is most favorable to the Plaintiff as the statute dictates.
>
> 19. The ALJ therefore finds that the average weekly wage of the Plaintiff is $452.06 and the corresponding TTD rate is $301.37.

With respect to medical benefits, the ALJ stated as follows:

> **Benefits per KRS 342.730**
>
> 22. The Plaintiff, by his own deposition testimony, admits that he has had no treatment for his work-related injury in over two years. It is not entirely clear why this was preserved as an issue but it is the finding of the ALJ that the Plaintiff is entitled to future medical benefits related to the injury at issue in this claim. It is also determined that at this time no such medical benefits have been shown to be currently necessary.

Accordingly, the ALJ awarded benefits as follows:

> **Calculation**
>
> 25. The Plaintiff's permanent partial disability award shall therefore be calculated as follows: $452.06 x 2/3 x 3% x .65 = $5.88.

Franklin filed a petition for reconsideration arguing there was at least one unpaid medical bill from High Field & Open MRI which the ALJ found was reasonable

and necessary. He asserted the agreement between the parties not to introduce medical bills into evidence should be enforced. Franklin requested the last sentence of paragraph twenty-two be deleted as paragraph two of the opinion and award is sufficient to provide for the payment of his unpaid medical bills and expenses. He further argued, as he does on appeal, the ALJ erred in calculating his AWW and in determining his subacromial bursitis or impingement condition was not part of the injury to his shoulder. The ALJ summarily overruled Franklin's petition for reconsideration.

On appeal, Franklin asserts the ALJ should not have determined the subacromial bursitis and impingement syndrome were not injuries as defined by the Act. He contends Dr. Schiller did not state the subacromial bursitis and impingement syndrome are not part of his injury; rather, he "indicated to the contrary." Franklin maintains the report of Dr. Schiller should not be read as meaning the subacromial bursitis and impingement syndrome are not injuries as defined by the Act. He posits Dr. Schiller did not state the subacromial bursitis and impingement syndrome would not have been aggravated by the injury and the condition would always be benign. Therefore, Franklin argues "there is a possibility

consistent with the report of Dr. Schiller that at that point the subacromial bursitis and impingement syndrome will no longer be benign."

Next, citing to Huff v. Smith Trucking, 6 S.W.3d 819 (Ky. 1999), Franklin contends the ALJ erred by dividing the total amount of his first quarter wages by thirteen rather than by ten, the number of weeks he actually worked during the first quarter. Franklin also relies upon Marsh v. Mercer Transportation, 77 S.W.3d 592, 595 (Ky. 2002) for the proposition KRS 342.140(1)(d) permits the ALJ to consider other factors. Franklin argues he was employed and earned wages during twenty-three consecutive weeks preceding the injury, and the testimony establishes the HVAC industry "has a seasonal nature to it." Therefore, the ALJ had discretion to divide the wages earned during the quarter, when overtime and more work was offered, by ten. The ALJ is not limited to dividing the wages earned during that ten week period by thirteen.

Finally, Franklin argues Bryant should be required to pay his unpaid medical expenses incurred prior to rendering the opinion and award. He argues the parties entered into an agreement, the terms of which are contained on pages four and five of the final hearing transcript. Franklin maintains case law holds when the defendant

employer insists, the petitioner is required to introduce unpaid medical expenses into evidence. However, Franklin asserts in this case an agreement was made to not unduly burden the proceedings. He maintains the award of medical expenses should include both those incurred prior to and subsequent to the award.

On cross-appeal Bryant argues as follows:

> Bryant concedes to this Board that as a compromise on this issue, it paid TTD benefits to Franklin based upon the 10-week period divided by 13-weeks, which produced an AWW rate of $452.06. Bryant was willing to stipulate to that as an AWW rate at the BRC. However, when AWW was reserved as an issue by Franklin, Bryant preserved this issue that is the subject of its cross-appeal to the Board. Bryant therefore asserts that pursuant to KRS 342.140(1)(d), Franklin's AWW rate must be based on the full 13-week quarter prior to the date of injury, which produces an AWW rate of $372.94. Bryant asserts that the ALJ's method of calculating AWW was therefore error.
>
> . . .
>
> The plain language of KRS 342.140(1)(d) requires that a full 13 weeks of consecutive wages be utilized to calculate Franklin's AWW rate. This same plain language prohibits the ALJ from basing the AWW rate on a quarter less than 13 weeks, and definitely prohibits calculating AWW by dividing a quarter less than 13 weeks by the number of actual weeks worked. It is a fundamental principle of statutory construction that where a statute is

> clear and unambiguous, it must be applied as written. [citation omitted]

Accordingly, Bryant requests the Board remand the claim to the ALJ for an award based on an AWW of $372.94.

As the claimant in a workers' compensation proceeding, Franklin had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Franklin was unsuccessful in his burden regarding the calculation of AWW and nature of the right shoulder injury, 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).

On the other hand, Bryant must establish the ALJ's calculation of the AWW is not in conformity with KRS 342.140(1)(d).

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).

We find no merit in Franklin's argument the ALJ erred in determining the subacromial bursitis and impingement syndrome is not part of his work-related right shoulder injury. In his March 8, 2012, report, Dr.

Schiller stated as follows:

> I recommend that Dr. Barrett needs to take a course in the AADEP. He makes several serious errors. Firstly, the patient is still complaining of pain, has not had a final Xray [sic], and thus is not at MMI. In fact Dr. Barrett did not examine this patient and thus does not know that there may be a diagnosis of subacromial bursitis, which is easily treatable and not related to the accident. If he is **not** at MMI, he should know that the Guides forbids [sic] the issuance of a PPI rating.

Dr. Schiller also stated:

> The patient, when seen by Dr. Kilambi, was noted to have a Neer 2 acromion. This type 2 acromion can be consistent with impingement syndrome of the shoulder.
>
> Impingement syndrome and a Neer 2 acromion are developmental conditions and are not related to a fall or the fracture.

In responding to the question regarding Franklin's impairment rating for the right shoulder, Dr. Schiller stated Franklin may have a diagnosis of subacromial bursitis and impingement syndrome which can be successfully treated with an injection of cortisone. However, Dr. Schiller did not causally link the condition to the work injury. Thus, that statement in and of itself does not vitiate the impact of Dr. Schiller's previous statement indicating the subacromial bursitis and

impingement syndrome is not related to the work injury. Further, the fact Dr. Schiller believed the subacromial bursitis and arthritis were benign does not establish the condition was caused by Franklin's November 4, 2009, right shoulder injury.

In his May 3, 2012, letter, Dr. Schiller stated:

> I stand by my opinion that this patient has not reached maximum medical improvement, mainly because Dr. Barrett has not obtained a recent x-ray to show healing, and also because the patient has not been seen by an orthopedic surgeon who could inject his subacromial space to remove the diagnosis of subacromial bursitis as a cause of his symptoms. This would go along with a diagnosis of impingement syndrome, which is not a work-related condition.

Dr. Schiller's opinions contained in his March 8, 2012, and May 3, 2012, reports constitute substantial evidence supporting the ALJ's determination Franklin's subacromial bursitis and impingement syndrome were not a part of his work-related right shoulder injury. Therefore, the ALJ's decision as to the nature of the work injury cannot be disturbed.

We find Franklin's argument regarding the unpaid medical bills generated prior to the award hard to follow. The hearing transcript reflects the following exchange took

place between counsel:

> MR. ERIC LAMB: Judge, unpaid medicals, we're not going to put in every bill. What we've agreed to do, I think, is that – this is on the record – is we'll just talk about it and then when His Honor renders the decision, we'll be able to figure out which medical should be paid and should not be paid. In other words, we're not going to put the bills in like we would in a personal injury trial where the judge has to go bill by bill to figure out which ones are in and out. We can always figure that out afterward. We're just going to describe the injury and after we see how His Honor rules – is that not the way we always do it, Bryan?
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> MR. GANNON: It just seems like there's a regulation that requires that the plaintiff present these unpaid outstanding medical bills and tender a notice with them attached, to my understanding.
>
> MR. ERIC LAMB: Yeah, but I think when we were here at the BRC we discussed with Jed (sic) we would do it the other way, which is what we usually –
>
> MR. GANNON: May well be, Eric. I will take your word for that. I was not here at the time, but I don't see a big issue with that.
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> MR. ERIC LAMB: I mean, I can't remember whether the MRI wasn't paid or what it was, but I wish you would take my word for it. We've got them here, we can pull them out and stick them into evidence, but it's pretty obvious from the decision what is being paid and what is not being paid if we can't work it out afterwards. Okay, Bryan?

MR. GANNON: Yes, that's fine.

Franklin did not introduce any unpaid medical bills nor indicate there were any unpaid medical bills. Significantly, Franklin testified he has no unpaid medical bills.[1] However, Franklin represented in his petition for reconsideration the MRI bill was not paid. Yet, the MRI report prepared by Dr. Peter Rothchild reflects it was performed on November 11, 2009, approximately one year and two months prior to Franklin's deposition in which he indicated there were no unpaid medical bills. Further, Franklin did not testify at the hearing there were any unpaid medical bills.

Because we lack fact-finding authority, any dispute regarding payment of pre-award medical bills and whether the parties reached an agreement regarding any such bills and the manner any dispute regarding the compensability of such bills would be resolved must be decided by the ALJ. Therefore, the ALJ must resolve any dispute regarding unpaid medical bills incurred prior to the award if and when such a dispute arises. Currently, there is no issue for us to decide as no medical bills were placed in issue and Franklin testified all of his medical

[1] See page 52 of the January 27, 2012, deposition.

bills had been paid.

Finally, we find no merit in either parties' argument regarding the ALJ's calculation of Franklin's AWW. Clearly, Franklin worked more than thirteen weeks prior to the injury. Thus, KRS 340.140(1)(d) is applicable in this case. Section (1)(d) reads as follows:

> The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;

We find Franklin's reliance upon Huff v. Smith Trucking, supra, to be misplaced as that case dealt with an employee who had been employed less than thirteen weeks prior to the injury. As a result, KRS 342.140(1)(e) was applicable. That is not the case here.

Likewise, Franklin's reliance upon Marsh v. Mercer Transportation, supra, is misplaced. Marsh, a truck driver, had worked almost forty-nine weeks before the injury and was paid based on the gross revenue generated by the truck she operated. Thus, the hourly rate had not been fixed and could not be ascertained. Consequently, KRS

342.140(1)(f) applied and was to be used in calculating Marsh's AWW.

In this case, there is no dispute Franklin earned $11.00 an hour during the twenty-three weeks he worked prior to the injury. Thus, KRS 342.140(1)(d) applies. In C & D Bulldozing Co. v. Brock, 820 S.W.2d 482 (Ky. 1991), the Supreme Court stated:

> KRS 342.140(1)(d) and (1)(e) govern the calculation of an employee's average weekly wage when the employee's wages are fixed by the day, hour, or by the output. The claimant here was paid on an hourly rate. If the employee has been employed for more than 13 weeks, the average weekly wage is calculated pursuant to (1)(d) by totalling the wages earned in either the first, second, third, or fourth quarter (13 week period), whichever quarter is more favorable to the employee, of the year immediately preceding the injury. That total is then divided by 13, and this sum is the average weekly wage.

Id. at 482-483.

The above language is controlling. Once the employee has worked more than thirteen weeks the ALJ shall determine the AWW by totaling the wages, excluding overtime and premium pay, earned in each thirteen week quarter and dividing by thirteen. The ALJ is to use the quarter most favorable to the employee. During the first quarter, Franklin worked ten weeks and earned a substantial amount of overtime. The

wages used to calculate his AWW were based on the total hours worked multiplied by $11.00 an hour. This resulted in wages of $5,876.75 over ten weeks in the first quarter. This amount divided by thirteen resulted in an AWW of $452.06. In the second quarter which spanned most of August through the first of September, Franklin earned $4,848.25 and worked thirteen weeks. This figure divided by thirteen equaled $372.94 per week. In this case, the first quarter in which Franklin only worked ten weeks generated the highest weekly amount and accordingly was his AWW.

KRS 342.140(1)(d) clearly states the total wages earned in a thirteen week period must be divided by thirteen. Therefore, we find no merit in Franklin's assertion the ALJ should have divided the total wages earned in the first quarter by ten. Likewise, we find no merit in Franklin's assertion his work was seasonal. Franklin testified he worked at least forty hours a week, and the summer was his busiest time. He stated he worked more hours in the summer than in winter. Franklin testified in the summer he started work at 8:30 a.m. and leave at 7:00 or 8:00 a.m. In the winter he would start work at 8:30 a.m. and leave at 4:30 or 5:00 p.m. The fact Franklin's hours increased in the warm months does not

cause his employment to be seasonal. This is particularly true since he acknowledged he also worked for Bryant during the winter months.

Likewise, we find no merit in Bryant's argument. KRS 342.140(1)(d) does not prohibit the ALJ from relying upon a quarter in which the employee worked less than thirteen weeks. KRS 342.140(1)(d) merely requires the ALJ to total the wages earned in the thirteen week period, excluding overtime and premium pay, and then divide the total wages earned by thirteen. KRS 342.140(1)(d) does not require the employee to work a full thirteen weeks in a quarter in order to obtain the benefit of a favorable calculation for that quarter. We find Bryant's argument rather disingenuous in light of the fact it did not raise this argument in a petition for reconsideration. Further, in its brief to the Board, Bryant admits it paid TTD benefits consistent with the ALJ's calculations of Franklin's AWW.

Accordingly, on appeal and cross-appeal, the July 30, 2012, opinion and award and the September 7, 2012, order overruling the petition for reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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