Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 5, 2015

CLAIM NO. 201290435

SHERWIN WILLIAMS CO. PETITIONER

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

TIMOTHY GUNN
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART
AND REMANDING

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

RECHTER, Member. Sherwin Williams appeals from the November 24, 2014 Opinion and Award and the January 9, 2015 Order on Petition for Reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ awarded Timothy Gunn ("Gunn") temporary total disability

benefits ("TTD"), permanent partial disability benefits, and medical benefits for a left shoulder injury. Sherwin Williams argues the ALJ erred in awarding TTD benefits during a period Gunn had returned to work at light duty, and erred in adopting an 11% impairment rating. For the reasons set forth herein, we affirm in part, vacate in part, and remand.

Gunn began working at Sherwin Williams In 2009 as a warehouse technician. On Friday, August 25, 2011, he was rolling a 55 gallon drum of paint from one pallet to another. He slipped on the floor and fell onto his left shoulder. He immediately felt burning, but was able to finish out the day with some difficulty. He attempted to return to work the following Monday, but was unable to perform his duties.

Gunn testified he visited Medworks in Berea the same day, though the submitted Medworks' records indicate the initial visit occurred some four months later. Physical therapy was ordered, and Gunn returned to light duty work. The conservative treatment did not resolve Gunn's condition and he was referred to Dr. Wallace Huff, an orthopedist.

On March 2, 2012, Dr. Huff performed a left shoulder arthroscopy with anterior labral repair and superior SLAP repair. Following surgery, Gunn returned to

light duty on April 10, 2012. Thereafter, Gunn's left shoulder pain continued and he was treated with injections. Eventually, Gunn sought treatment with Dr. Ben Kibler.

Dr. Kibler diagnosed continued labral tear and recommended surgery. Gunn underwent a second surgery to correct the first on October 24, 2012. He thereafter returned to modified duty and continued physical therapy. In a letter dated January 23, 2014, Dr. Kibler assessed an 8% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). In a subsequent letter dated April 10, 2014, Dr. Kibler assessed an 11% whole person impairment rating pursuant to the AMA Guides. He released Gunn from his care as of this date.

Dr. Daniel Primm performed an independent medical evaluation on September 5, 2014. He conducted a physical evaluation and reviewed medical records. Dr. Primm noted Gunn had excellent results following his second surgery, and could return to the type of work he performed at the time of injury. He assessed a 2% whole person impairment rating pursuant to the AMA Guides.

Gunn never returned to work at Sherwin Williams following the second surgery. Thereafter, he obtained

employment with Eastern Kentucky University as a police officer. He began this position on August 12, 2013.

The ALJ determined Gunn suffered an injury to his left shoulder and adopted Dr. Kibler's 11% impairment rating. He determined Gunn reached maximum medical improvement ("MMI") on April 10, 2014, the date he was released from Dr. Kibler's care. The ALJ awarded TTD benefits from the date of injury through April 10, 2014. He also awarded permanent partial disability benefits, enhanced by the three multiplier, and medical benefits.

Sherwin Williams petitioned for reconsideration, requesting further findings of fact regarding the date at which Gunn reached MMI. Additionally, it argued Dr. Kibler's 11% impairment rating is not in conformity with the AMA Guides. In response, Gunn conceded the award of TTD benefits should cease on August 11, 2013, when he began full-time employment as a police officer at Eastern Kentucky University. In his Order on Reconsideration, the ALJ amended the award of TTD benefits to cease on August 11, 2013, but otherwise denied the petition.

Sherwin Williams now appeals, first arguing the ALJ erred in awarding TTD benefits from the date of injury. According to Sherwin Williams, there is insufficient evidence to establish Gunn worked at light duty between the

date of injury (August 25, 2011) and the date of his first surgery (March 2, 2012). It points to a Medworks' medical record dated December 12, 2011, which characterizes Gunn's visit that day as "an initial evaluation of injury to left shoulder." Further, it claims, Gunn testified he was not immediately put on light duty following the surgery, but was instead sent for physical therapy. Sherwin Williams notes Gunn earned his full wages from August 25, 2011 through March 2, 2012.

TTD means the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Generally, the duration of an award of TTD benefits may be ordered only through the earlier of those two dates. Case law establishes that a "return to employment" does not mean a return to "any type of work" or "minimal work." KRS 342.0011(11)(a); Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000). A "return to employment" means the claimant is capable of returning to work that is "customary" or work that he or she was "performing at the time of [the] injury." Id. at 659.

The ALJ explained why he began the award of TTD benefits on August 25, 2011, even though Gunn returned to

work following his injury until the date of his first surgery:

> [Gunn] has provided undisputed testimony that he returned to work on light duty thereafter including driving at first and then when that was too strenuous, placing labels on paint cans and performing inventory like work. [Gunn] has credibly testified that he never returned to the full duty work that he was performing at the time of his injury and asserts that he is not incapable of doing so. [Gunn's] assertion is supported by his ongoing lifting restrictions imposed by Dr. Kibler and significantly by the FCE submitted by [Sherwin Williams].

In the Order on Reconsideration, the ALJ reaffirmed his finding that the "light duty work that [Gunn] performed for [Sherwin Williams] is insufficient to terminate temporary total disability benefits."

At his deposition, Gunn explained his position at Sherwin Williams involved driving a forklift and riding a "picker" to fulfill orders. When "picking" an order, he was required to lift paint bins weighing between 5 and 100 pounds. He further testified he returned to work on Monday following the injury, but left during the workday to be evaluated. Sherwin Williams' human resources manager made the appointment for him. Physical therapy was ordered, which was unsuccessful after four months. The physical therapist then recommended he visit an orthopedic

specialist. During this period, Gunn testified he was working light duty. He further explained he returned to light duty *following* his first surgery. During this period, he was restricted to driving a fork lift and putting labels on paint cans. Other than stating he was placed on light duty, Gunn provided no specific testimony regarding his light duty job duties between the date of injury and the date of his first surgery.

At the final hearing, Gunn was again questioned about the discrepancy between the date of injury and Medworks' record indicating an "initial evaluation" four months later. He denied waiting four months to be seen about his shoulder, and opined the Medworks' record reflected when he was seen for a referral to an orthopedic surgeon, following his unsuccessful course of physical therapy. Additionally, Gunn unequivocally testified he was working light duty between the date of injury and the first surgery. He explained Medworks placed him on light duty when he was seen immediately after the injury. However, he provided no specific information regarding the tasks he performed while on light duty.

We believe the ALJ erred in relying upon Gunn's testimony that he drove a forklift and performed inventory-like work while on light duty following his injury. The

record of Gunn's deposition is clear he performed these tasks while on light duty following his first surgery. Thus, the ALJ may not rely upon this testimony to conclude Gunn is entitled to TTD benefits from August 25, 2011 through March 2, 2012. For this reason, the award of TTD benefits must be vacated and the claim remanded for reconsideration of the award of TTD benefits during this period. If the ALJ again chooses to award TTD benefits from August 25, 2011 through March 2, 2012, he must identify which evidence he relies upon in determining Gunn's light duty work does not constitute a "return to employment" within the meaning of KRS 342.0011(11)(a).

Sherwin Williams next argues the ALJ erred in relying upon Dr. Kibler's 11% impairment rating. Dr. Kibler initially assessed an 8% impairment rating on January 23, 2014. At that time, he noted Gunn's strength was normal. When he revisited the issue on April 10, 2014, Dr. Kibler assessed an 11% impairment rating "based on his range of motion and strength measurements." Sherwin Williams also emphasizes Gunn's testimony that his condition "plateaued" between January, 2013 and April, 2014.

As pointed out by Sherwin Williams, the AMA Guides do not permit the combination of impairment for range of motion with strength: "[D]ecreased strength cannot be rated

in the presence of decreased motion, painful conditions, deformities, or absence of parts…that prevent effective application of maximal force in the region being evaluated." AMA Guides at p. 508. However, the ALJ acknowledged the discrepancy in Dr. Kibler's ratings and determined "the reference made by Dr. Kibler to strength measurements is not significant enough to invalidate his rating because he noted that the muscle weakness to which he was referring was minimal calling it a little bit of tightness and muscle strength weakness."

We do not believe the ALJ erred in relying upon Dr. Kibler's 11% impairment rating. The impairment rating is based on range of motion measurements documented on April 10, 2014, and are sufficient to substantiate Dr. Kibler's opinion. Furthermore, the ALJ explained why he did not believe the brief reference to strength invalidated the opinion. It is noted Dr. Kibler was not deposed regarding his impairment rating. As such, it is within the ALJ's discretion to rely upon his impairment rating.

Furthermore, while Sherwin Williams has noted some inconsistencies in Dr. Kibler's office notes concerning Gunn's strength, such is insufficient to warrant reversal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). These inconsistencies, if any, go to the weight to be

afforded the evidence. It is not within this Board's province to re-weigh the evidence. 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). Dr. Kibler's opinion constitutes substantial evidence upon which the ALJ is free to rely and therefore, we will not disturb this portion of the Opinion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

For the above-stated reasons, the November 24, 2014 Opinion and Award and the January 9, 2015 Order on Petition for Reconsideration of Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART** and the claims **REMANDED** for further findings of fact and an award of temporary total disability benefits.

ALL CONCUR.

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