OPINION ENTERED: July 24, 2013

CLAIM NO. 201182620

STAFFMARK PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

BOBBY AGRUE
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
AND ORDER DENYING ORAL ARGUMENT
* * * * * *

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

STIVERS, Member. Staffmark appeals from the December 17, 2012, Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Bobby Agrue ("Agrue") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits as a result of a July 6, 2011, crush injury to Agrue's right hand. Staffmark also appeals from the January

13, 2013, Opinion and Order on Reconsideration.[1] Staffmark argues the ALJ erred in relying upon Dr. Lutz's impairment rating as it was contrary to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), in not properly considering the evidence, in failing to provide any substantive discussion or make factual findings regarding entitlement to vocational rehabilitation benefits, and in awarding additional TTD benefits. We affirm.

Agrue testified by deposition on June 13, 2012, and at the hearing held December 12, 2012. His deposition testimony reveals Agrue has a GED and specialized training in computerized automotive repair. He received ASE certification as a mechanic and "parts pro" and is a certified journeyman electrician. He testified he also received certification from OSHA for "Hazmat" shipping and receiving and for operation of all types of forklifts. In addition to working in the areas for which he obtained certifications, Agrue has worked as an industrial cleaner, disk jockey and assistant project manager for River Downs supervising 371 employees.

[1] After Staffmark appealed, the Board remanded the matter for ruling on a cross-petition for reconsideration filed by Agrue. The ALJ issued an Amended Opinion and Order on Reconsideration on March 13, 2013. Neither party appealed from this decision.

Agrue injured his hand while employed by Staffmark as a temporary employee assigned to Mazak. Agrue was working as a brake press operator bending parts on July 6, 2011, when his glove was caught, pulling his hand into the press and crushing it. Agrue was treated at the hospital emergency room and referred to Dr. James D. Baker who performed trigger finger release surgery. Agrue testified he was released to temporary full duty by Dr. Baker two days before Thanksgiving. Agrue took the release to Staffmark and was told to apply for work elsewhere since it could not accommodate him. Agrue later received TTD benefits when Dr. Baker performed the release surgery.

Agrue testified he is unable to perform the brake press operator job with Mazak due to his lifting restriction and inability to perform the constant gripping and holding of parts. Agrue looked for work following the release by Dr. Baker and was turned down because of his hand condition.

At the hearing, Agrue testified Staffmark terminated his employment two days before Thanksgiving in 2011. Agrue testified he is not able to perform the brake press job. He stated lifting a gallon of milk makes his hand shake and gripping with any significant strength causes hand pain. Agrue takes Tylenol for swelling in his hand and Aleve for pain. Following the injury, he was in a cast for

three months and then underwent physical therapy. Agrue underwent the release surgery approximately six weeks after physical therapy ended. Agrue testified he continues to have problems gripping and has pain, swelling and shaking in his hand. Agrue felt he could perform work associated with auto parts, some retail positions, light factory positions, and as a forklift or boom operator. Agrue indicated he had been turned down for several jobs because of his hand condition. He stated he contacts Staffmark every Monday, but has never been offered work within the restrictions assessed by Dr. Lutz or Dr. Lim. Agrue expressed a desire to be trained in biomechanical technology which involves servicing hospital x-ray machines, breathing machines and other equipment.

Agrue confirmed he received TTD benefits from the date of his injury until Dr. Baker released him in November 2011. TTD benefits were reinstated on March 15, 2012, through March 25, 2012, due to the surgery. Agrue testified he was unable to perform the brake press job at the time Dr. Baker first released him to return to work.

Glenda Belt, Agrue's fiancée, testified at the hearing. She confirmed that since the accident, Agrue has pain in his hand and difficulty gripping. She also testified regarding his attempts to secure employment.

Agrue introduced Dr. James T. Lutz's report generated as a result of an independent medical examination ("IME") on April 11, 2012. Dr. Lutz found marked tenderness across the wrist, base of the hand, and mid-dorsum of the hand. Agrue also had decreased sensation over the mid-dorsum of the hand and over all digits. Grip strength measured "68kg" on the left and "38kg" on the right.

Dr. Lutz diagnosed work-related fractures of the right second through fifth metacarpal bones, fracture of the right trapezium, and trigger finger. Pursuant to the AMA Guides, Dr. Lutz assigned a 1% impairment for the fracture of the trapezius with an additional 1% for pain and 12% for loss of grip strength related to the metacarpal fractures with an additional 2% impairment for pain producing a combined 16% whole person impairment. He restricted Agrue to light duty with repetitive use of the right upper extremity limited to one third of his work time.

In an April 20, 2012, addendum, Dr. Lutz indicated Agrue could not return to his prior position as a brake press operator.

Dr. Baker, Agrue's treating physician and surgeon, completed a Form 107-I on October 13, 2011. Dr. Baker diagnosed a right trapezium fracture, fractures at the metacarpal base of the second through fifth fingers, and

right post-traumatic trigger finger. Dr. Baker indicated an impairment rating could not be determined since Agrue had not reached maximum medical improvement ("MMI"). Dr. Baker believed Agrue did not retain the physical capacity to return to the type of work performed at the time of the injury. Dr. Baker assigned a five pound lifting restriction with the use of a brace.

Staffmark submitted Dr. Baker's June 4, 2012, report, in which he noted Agrue was last seen on March 26, 2012, and was given a full duty release for work. Dr. Baker found Argue had full range of motion of his digits and wrist. In accordance with the AMA Guides, Dr. Baker noted "strength as an individual factor cannot be used to determine impairment except for extenuating circumstances which I feel do not apply to this situation." Dr. Baker assessed a 0% impairment rating pursuant to the AMA Guides.

In a June 13, 2012, report, Dr. Baker opined Agrue had no consistent objective findings limiting his ability to return to full duty as a brake press operator.

A work status form completed by Dr. Baker on November 22, 2011, indicates Agrue was able to return to full duty work with no restrictions as of November 20, 2011.

Staffmark submitted reports from Dr. Edward V. A. Lim who performed an independent medical examination on

February 3, 2012. On examination, Dr. Lim determined Agrue had full range of motion of his shoulder, elbow, hand and wrist. He was able to fully flex and extend his wrist. Grip strength was approximately 70% on the right. He had no restriction of motion involving full flexion or extension of his fingers and abduction and adduction. Dr. Lim noted tenderness over the A1 pulley of the right middle finger. On full flexion, Agrue tended to have a trigger finger sensation.

Dr. Lim found no evidence to suggest a pre-existing impairment of the right middle finger. He opined the work injury caused the trigger finger. Dr. Lim believed Agrue was not at MMI and trigger finger release surgery would be reasonable and necessary treatment of the work injury. Dr. Lim opined Agrue would reach MMI within three to four weeks after the surgical release.

Dr. Lim conducted a second IME on May 25, 2012, during which he determined Agrue had reached MMI. Dr. Lim found full range of motion of the shoulder, elbow and hand. He observed the major residual impairment is weakness of grip strength in the right hand. Pursuant to the AMA Guides, Dr. Lim assessed a 6% impairment rating for loss of grip strength. Dr. Lim indicated he accepted the objective

findings of the treating physicians, but not necessarily the opinions drawn therefrom.

In the December 17, 2012, Opinion and Order, the ALJ found Agrue sustained a permanent partial disability as a result of the work injury. The ALJ accepted the 16% impairment rating assessed by Dr. Lutz and enhanced the income benefits by the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ awarded TTD benefits from July 7, 2011, to November 21, 2011. On his own motion, the ALJ referred Agrue to the Department of Vocational Rehabilitation "for an evaluation of the practicability of and need for service, treatment, or training necessary and appropriate to render him fit for a remunerative occupation."

Staffmark filed a petition for reconsideration raising the same arguments it now makes on appeal and requesting additional findings regarding the issue of extent and duration. Agrue filed a cross-petition for reconsideration asserting entitlement to TTD benefits from July 7, 2011, to March 26, 2012.

Agrue filed a response to Staffmark's petition for reconsideration and a cross-petition for reconsideration again requesting additional TTD benefits through March 26, 2012.

In the January 11, 2013, Opinion and Order on Reconsideration, relying on testimony of Agrue and Glenda Belt and the report of Dr. Lutz, the ALJ determined Agrue was entitled to TTD benefits for the period spanning July 7, 2011, through March 26, 2012. The ALJ indicated the remaining issues raised by the parties had been discussed and ruled on in the December 17, 2012, decision.

On appeal, Staffmark argues the ALJ erred in relying on Dr. Lutz's impairment rating which it contends is not in conformity with the AMA Guides. Staffmark asserts Dr. Lutz impermissibly rated Agrue's condition based upon grip strength since the Guides do not allow a rating in the presence of painful conditions.

Next, Staffmark argues the ALJ did not consider all of the evidence, noting he failed to discuss Dr. Lim's report. Staffmark observes the ALJ discussed Dr. Baker's 0% impairment rating and Dr. Lutz's 16% impairment rating but failed to mention Dr. Lim's 6% impairment rating.

Staffmark also argues vocational rehabilitation is not appropriate given Agrue's education, training, certifications and work history. Staffmark notes Agrue has a GED with vocational certification in computerized automotive repair. Further, he is an ASE certified mechanic, certified "parts pro," a certified journeyman

electrician, and OSHA certified for Hazmat shipping and receiving, and in the operation of forklifts and other equipment. Staffmark notes Agrue has been employed in retail at an auto parts store, has worked as an electrician, has managed 371 employees at River Downs and has worked as a disc jockey. Staffmark also notes Agrue did not testify he was unable to perform these jobs, but merely indicated he had not found employment. Staffmark contends an award of vocational benefits is not appropriate. Alternatively, it requests the Board remand the matter for additional findings of fact explaining why Agrue is unable to perform the prior jobs and needs training beyond the training he has already completed.

Finally, Staffmark argues the ALJ erred in awarding additional TTD benefits. It notes TTD benefits were paid until Dr. Baker provided a release to full duty on November 22, 2011. Additionally, payment of the TTD benefits resumed when Dr. Baker performed the trigger finger release. Staffmark contends TTD benefits were paid for the proper periods pursuant to Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000).

As the claimant in a workers' compensation proceeding, Agrue had the burden of proving each of the essential elements of his cause of action including the

appropriate impairment rating and entitlement to TTD benefits and vocational rehabilitation. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since he was successful before the ALJ, the question on appeal is whether substantial evidence supports the 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).

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 (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 supporting 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). In order to reverse the decision of the ALJ, 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).

We believe the outcome selected by the ALJ regarding the extent of Agrue's impairment and the duration of TTD benefits is supported by substantial evidence and in conformity with the Act.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Supreme Court instructed that assessing a permanent impairment rating pursuant to the AMA Guides is a medical determination which may only be performed by a medical expert. Elkins establishes the existence and cause of a permanent impairment, the date for assessing a permanent impairment rating, the method to be utilized in assessing an impairment rating, and the impairment rating are medical questions. As such, an impairment rating can only be established through expert

medical testimony sufficient to support a reasonable inference by the ALJ that the AMA Guides were properly utilized. Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002).

While an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be afforded a physician's impairment rating, as finder of fact he or she is never required to do so. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). So long as sufficient information is contained within a medical expert's testimony from which an ALJ can reasonably infer the assessed impairment rating is based upon the AMA Guides, the ALJ, as fact-finder, is free to adopt that physician's impairment rating for purposes of calculating an injured worker's permanent disability pursuant to KRS 342.730(1)(b). The ALJ may also rely upon the physician's impairment rating in determining and excluding a pre-existing impairment. Transportation Cabinet, Department of Highways v. Poe, 69 S.W.3d 60 (Ky. 2002); Roberts Brothers Coal Co. v. Robinson, supra.

Dr. Lutz stated he relied on the AMA Guides in assessing Agrue's functional impairment rating caused by the work-related injury. In making those assessments, Dr. Lutz cited to the various models, tables and standards

contained within the AMA Guides. In light of this evidence, we believe the ALJ could reasonably conclude Dr. Lutz's application of the AMA Guides was accurate, and the injury of July 6, 2011, resulted in the 16% impairment rating. While Drs. Baker and Lim arrived at different conclusions based on their interpretations of the AMA Guides, their opinions represents nothing more than conflicting evidence which the ALJ, as fact-finder, was free to reject. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Hence, we find no error in the ALJ's reliance upon Dr. Lutz's impairment rating.

Although Dr. Lim's report was not summarized in the December 17, 2012, Opinion and Order, the ALJ stated he had reviewed and considered the report in reaching his decision. Further, in his argument at the close of the hearing, Staffmark's counsel specifically referenced Dr. Lim's 6% impairment rating. Clearly, the ALJ was aware of the impairment rating even though he did not refer to it in the summary of the evidence or in the findings of fact. Thus, we find no error in the ALJ's failure to reference Dr. Lim's impairment rating.

Concerning Staffmark's argument relating to the additional TTD benefits awarded, KRS 342.0011(11)(a) defines temporary total disability as follows:

> ‘Temporary total disability’ means 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.

The above definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (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.

In Central Kentucky Steel v. Wise, supra, the 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 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.

More recently, in Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that 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.
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> . . . .
>
> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court elaborated with regard to the standard for awarding TTD as follows:

> As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See* Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform 'any type of work.' *See* KRS 342.0011(11)(c).
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> . . . .
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> Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

In the case *sub judice*, Dr. Baker permitted Agrue to return to work with no restrictions on November 20, 2011. However, Agrue testified he was not able to perform the brake press operator job at the time Dr. Baker released

him. Further, Agrue testified the release was temporary or on a trial basis. Agrue had not reached MMI since his active trigger finger had yet to be surgically repaired. His uncontroverted testimony establishes that Staffmark would not accommodate Agrue's hand condition at that time. Based upon Agrue's testimony, the ALJ could reasonably conclude Agrue remained incapable of performing his customary work and was not at MMI until after he recovered from the trigger finger release surgery.

Regarding the referral for a vocational rehabilitation evaluation, KRS 342.710 states as follows:

> (1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment. . .
>
> (3) . . . When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

In Wilson v. SKW Alloys, 893 S.W.2d 800 (Ky. App. 1995), the Kentucky Court of Appeals noted a purpose of this statute is to expeditiously restore the injured worker as near as possible to a condition of self-support as an able

bodied worker, and further held "work for which an employee has previous training or experience" must be suitable employment. Wilson defined "suitable employment" as:

> work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors both at the time of the injury and after reaching his post-injury maximum level of medical improvement.
> Id. at 802.

In Haddock vs. Hopkinsville Coating, Inc., 62 S.W.3d 387 (Ky. 2001), the Court noted, restoring a worker to "suitable employment" means "attempting to achieve a reasonable relationship between the worker's pre and post-injury earning capacity." Whether a claimant has returned to suitable employment is a factual determination solely within the role of the ALJ as fact-finder.

In his opinion, award, and order, the ALJ stated as follows:

> Plaintiff shall be referred to the Department of Vocational Rehabilitation for a vocational evaluation in accordance with the provisions of the aforementioned statute. The vocational evaluation shall be at the expense of the defendant and a determination as to the propriety of recommended training for the plaintiff shall be in

> accordance with the provisions of KRS 342.710.

Here, we are presented with a hybrid situation in that the benefit review conference ("BRC") order does not reflect that entitlement to vocational rehabilitation was a contested issue. However, Agrue testified he desired vocational rehabilitation. No objection was made by Staffmark to this testimony. Significantly, Staffmark does not complain it was denied an opportunity to be heard regarding entitlement to vocational rehabilitation benefits. Moreover, Staffmark does not dispute that the statute permits the ALJ to refer Agrue for a vocational rehabilitation evaluation on his own motion. Agrue first asserted his desire for vocational training in his notice of contested issues filed on October 17, 2018, one day following the BRC but nearly two months prior to the hearing. Although no motion was filed to add vocational rehabilitation as a contested issue, Staffmark was placed on notice of Agrue's intent to seek those benefits at that time. Significantly, at the hearing, Staffmark presented its argument Agrue did not qualify for rehabilitation benefits. Thus, Staffmark had an "opportunity to be heard" at the hearing and raised no objection to the ALJ determining whether Agrue was entitled to vocational

rehabilitation benefits. Clearly the parties were aware entitlement to vocational rehabilitation benefits was an issue to be resolved by the ALJ.

The statute permits the ALJ, on his own motion, to order a vocational rehabilitation evaluation. Staffmark argues Agrue has not shown entitlement to vocational rehabilitation services and, in the alternative, the ALJ should make additional findings regarding Agrue's physical capacity to perform any of his pre-injury work. Staffmark contends Agrue's prior training, certifications and work experience negate his entitlement to vocational rehabilitation. Staffmark argues to determine whether Agrue qualifies for vocational rehabilitation, the ALJ must consider all of his prior jobs and then determine whether his permanent restrictions prevent Agrue from performing all of his previous jobs. We disagree.

Dr. Lutz's restrictions and Agrue's testimony, upon which the ALJ relied, establish significant limitations on the use of Agrue's dominant hand. Agrue testified he is has continuing problems with pain, difficulty gripping with his right hand, and can no longer perform the work of a brake press operator. As to Agrue's previous employment history, the ALJ could reasonably conclude Agrue's hand condition would affect his ability to

perform most, if not all, of his previous jobs. Consequently, substantial evidence supports the ALJ's finding Agrue does not retain the physical capacity to return to the type of work he performed for Staffmark at the time of his injury and is unable to perform work for which he has previous training or experience. Based on the evidence, we believe the ALJ could logically conclude an evaluation was proper to determine whether Agrue needs vocational rehabilitation. Therefore, we affirm the ALJ's referral for a vocational rehabilitation evaluation.

Finally, Staffmark requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, the request is **DENIED**.

Accordingly, the opinion, order and award rendered by Hon. William J. Rudloff, Administrative Law Judge, on December 17, 2012, as well as the order on reconsideration dated January 11, 2013 are hereby **AFFIRMED**. In addition, Staffmark's motion for oral argument is **OVERRULED**.

ALL CONCUR.

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