Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 16, 2016

CLAIM NO. 201464884

SAMUEL ADKINS PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

FORD MOTOR CO. and
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

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

ALVEY, Chairman. Samuel Adkins ("Adkins") appeals from the Opinion, Award and Order rendered March 31, 2016 by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ"), dismissing his claim for a right shoulder injury, while finding other conditions compensable, in his claim against Ford Motor Co. ("Ford") for which she awarded temporary

total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. Adkins also seeks review of the June 20, 2016 order denying his petition for reconsideration.

On appeal, Adkins argues the ALJ abused her discretion and committed reversible error in finding his right shoulder condition not work-related. He argues the right shoulder condition should have been found compensable because Dr. Stacie Grossfeld opined his right biceps injury was found work-related. Because we determine the ALJ improperly noted the biceps tear was on the left and not on the right, we vacate, in part, her decision, and remand for further determination of the impact of the right biceps tear as it may relate to the right shoulder injury.

Adkins filed a Form 101 alleging injury dates on December 17, 2013 and September 30, 2014 for injuries to both knees and shoulders due to strenuous repetitive work activities in the course of his employment at Ford.

Adkins testified by deposition on December 18, 2015, and at the hearing held February 3, 2016. Adkins was forty-two years old at the time of the hearing. Adkins was born on July 7, 1973 and is a resident of Louisville, Kentucky. He completed the eleventh grade and subsequently obtained a GED. He took vocational training in auto body

work while in high school, for which he received a certificate, but he has no additional vocational or college course work. His work history consists of working as a bus boy, foreman for a lawn mowing service, brick layer for various masonry companies, and assembly work.

Adkins testified he had low back surgery in 2006, and continues to experience pain from that condition for which he still receives treatment. The records from Dr. Christopher Shields indicate this surgery actually occurred in 2008. He also indicated he has had numerous cysts removed beginning at the age of 14. Adkins initially denied any previous injuries for the conditions he alleged in his claim, but later admitted he had a right shoulder injury in 2011 while working for a previous employer.

Adkins began working for Ford in 2012 on the assembly line for Ford Expeditions and Lincoln Navigators for better pay and benefits. He stated his initial job with Ford involved removing crossbars with a hammer and placing them on a rack. He used a hoist to move parts onto skids. He stated his knees began hurting due to turning to stack the skids. On December 17, 2013, his right foot slipped causing knee pain causing him to miss one to two months of work. In 2014, the stacking procedure changed, and his right shoulder began hurting. He eventually saw

Dr. Daniel Maurer who recommended physical therapy, which was helpful. After he returned to work, his left shoulder began hurting.

Dr. Ryan Krupp performed right shoulder surgery in April 2015. Adkins was off work for four months after the surgery. He has worked on different jobs since his return to work. He currently goes to physical therapy and takes Norco for his pain. He testified he earns more now than he was earning at the time of the injury. At his deposition, he indicated although he planned to continue to work despite ongoing knee pain, he believed he had re-torn his biceps.

In support of the Form 101, Adkins filed Dr. Maurer's October 31, 2014 office note in which he diagnosed right and left shoulder pain secondary to chronic repetitive scapular strain syndrome with overuse syndrome. He also filed the December 17, 2013 and September 30, 2014 notes of Stephen Croninger, R.N. ("Nurse Croninger") with the Ford Motor Company Occupational Health and Safety Management System ("Ford Medical"). On December 17, 2013, Nurse Croninger noted Adkins complained of a sharp pain in the right knee while pushing a skid. On September 30, 2014, he noted Adkins complained of pain in the right wrist, right shoulder, right side of his neck, and left

elbow due to working with a hoist in skid removal. On December 18, 2013, Dr. Raymond Hart, also with Ford Medical noted Adkins complained of pain in both knees and he diagnosed a right knee sprain/strain.

Adkins later filed the report of Dr. Jules Barefoot who examined him on November 12, 2015. Dr. Barefoot diagnosed Adkins as status post right shoulder arthroscopy on April 30, 2015 with a SLAP and rotator cuff debridement, subacromial decompression, distal clavicle excision and biceps tenodesis. He also diagnosed left shoulder tendinitis/rotator cuff irritation and AC joint arthrosis. Finally, he diagnosed bilateral degenerative osteoarthritis of the knees, right greater than left. Dr. Barefoot assessed an 18% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Regarding causation, Dr. Barefoot stated, "I would apportion 100% of this 18% whole person impairment to work-related activities." Regarding the knees, he stated, "Specifically in regards to the knees, it is clear that his repetitive work activities have accelerated or hastened his underlying right knee and left knee conditions into its current symptomatic and painful reality." Dr. Barefoot then outlined numerous restrictions he would recommend.

Ford filed numerous medical records and reports. It first filed the report of the right shoulder MRI performed October 6, 2014 at Jewish Medical Center Northeast. That MRI reflected moderate hypertrophic AC joint arthrosis with a minimal inflammatory component and a huge osteophyte; mild supraspinatus tendinosis without a rotator cuff tear; and the glenoid, labrum and humeral joints were noted as normal. The radiologist recommended the study be correlated clinically for impingement syndrome. The left knee MRI performed January 23, 2014 was read as unremarkable with no evidence of meniscus tears, acute ligament injury, or significant cartilage loss.

Dr. Stacie Grossfeld evaluated Adkins on November 19, 2015 at Ford's request. She stated Adkins had pre-existing active osteoarthritis in the right knee. She noted the history of osteoarthritis in the AC joint involving the right shoulder with a partial biceps tendon repair. She opined the right shoulder condition was pre-existing and active. She found the biceps tendon repair related to the work injury. She also determined the left rotator cuff tendonitis was work-related. Dr. Grossfeld determined Adkins reached maximum medical improvement as of August 31, 2015. She assessed 0% impairment ratings to the bilateral knee and shoulder conditions. She stated she

would not recommend permanent restrictions, and Adkins should be able to return to the type of work he performed prior to the date of his injury. Ford later filed the supplemental hand-written note from Dr. Grossfeld in response to a letter dated January 25, 2016 setting forth the basis of her opinions regarding causation and impairment.

Ford also filed records from Unicare, its health insurer. The August 7, 2014 note from Dr. James Jackson indicated Adkins complained of low back pain which was related to his 2008 surgery. Dr. Maurer's October 31, 2014 note stated Adkins had left and right scapular pain, left and right shoulder pain, and osteoarthritis of the acromial joint, not due to work. Dr. Krupp's note of January 19, 2015 stated Adkins had left and right shoulder sprain/ strains, and opined it was unknown if it was work-related. Dr. Krupp's April 23, 2015 noted stated Adkins had osteoarthritis and impingement of the right shoulder, neither of which were work-related.

Ford additionally filed records from Dr. Shields for treatment from November 1, 2008 through October 8, 2011 for Adkins' low back. It also filed records from Dr. George Stege from July 30, 2008 through June 1, 2011 regarding treatment of low back pain, cysts and warts.

A benefit review conference ("BRC") was held on January 2, 2016. The BRC order and memorandum reflects the issues preserved included Adkin's capacity to return to the type of work performed at the time of the injury; whether he returned to work at the same or higher average weekly wage ("AWW"); benefits per KRS 342.730; work-relatedness/ causation; AWW; unpaid or contested medical expenses; injury as defined; exclusion for pre-existing disability/ impairment; and TTD benefits.

In her decision rendered March 31, 2016, the ALJ found as follows:

> **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
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> **GENERAL AUTHORITY:** 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 sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

A. AVERAGE WEEKLY WAGE

The parties preserved average weekly wage as a contested issue, but the Plaintiff and Defendant have both indicated an average weekly wage of $775.13 for the alleged December 17, 2013 alleged injury and $891.64 for the September 20, 2014 alleged injury and the ALJ adopts these as Plaintiff's average weekly wage.

B. WORK-RELATEDNESS/CAUSATION, INJURY AS DEFINED BY THE ACT & EXCLUSION FOR PRE-EXISTING DISABILITY/IMPAIRMENT

It has long been held in Kentucky courts that a worker is entitled to be compensated for all the harmful changes that flow from a work-related injury that are not attributable to an independent, intervening cause. Elizabeth Sportswear v. Stice, 720 S.W. 2d (Ky. App. 1986).

"Injury is statutorily defined in KRS 342.0011 (1):

"Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of an in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

"Objective medical findings" is defined by KRS 342.0011 (33) as information gained through direct observation and testing of the patient, applying objective or standardized methods. In Gibbs v. Premier Scale Co., 50 S.W. 3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011 (1) and

(33) if it is based upon symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001), in which the Court held that while objective medical evidence must support a harmful change diagnosis, it is unnecessary to prove causation of any injury through objective medical findings.

Medical causation must be proved to a reasonable medical probability with expert testimony… [however] [i]t is the quality and substance of a physician's testimony, not the use of particular 'magic words,' that determines whether it rises to the level of reasonable medical probability, i.e. to the level necessary to prove a particular medical fact." Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004).

In Derr Construction, the Kentucky Supreme Court explained:

> KRS 342.120(4) [now KRS 342.120(6)] specifically exempts the employer from paying income benefits for prior, active disability or for disability resulting from the arousal of a previously dormant condition. However, KRS 342.020 contains no such exemption regarding medical benefits. Liability for medical expenses requires only that an injury was caused by work and that medical treatment was necessitated by the injury.
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> An arousal of a previously dormant condition is compensable and is not to be considered "natural aging" to be excluded from compensability. McNutt

> Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). It is the Defendant's burden to prove the existence of pre-existing, active disability. In order for a condition to be deemed pre-existing and active, it must be symptomatic, and impairment ratable immediately prior to the occurrence of the work event. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007).
>
> Medical causation must be proved to a reasonable medical probability with expert testimony… [however] [i]t is the quality and substance of a physician's testimony, not the use of particular 'magic words,' that determines whether it rises to the level of reasonable medical probability, i.e. to the level necessary to prove a particular medical fact." Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004).
>
> Causation in cumulative trauma claims was squarely addressed in Haycraft v. Cohart Refractories Co., 544 S.W.2d 222 (Ky. 1976). The test is whether the nature and duration of the work probably aggravated a degenerative condition into an active physical impairment sooner than would have been the case had the work been less strenuous. *Id*.

Plaintiff has alleged an injury to his knees and shoulders as the result of a work accident on December 12, 2013 and cumulative trauma manifesting on September 30, 2014. Dr. Grossfeld has indicated Plaintiff's left bicep tendon

tear and rotator cuff tendonitis are work-related conditions. Dr. Barefoot has provided a causation opinion for Plaintiff's knees, but he did not specifically address causation for Plaintiff's upper extremity conditions in his narrative report. Dr. Barefoot was clear that he attributed the entirety of Plaintiff's impairment to his work activities. However, there is no discussion or analysis as to how Plaintiff's work activities accelerated or aggravated Plaintiff's right shoulder condition into a symptomatic, disabling reality. As such, this ALJ finds Plaintiff failed to meet his burden of proving an injury to his right shoulder.

After a careful review of the evidence, the ALJ concludes Plaintiff has failed to meet his burden of proving a work-related injury to his knees. Plaintiff's left knee MRI was normal. Plaintiff's right knee MRI showed degenerative changes by his physical examination findings have been benign. The ALJ is not convinced that the evidence demonstrates a harmful change as defined by the Act to Plaintiff's right knee or that his work activities or the slip and fall accident on December 17, 2013 aggravated Plaintiff's pre-existing degenerative right knee changes into a symptomatic disabling reality.

Plaintiff's treating physicians have not provided any in-depth opinion addressing causation. On October 31, 2014, Dr. Maurer noted the cause of Plaintiff's disability was unknown and not the result of any injury. Likewise, on January 19, 2015, Dr. Krupp could not conclusively conclude Plaintiff's bilateral shoulder condition was due to his occupation.

Dr. Grossfeld, the Defendant's own evaluating expert indicated Plaintiff's left bicep tendon tear and rotator cuff tendonitis are work-related, and the ALJ adopts Dr. Grossfeld's opinion on this issue. Accordingly, this ALJ finds Plaintiff sustained an injury to his left shoulder.

C. TEMPORARY TOTAL DISABILITY BENEFITS

KRS 342.0011(11)(a) defines "temporary total disability" to mean the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App .2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in Helms, *supra*, stated:

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.

W.L. Harper Construction Co. v. Baker, 858 S.W.2d 202 (Ky. App. 1993), wherein the Court of Appeals stated generally:
TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or

some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined. Id. at 205.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury." *Id*. at 659. In other words, where a claimant has not reached maximum medical improvement ("MMI"), TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event. This test was reinforced by the recent holding by the Kentucky Supreme Court in Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015). The holding in Livingood was delineated in Trane Commercial Systems v. Tipton, 2014-SC-000561-WC TO BE PUBLISHED:

[I]t is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is in appropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment. Id.

Plaintiff was off work from October 31, 2014 through November 24, 2014 based upon Unicare records, which noted Plaintiff was restricted from working by Dr. Maurer. Dr. Maurer was treating Plaintiff during this period for a bilateral shoulder strain. As noted above, this ALJ did not find Plaintiff met his burden of proving an injury to his right shoulder. This ALJ did find Plaintiff sustained an injury to his left shoulder. Dr. Maurer was clearly providing treatment for Plaintiff's left shoulder during this period. As such Plaintiff is entitled to temporary total disability benefits at the rate of $594.43/week from October 31, 2014 through November 24, 2014 for his left shoulder injury.

Plaintiff was off work from January 8, 2015 through January 21, 2015 based upon Unicare records, which note Plaintiff was restricted from working by Dr. Krupp. Dr. Krupp treated Plaintiff for bilateral shoulder conditions during this period. Plaintiff is awarded temporary total disability benefits from January 8, 2015 through January 21, 2015 for his left shoulder injury at the rate of $594.43/week.

Plaintiff was off work from April 30, 2015 through August 20, 2015 following right shoulder surgery. No temporary total disability benefits will be awarded during this period because in light of the ALJ's previous findings.

C. UNPAID OR CONTESTED MEDICALS

KRS 342.020(1) provides that "[i]n addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . the

medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability." In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed that KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award. Instead, liability for medical expenses exists "for so long as the employee is disabled regardless of the duration of the employee's income benefits."

It has consistently held that a worker who has established a work-related impairment rating has also established a disability for purposes of KRS 342.020 and need prove nothing else to receive an award of future medical benefits.

In this case, the ALJ has determined Plaintiff did sustain a work-related injury to his left shoulder. Therefore, Plaintiff is entitled to a general award of future reasonable, necessary and work-related medical benefits pursuant to KRS 342.020 for Plaintiff's left shoulder.

D. BENEFITS PER KRS 342.730

The ALJ must decide the appropriate permanent impairment rating for Plaintiff's left shoulder injury. Dr. Grossfeld assessed 0% impairment for Plaintiff's left shoulder, and Dr. Barefoot assessed 2% for decreased range of motion. Plaintiff has a left shoulder bicep tendon tear and rotator cuff tendonitis, which would correlate

> with a minimal loss of motion. As such, the ALJ adopts Dr. Barefoot's 2% whole person impairment rating for lost motion.
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> Dr. Grossfeld did not recommend any permanent work restrictions. Dr. Barefoot has indicated Plaintiff would have difficulty operating equipment that requires pushing/pulling. Both Drs. Maurer and Krupp released Plaintiff to return to work without any restrictions. Plaintiff is right-hand dominant, and he may very well have right shoulder limitations following surgery, but that condition and accompanying limitations are not work-related. In any event, both of Plaintiff's treating orthopaedics declined to recommend permanent restrictions, and neither did Dr. Grossfeld. As such, this ALJ finds Plaintiff retains the physical capacity to perform his pre-injury duties, despite his left shoulder bicep tendon tear and rotator cuff tendonitis. Plaintiff's permanent partial disability benefits are calculated as follows:
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> $576.80 (max PPD rate) x 2% x .65 (state factor) x 1 (multiplier) = $7.50/week
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> Accordingly, Plaintiff is awarded $7.50/week for 425 weeks.

Adkins filed a petition for reconsideration arguing the ALJ erroneously found he had a left biceps tear instead of it being on the right, and this compelled her to correct her decision and make a proper determination regarding the causation and extent of the right shoulder

condition. Without any explanation, the ALJ denied the petition for reconsideration.

We first note, as the claimant in a workers' compensation proceeding, Adkins had the burden of proving each of the essential elements of his cause of action, including the extent and duration of disability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in this 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). "Compelling evidence" is defined as that which 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 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 sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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 could otherwise have been drawn from the record. Whittaker v. Rowland, supra. 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, supra.

On appeal, Adkins argues the ALJ erred in referencing a left biceps tear rather than right biceps

tear. He argues if the ALJ properly considered the right biceps tear, she would necessarily have found he sustained a right shoulder injury. Whether this is true or not, the ALJ must render a decision based upon accurate facts. That said, we feel it necessary to vacate the ALJ's determination regarding the right shoulder injury, and remand for a determination taking into consideration Adkins sustained a right, not left, biceps tear. The result may well be the same since the shoulder and biceps are both located in the upper extremity but are not one and the same. However, the ALJ must make that determination. No particular result is directed, and the ALJ may well reach the same conclusion, but any determination must be based upon accurate facts.

Accordingly, the March 31, 2016 Opinion, Award and Order and the June 20, 2016 order denying the petition for reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **VACATED** in part, and **REMANDED** for additional determinations regarding the impact of a right biceps tear upon her consideration of the right shoulder claim.

ALL CONCUR.

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