Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 15, 2016

CLAIM NO. 201361995

SHOE SHOW, INC. PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

LINDA PALUZI
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Shoe Show, Inc. ("Shoe Show") seeks review of the January 25, 2016, Opinion, Award & Order of Hon. R. Roland Case, Administrative Law Judge ("ALJ") finding Linda Paluzi ("Paluzi") sustained a work-related low back injury and awarding temporary total disability ("TTD") benefits, permanent partial disability benefits enhanced pursuant to KRS 342.730(1)(c)1, and medical benefits. Shoe Show also

appeals from the March 18, 2016, Order overruling its petition for reconsideration.

The Form 101, alleged on October 30, 2013, Paluzi injured her low back and bilateral lower extremities while "lifting multiple boxes filled with shoes." It asserts after repetitive bending and stooping, Paluzi felt a sharp pain in her back.

The Form 111 accepted the claim as compensable but indicated there was a dispute as to the amount of compensation owed.

After initially receiving treatment, Paluzi was treated by Dr. Amr El-Naggar, a neurosurgeon, in Somerset, Kentucky. Paluzi underwent an MRI on December 3, 2013, and on February 3, 2014, was first seen by Dr. El-Naggar. Dr. El-Naggar saw Paluzi on a regular basis thereafter and concluded her treatment on October 30, 2014.

The ALJ was faced with accepting the impairment rating of Shoe Show's evaluating physician, Dr. Timothy Kriss, or the impairment rating of Dr. Warren Bilkey, Paluzi's evaluating physician.

The February 25, 2015, Independent Medical Evaluation ("IME") report of Dr. Kriss, his October 3, 2015, report critiquing Dr. Bilkey's findings and

impairment rating, and his deposition of November 11, 2015, were introduced by Shoe Show.

Dr. Bilkey's IME report of May 26, 2015, an August 16, 2015, addendum addressing Dr. Kriss' August 3, 2015, report, and a November 22, 2015, addendum addressing Dr. Kriss' deposition testimony were submitted by Paluzi.

The ALJ awarded TTD benefits from the date of injury through October 30, 2014, the date Dr. El-Naggar determined Paluzi was at maximum medical improvement ("MMI"). Concerning the extent of Paluzi's occupational disability and whether Dr. Bilkey had correctly assessed an impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), the ALJ provided the following analysis and conclusions:

> **2. Benefits pursuant to KRS 342.730?**
>
> The issue of benefits under KRS 342.730 involves the determination of whether the plaintiff has a permanent disability and if so whether it is total or partial in nature. In this case, the plaintiff obviously has a permanent disability as all the physicians assigned an impairment rating. The issue then becomes whether the disability is total or partial.
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> The Administrative Law Judge has carefully reviewed all the evidence of record including the plaintiff's testimony and the vocational experts.

The plaintiff clearly has significant restrictions assigned by her treating physician, Dr. El-Naggar. These restrictions would essentially restrict the plaintiff to sedentary work. In a close call the Administrative Law Judge finds the plaintiff is not totally disabled. Although she is 61 years old, she does have a high school education and a good work record including her last position which certainly had significant responsibilities associated with it. The plaintiff has demonstrated reliability on the job. When weighing all the testimony, the Administrative Law Judge concludes the plaintiff is not totally disabled and could perform sedentary work.

The plaintiff's disability must therefore be considered partial in nature. This begins with a determination of the appropriate impairment rating under the AMA Guides. The Administrative Law Judge is convinced form a review of the evidence that Dr. Warren Bilkey correctly indicated the plaintiff would have an impairment under the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* of 24% attributable to the injury. Under *KRS 342.730(1)(b),* a 24% impairment carries a multiplication factor of 1.15 for a 27.6% permanent partial disability. However, the analysis does not end there as the Administrative Law Judge must also determine whether the provisions of *KRS 342.730(1)(c) 1 or 2* apply. Subparagraph 1 applies when the plaintiff lacks the physical capacity to return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. If the plaintiff is earning same or greater wages, a

determination must be made as to whether the plaintiff will be able to continue doing so for the indefinite future. If employment is found to be not likely, then the 3 multiplier would apply. See *Fawbush v. Gwynn,* 103 S.W. 3d 5 (Ky., 2003), *Kentucky River Enterprises, Inc. v. Elkins,* 107 S.W.3d 206 (Ky. App. 2003) *and Adkins v. Pike County Board of Education,* 141 S.W.3d 387 (Ky. App. 2004). Subparagraph 2 applies only in the limited instance where the plaintiff returns to work earning same or greater wages, but then ceases to do so by reason of a work injury. *Chrysalis House, Inc. v. Tackett,* 283 S.W.3d 671 (Ky. 2009) and *Hogston v. Bellsouth Telecommunications,* 325 S.W.3d 314 (Ky. 2010). The evidence clearly establishes the plaintiff does not retain the physical capacity to return to the type of work she was performing at the time of the injury. This essentially is uncontroverted.

The Administrative Law Judge accepted the impairment rating of Dr. Warren Bilkey since the plaintiff has an injury to multiple levels within one spine region, the range of motion method is used to calculate impairment. It appears Dr. Bilkey was the only physician to use the range of motion method. Dr. Kriss assigned a 6% impairment but this was based on only one level. Dr. El-Naggar assigned a 13% rating but did not use the range of motion method. Dr. Bilkey specifically found the plaintiff was at MMI and that there had been injury to multiple levels and therefore used the range of motion method. Injury to multiple levels is confirmed by Dr. El-Naggar and by Dr. John Guarnaschelli. After carefully reviewing and weighing all of the medical evidence the Administrative

> Law Judge is persuaded by the evidence of Dr. Warren Bilkey that the plaintiff has a 24% impairment based on the AMA Guides.
>
> Since the plaintiff was 59 years old at the time of her injury, she is also entitled to a multiplier of .4. Therefore, the plaintiff's disability rating will be increased by 3.4. The calculation of benefits is therefore 24% x 1.15 x $564.52 x 3.4 equaling $529.75.
>
> In summary, while the Administrative Law Judge finds the plaintiff is not totally disabled he finds the plaintiff does not have the physical capacity to do the type of work she performed at the time of the injury and has a 24% impairment rating based on the AMA Guidelines increased by the appropriate factors.

Shoe Show filed a petition for reconsideration asserting it had properly raised the issue of the admissibility of Dr. Bilkey's impairment rating and the proper use of the AMA Guides. It requested:

> [A]dditional findings of fact on the evidence presented by Dr. Kriss regarding Dr. Bilkey's incorrect method for measuring the Plaintiff's alleged compression fractures; his use of the pre-surgical MRI scan to perform those measurements (resulting in a temporary rating, at best); his assessment of range of motion deficits given the inconsistencies in the Plaintiff's tested versus observed range of motion; and his assessment of impairment for a compression fracture at L2.

In the March 18, 2016, Order overruling the petition for reconsideration, the ALJ stated:

> The Petition for Reconsideration raises no new issues and the issue of Dr. Bilkey's rating and proper use of the Guides was considered by the ALJ on pages 17 – 19 of the Opinion and Award. The ALJ was quite simply persuaded by Dr. Bilkey's opinion and that he properly calculated the impairment using the AMA Guides. For that reason, the Petition for Reconsideration is nothing more than a re-argument of the case and the Petition for Reconsideration is **OVERRULED**.

Significantly, on appeal Shoe Show does not contend the entire 24% impairment rating is not in compliance with the AMA Guides nor does it question Dr. Bilkey's utilization of the ROM method, pursuant to the AMA Guides, in assessing the impairment rating.[1] Rather, its argument is:

> The only question on appeal is whether the 5% and 7% whole person impairment ratings that Dr. Bilkey assessed for alleged compression fractures at L2 and L3, respectively, comport with substantial evidence. As set forth below, the Petitioner maintains that those portions of Dr. Bilkey's rating are fatally flawed and cannot be relied on for an award of benefits.

[1] Range of Motion.

Shoe Show notes as follows: “impairment is considered permanent when it has reached maximal medical improvement (MMI), meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment.” Thus, MMI is a prerequisite for the evaluation of permanent impairment. It observes Dr. Bilkey measured the compression fractures at L2 and L3 as shown on the December 3, 2013, MRI scan which was prior to the successful Kyphoplasty procedure performed by Dr. El-Naggar and the attainment of MMI. It notes the earliest MMI date is October 30, 2014, as opined by Dr. El-Naggar.

Shoe Show argues Paluzi experienced objective improvement in the vertebral body height due to the Kyphoplasty which was confirmed by a July 9, 2014, MRI scan. It posits that at the time of the December 3, 2013, MRI scan, Paluzi’s condition had not yet stabilized and changed substantially after her surgery. Shoe Show cites to Dr. Kriss’ opinion Dr. El-Naggar successfully reduced Paluzi’s L3 compression fracture through surgery and she had no measurable L2 compression fracture despite receiving no treatment. In summary, both levels improved, one with and one without medical treatment. Thus, Shoe Show contends the impairment rating assessed based on the

December 2013 MRI does not comply with the AMA Guides and cannot be relied upon.

Paluzi, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Paluzi was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky.

1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The December 3, 2013, MRI report provides the following findings and impression:

. . .

> Bones: There is a large amount of edema throughout the L3 vertebral body. Minimal edema is present in the superior aspect of L2. There is a 25% superior endplate compression of the L3 vertebral body with minimal superior endplate compression of L2. No other compression fractures are identified.
>
> T12-L1: Mild broad-based protrusion.
>
> Lumbar disc levels
>
> L1-L2: L1-2: Mild broad-based protrusion.
>
> L2-L3: L2-3: Mild left posterior lateral bulging. There is 6 mm anterior deformity of the thecal sac secondary to the superior endplate compression fracture.
>
> L3-L4: Moderate broad-based protrusion with anterior deformity of the thecal sac and bilateral neural foraminal narrowing. Mild facet degenerative change.
>
> L4-L5: Advanced disc space narrowing. Large left posterior lateral extrusion with left neural foraminal narrowing. Mild right posterior lateral bulging. Mild facet degenerative change.
>
> Impression: acute/subacute superior endplate compression of L3 with 25% loss of height. Minimal superior endplate compression of L2.
>
> Multilevel level discogenic degenerative change most notable at L4-5 on the left. Please see above for individual level discussion.

In his initial note of February 3, 2014, Dr. El-Naggar stated the MRI of the lumbar spine:

> Demonstrates evidence of compression fracture at the superior margin of L2 and the entire L3 vertebral body shows edema indicated acute compression fracture. There is also evidence of multiple level degenerative changes and a leftward foraminal disc herniation with facet stenosis.

Dr. El-Naggar recommended an L3 Kyphoplasty. An off work slip also refers to “compression fractures of vertebre.” His notes of March 27, 2014, and April 4, 2014, contain the same notation. On April 4, 2014, Dr. El-Naggar performed the Kyphoplasty and on May 29, 2014, he performed an S/P injection. Dr. El-Naggar’s notes of April 14, 2014, June 20, 2014, and July 7, 2014, reference compression fractures of vertebre.

In his note of July 7, 2014, Dr. El-Naggar stated Paluzi had undergone an L3 Kyphoplasty on April 4, 2014, and an L2-3 ESI on May 29, 2014. One of his assessments was “[c]ompression fractures of vertebre.”

The MRI report of July 9, 2014, provides the following findings:

> Conus Medullaris: Normal terminating at L1. The visualized cauda equine is unremarkable.
>
> Paraspinal area: Normal.
>
> Bones: The patient is post kyphoplasty of L3. Minimal retropulsion is seen to the superior endplate of L3.

In his July 10, 2014, record Dr. El-Naggar did not reference a compression fracture at either the L3 or L2 area. He noted a Kyphoplasty had been performed on April 4, 2014, and an L2-3 ESI had been performed on May 29, 2014, and the MRI did not demonstrate a new compression fracture.

In his answers to a questionnaire dated October 29, 2014, Dr. El-Naggar again noted the L3 Kyphoplasty and the L2-3 ESI had been previously performed. He made no mention of the compression fractures and opined Paluzi was at MMI and assessed a 13% impairment rating.

In the note of October 30, 2014, Dr. El-Naggar did not reference a compression fracture. Dr. El-Naggar noted the Kyphoplasty did not provide significant benefit and the ESI had provided about 30% relief in the upper lumbar region for about two or three days. Paluzi did not have lower lumbar pain.

In his May 26, 2015, report Dr. Bilkey noted the lumbar MRI dated December 3, 2013, demonstrated a large amount of edema throughout L3 vertebral body and minimal edema was present in the superior aspect of L2. There was an L3 superior end plate compression amounting to 25% of vertebral body height. At the L2 level there was a minimal superior end plate compression.

Dr. Bilkey noted Dr. Kriss assigned a 6% impairment rating based on the AMA Guides and found Paluzi fell within Lumbar DRE Category II. He also noted Dr. Kriss stated that after the Kyphoplasty, Paluzi had a 10% to 15% loss of vertebral body height and in his opinion she was more appropriately classified for impairment for this comparatively lesser loss of vertebral body height rather than the original diagnosed loss of vertebral body height.

Dr. Bilkey's impression was as follows:

> 10/30/13 work injury lumbar strain, L2 compression fracture less than 25% of vertebral body height, L3 compression fracture greater than 25% of vertebral body height but less than 50% vertebral body height, L4 lumbar disc herniation, aggravation of degenerative disc disease lumbar spine, deconditioned state. Ms. Paluzi has undergone kyphoplasty L3 level.

Dr. Bilkey assessed a 24% whole person impairment rating pursuant to the AMA Guides, providing the following explanation:

> Ms. Paluzi has acquired a permanent partial impairment resulting from the 10/30/13 work injury. In preparation for the impairment rating, I did review the lumbar MRI scan of 12/3/13. I measured the vertebral body heights for these. On the computer screen the measurement for these vertebral body heights were L1 12 mm, L2 12 mm, L3 9 mm, L4 13 mm. This means that the L3 compression fracture with reference to L4 was a 31% loss of vertebral body

height. The L3 compression fracture with reference to L2 is a 25% loss of vertebral body height.

According to the AMA Guides, Fifth Edition, when there has been injury to multiple levels within one spine region, the Range of Motion method is used to calculate impairment. This has not been done by either Dr. El-Naggar or Dr. Kriss. According to Table 15-71, for the lumbar spine compression fractures, these are to be assigned according to loss of vertebral body height and then combined. Consequently the L2 compression fracture has 5% whole person impairment and the L3 compression fracture 7% whole person impairment. These combine to yield 12% whole person impairment. For loss of trunk active range of motion, according to Table 15-8 for loss of forward bending there is 7% impairment and loss of back bending 5% impairment. According to Table 15-9 for loss of side bending to the right and left each there is 1% impairment. Thus for loss of active range of motion of the trunk there is 14% whole person impairment. Combining the impairments from Table 15-7, 8, 9 yields 24% whole person impairment and this is the whole person impairment rating that Ms. Paluzi has acquired solely as a result of the 10/30/13 work injury.

I disagree with the conclusions of Dr. Kriss with respect to impairment. I think he is right with respect to the source of ongoing pain actually coming from the L4-5 level. Dr. Kriss utilized the DRE method to calculate whole person impairment and instead of using the actual work injury diagnosis, he used the post-operative diagnosis for this. This in my opinion is incorrect. However, as noted above, it’s the Range

> of Motion method that implies since there is prior documentation of fracture affecting two lumbar vertebrae.

Shoe Show does not maintain Dr. Bilkey's impairment rating was assessed prior to MMI; rather, he improperly relied upon an MRI performed prior to MMI. We know of no provision within the AMA Guides which would prohibit Dr. Bilkey from relying upon the result of the December 3, 2013, MRI. More importantly, Dr. El-Naggar did not express the opinion there had been a change in the height of the vertebral body at the L3 level due to the Kyphoplasty. Even though the July 9, 2014, MRI report states "minimal retropulsion is seen to the superior endplate of L3," it contains no explanation of what is meant by that statement. The MRI report does not establish a change in the loss of vertebral body height. Notably, Dr. El-Naggar noted no change in Paluzi's condition following the Kyphoplasty.

The opinions of Dr. Bilkey expressed in his three reports, the December 2013 MRI, and Dr. El-Naggar's notes qualify as substantial evidence sufficient to support the ALJ's finding Paluzi has a 24% impairment rating. There is objective medical evidence establishing the existence of a compression fracture at the L2 level; thus, substantial

evidence supports the existence of both an L3 compression fracture and an L2 compression fracture. That being the case, an assessment of an impairment rating for both compression fractures by Dr. Bilkey is supported by substantial evidence.

While the contrary opinions expressed by Dr. Kriss may have been articulated in greater detail, his opinions represented nothing more than conflicting evidence compelling no particular result. Concerning the L3 compression fracture, Dr. Bilkey noted there was a 31% loss of vertebral body height and based his impairment rating on Table 15-7I of the AMA Guides as there was a compression of the L3 vertebral body of 26% to 50% thereby meriting a 7% impairment rating. Similarly, he assessed a 5% impairment rating for a compression of the vertebral body between 0% and 25% for the L2 compression fracture. Although Dr. Kriss testified there had been a reduction in the loss of the vertebral height there is no other evidence substantiating Dr. Kriss' opinion. The ALJ was free to reject Dr. Kriss' opinion.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court instructed that the proper interpretation of the AMA Guides is a medical question solely within the province of the

medical experts. Consequently, 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 the trier of fact the ALJ is never required to do so. Thus, we find no error in the ALJ's reliance upon Dr. Bilkey's impairment ratings of 7% for the L3 compression fracture and 5% for the L2 compression fracture.

This Board has repeatedly held that the ALJ, as fact-finder, has the authority to pick and choose whom and what to believe. The AMA Guides is clear that its purpose is to provide objective standards for the "estimating" of permanent impairment ratings by physicians. Because Dr. Bilkey is a licensed medical doctor, the ALJ could appropriately assume his expertise in utilizing the AMA Guides was comparable or superior to any other expert medical witnesses of record. The ALJ is not required to look behind an impairment rating and meticulously sift through the AMA Guides to determine whether an impairment assessment harmonizes with that treatise's underlying criteria. 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. REO Mechanical v. Barnes, 691 S.W. 2d 224 (Ky. App. 1985). Hence, we find no error in the ALJ relying upon Dr. Bilkey's impairment ratings for the compression fractures.

Accordingly, the January 25, 2016, Opinion, Award, and Order and the March 18, 2016, Order overruling the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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