OPINION ENTERED: April 19, 2013

CLAIM NO. 201076027

TERRI WELLS PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

HOME INSTEAD SENIOR CARE
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. Terri Wells ("Wells"), *pro se*[1], seeks review of the Opinion and Order rendered August 21, 2012 by Hon. Chris Davis, Administrative Law Judge ("ALJ"),[2]

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[1] It appears Wells was represented by counsel throughout the litigation of her claim and subsequently filed this appeal to the Board *pro se*.
[2] This claim was originally assigned to Hon. Joseph W. Justice. By order dated April 5, 2012, the claim was reassigned to the Hon. Chris Davis.

finding she sustained only a temporary left shoulder condition due to the September 5, 2010 incident, for which she had reached medical maximum improvement ("MMI") and sustained no permanent impairment rating. The ALJ awarded temporary total disability ("TTD") benefits and temporary medical benefits only for the September 5, 2010 injury. Wells also seeks review of the order denying her petition for reconsideration rendered September 21, 2012.

On appeal, Wells argues the ALJ's opinion is not supported by substantial evidence, and a contrary result is compelled in her favor. We disagree and affirm.

Wells filed a Form 101 on January 20, 2012 alleging she injured her left shoulder while employed by Home Instead Senior Care ("Home Instead") on September 5, 2010, when a patient became combative and pulled on her left arm. At the time of her injury, Wells was working as a home health care worker. In the Form 101, Wells disclosed she had previously filed for or received workers' compensation benefits for a 1991 back injury and a 2006 left shoulder injury.

In support of the Form 101, Wells attached the September 22, 2010 note of Dr. John Burch with Western Kentucky Orthopaedic & Neurosurgical Associates. He noted Wells was working with a belligerent patient on September 5,

2010 who grabbed and shoved her arm behind her. Wells reported she subsequently experienced left shoulder pain and popping, with occasional numbness and tingling. Dr. Burch recommended an MRI and released Wells to one handed work only.

Wells filed a supplemental medical dispute on April 23, 2012. Wells sought an order directing the employer's insurer to authorize and pay for additional treatment recommended by Dr. Burch, namely a CT arthrogram and referral to a shoulder specialist.

In support of the dispute, Wells attached additional records from Dr. Burch. On September 22, 2011, Dr. Burch noted Wells is status post surgery to the left shoulder on May 6, 2011 for a "very small tear of the rotator cuff partial" and continues to have pain. He noted the examination showed she could passively achieve full forward flexion, abduction, elevation and external rotation, but she actively exhibited no more than 30 degrees of forward flexion and abduction. Dr. Burch noted "I do not have an explanation for this discrepancy." He recommended a CT arthrogram and restricted Wells to right hand duty. On December 8, 2011, Dr. Burch noted the CT arthrogram had not been approved and adjusted her restrictions to no overhead lifting and no lifting of more than five pounds. In a

December 20, 2011 note, Dr. Burch noted “since she states that work comp has re-denied her CT arthrogram but will permit her to see a ‘shoulder specialist’, we are going to get her to see doctors at Vanderbilt Shoulder Center.”

Home Instead filed a Form 111 accepting the claim as compensable, however disputed the amount owed and to the impairment attributable to a injury. A Benefit Review Conference (”BRC”) was held on June 13, 2012. In the BRC order and memorandum, the parties stipulated Wells sustained an injury on September 5, 2010 and TTD benefits were paid by Home Instead at the rate of $443.28 per week from September 8, 2010 through December 22, 2011 for a total of $29,091.66. Medical benefits were paid in the amount of $37,030.61. The following contested issues were preserved for decision: benefits per KRS 342.730, work relatedness/causation, unpaid or contested medical expenses, exclusion for pre-existing disability/impairment, TTD, and the pending medical fee dispute regarding a proposed CT arthrogram.

Wells testified by deposition on March 30, 2012 and at the hearing held June 25, 2012. Wells was born October 10, 1953 and resides in Rockfield, Kentucky. She completed high school and attended three semesters of college. Wells also has a paralegal certificate, which she has never used. Wells testified her work history includes

work as an assembly line worker, a cook in various restaurants, in the deli department of various grocery stores, a cashier, at an elementary school assisting children with reading skills, assistant manager at a grocery, and as a stocker.

As a caregiver, Wells began working for Home Instead in January 2010. She primarily worked the overnight shift. Wells stated she worked approximately one hundred twenty-five hours per week earning $7.25 per hour, without overtime pay. Wells testified her job duties varied depending on a client's needs. She assisted clients with bathing, dressing and transferring, and she was required to do laundry, cooking, housecleaning and grocery shopping. Wells has not returned to work since the September 5, 2010 incident.

Wells testified on September 5, 2010, she was walking outside with a client who suffered from Alzheimer's, and episodes of paranoia and aggression. Wells testified "[w]hile I was trying to contain her in the yard and keep her calm, she kept taking my left arm in her hand trying to shove it really hard back behind me to get away again." Wells stated on approximately the third shove, she began experiencing pain and burning in her left shoulder. Wells sought treatment the following day at UrgentCare where an x-

ray was taken, a sling was prescribed, and physical therapy was ordered. After showing no improvement, Wells was treated by Dr. Burch who eventually performed an arthroscopic procedure in December 2010. Dr. Burch initially ordered physical therapy, which Wells stated did not relieve her left shoulder symptoms. A subsequent contrast dye MRI revealed a tear between two muscles. Thereafter, Dr. Burch performed an open incision procedure on her left shoulder in May 2011 and ordered another round of physical therapy. Wells testified her left shoulder did not improve. Dr. Burch has recommended additional treatment, consisting of a CT arthrogram and referral to a specialist, both of which have been denied by workers' compensation.

Currently, Wells experiences left shoulder pain and is unable to raise her left arm up, out or to the side. At her deposition, Wells explained "[p]assively, you can lift it . . . but on its own, it will not - - aggressively (sic), I cannot lift it." Wells stated she is restricted to no lifting over five pounds and no overhead lifting. Wells denies Home Instead has been able to provide work within her restrictions. Wells also asserted she began experiencing anxiety attacks following the work incident. Wells

testified she is no longer capable of performing her job as a caregiver due to her left shoulder condition.

Wells testified regarding several injuries occurring prior to the September 5, 2010 accident. Wells fractured her skull and broke her ankle in a motor vehicle accident in 1971. She underwent cancer and gallbladder surgery in 1992, as well as a heart ablation in 2000. Wells was diagnosed with right carpal tunnel syndrome in 1978 and left carpal tunnel syndrome in the early 1990s. Both conditions were work-related and resulted in surgery. In 1991, Wells testified she ruptured three disks in her lower back while working for Cracker Barrel and received workers' compensation benefits.

Wells testified she tore her rotator cuff in her left shoulder in 2005 while working as an assistant manager at Save-a-Lot. Wells was treated by Dr. Burch, who eventually performed surgery in 2006, and last treated for that condition two or three months later. She was unaware of any limitations, permanent restrictions or impairment ratings due to the 2005 work incident. Wells testified she experienced no pain, loss of range of motion or any other symptoms between 2005 when she was released from Dr. Burch's care, until the September 5, 2010 accident. Likewise, she was able to perform her job as a caregiver and had not

actively received treatment for her left shoulder prior to her accident.

Home Instead submitted the September 8, 2010 medical note from Corpcare, which noted the September 5, 2010 work incident resulting in left arm pain and weakness. She was diagnosed with a probable rotator cuff tear, and referred to physical therapy and Dr. Burch. She was prescribed a sling and medication, and restricted to no use of her left arm.

Home Instead also submitted additional records of Dr. Burch from Bowling Green Medical Center. On November 30, 2010, Dr. Burch noted continued left shoulder pain and weakness despite conservative treatment, and diagnosed tendinitis with impingement syndrome and biceps tendon split. The December 7, 2010 operative report indicates Dr. Burch performed left shoulder arthroscopic debridement, subacromial decompression, excision of the left distal clavicle spur and subtotal synovectomy. On May 2, 2011, Dr. Burch noted Wells experienced a worsening of symptoms in her left shoulder in March 2011 and an arthrogram revealed a possible rotator cuff tear. The May 6, 2011 operative report indicates Dr. Burch performed an open left subacromial decompression and rotator cuff repair. In a follow-up note dated May 13, 2011, Dr. Burch noted Wells had

removed her brace despite being told it had to stay on all the time for three weeks.

Home Instead submitted Dr. Burch's records from 2005 and 2006 indicating Wells sustained a work-related left shoulder injury on November 26, 2005. Dr. Burch diagnosed left shoulder rotator cuff tendinitis with impingement syndrome. After conservative treatment failed, he performed an arthroscopic procedure on March 22, 2006. Follow-up records indicate Wells ceased physical therapy because it exacerbated her symptoms. On June 27, 2006, Dr. Burch noted a CT arthrogram showed no evidence of a rotator cuff tear or impingement, and her exam did not reveal evidence of radiculopathy. He recommended resuming physical therapy and declined to provide restrictions. On August 22, 2006, Dr. Burch noted Wells "is back with really no improvement in her shoulder problem." He diagnosed impingement syndrome left shoulder post arthroscopic subacromial decompression, sprain/strain shoulder and pain in the shoulder. Due to the lack of improvement, he referred Well to Dr. Thomas Limbird for a second opinion.

Home Instead submitted Dr. Dennis O'Keefe's June 13, 2012 report. He evaluated Wells on May 22, 2012 at Home Instead's request. Wells reported continued left shoulder pain and difficulty elevating her left arm. Upon

examination, Dr. O'Keefe noted Wells had essentially normal passive movement, but limited active movement at the left shoulder. He found no evidence of a frozen shoulder nor did he detect a nerve or muscle weakness.

Dr. O'Keefe diagnosed status post-arthroscopic decompression of the left shoulder and open surgical repair of a minor tear to the left rotator cuff. He also noted "limited range of motion at the left shoulder due to voluntarily limited effect in the use of her left shoulder." He noted Wells had a previous 2005 rotator cuff injury which would make her left shoulder more susceptible to re-injury. He opined the mechanism of injury appeared to be minor, and would be an unusual cause of a rotator cuff tear. Dr. O'Keefe opined Wells reached MMI for her left shoulder on December 1, 2011.

Dr. O'Keefe opined Wells' "current limited use of her left shoulder is due to limited voluntary attempts to use the left shoulder related to her current litigation," and is the cause of her current complaints. He noted Wells' treatment for the September 5, 2010 injury, including two MRIs, an MR arthrogram and two surgical procedures, revealed only very mild changes to the left shoulder joint. He found no objective medical findings to support an impairment rating. Therefore, he assessed a 0% impairment rating

pursuant to the American Medical Association, Guides to Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides") as a result of the September 2010 work incident. He recommended a restriction of no lifting above shoulder level, unrelated to the September 2010 injury. He opined Wells may perform the type of work she was capable of prior to September 5, 2010. He noted significant symptom magnification.

After summarizing the lay and medical evidence, the ALJ made the following findings of fact and conclusions of law in the August 21, 2012 decision:

> 6. The issues to be decided are benefits per KRS 342.730; unpaid or contested medical expenses; temporary total disability benefits; work-relatedness/causation; and exclusion for pre-existing, active disability.
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> . . . .
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> In analyzing this claim the Administrative Law Judge has reviewed all of the evidence in this claim, as summarized above. The Administrative Law Judge has also reviewed the parties' briefs and arguments.
>
> I would first take note of the highly relevant fact that, in this claim, the Defendant has certainly not rejected all possible medical treatment or temporary total disability benefits. To the contrary, while simple dollar amounts are by themselves not relevant, the Defendant has given the Plaintiff

> ample opportunity to recover from the incident of September 5, 2010.
>
> Further, while I respect Dr. Burch he, as a treating physician has no motivation to disbelieve the Plaintiff, or even to feel that if she is subjectively honest she is objectively exaggerating. To the contrary, he is probably motivated to not simply dismiss the Plaintiff from his care while she continues to complain. However, even he has no sound explanation for her continued complaints.
>
> In short, while I have no doubt that the incident as described occurred on September 5, 2010 and I have no doubt that some temporary condition did exist I believe that the Plaintiff has reached MMI and sustained no permanent impairment rating. This finding is made in reliance on Dr. O'Keefe.
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> This claim is dismissed, in its entirety, as to any benefits beyond December 1, 2011.
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> ORDER
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> 1. This claim is dismissed in its entirety, for any benefits beyond December 1, 2011.
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> 2. Income and medical benefits, as already paid, are awarded for the temporary exacerbation to the left shoulder.
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> . . . .

Wells filed a petition for reconsideration requesting the ALJ further explain his finding she is not entitled to receive any additional medical treatment for

her left shoulder injury subsequent to December 1, 2011. Wells requested the ALJ specifically address the medical fee dispute regarding the treatment recommended by Dr. Burch. She noted Dr. O'Keefe did not address the medical fee dispute or Dr. Burch's additional treatment recommendations. The ALJ denied Wells' petition by order dated September 21, 2012.

On appeal, Wells argues she injured her left shoulder on September 5, 2010 while working with a client. She states she experiences constant left shoulder pain and is unable to lift and extend her arm. She also claims to suffer from anxiety attacks, depression, and stress due to her injury. Wells requests she be allowed to have further testing to determine the cause of her current condition. Wells also states her disagreement with Dr. O'Keefe's opinion. She insists she is in need of further medical treatment, has sustained permanent loss, and has experienced loss of job opportunity due to her left shoulder condition. Wells further outlines several physical demands required by various clients she has cared for and states she could not perform her job as a care giver in her current condition. Wells also submitted a reply brief disagreeing with several statements made by

Home Instead in its brief and again notes her disagreement with Dr. O'Keefe.

We find substantial evidence exists in the record to support the ALJ's conclusion and no contrary result is compelled. Because Wells is proceeding *pro se*, we will attempt to explain the fundamental legal principles controlling how this Board must decide an appeal.

Under Kentucky's workers' compensation system, the ALJ functions as both judge and jury. When performing the duties of a jury, the ALJ is commonly referred to as the "fact-finder." As fact-finder, the ALJ reviews the evidence submitted by the parties and decides which testimony from the various witnesses is more credible and best represents the truth of the matter or matters in dispute. The ALJ, as judge, then applies the law to the facts as he determines them to be true. As a matter of law, the facts as decided by the ALJ cannot be disturbed on appeal by this Board so long as there is some substantial evidence of record to support the ALJ's decision. *See* KRS 342.285(1); Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Although we understand Wells is frustrated at the outcome of her workers' compensation claim, we also recognize the ALJ's job as fact-finder is difficult. As a

rule, in every worker's compensation claim, both sides resolutely contend they have presented evidence of "the truth" concerning those matters at issue. It is for this very reason in cases where the evidence is conflicting, the facts concerning an issue as determined by the ALJ are afforded vast deference as a matter of law on appellate review.

Authority establishes Wells, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of her cause of action before the ALJ, including the extent and duration of any disability generated by the work injury alleged. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Wells was unsuccessful in her burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

"Compelling evidence" is defined as evidence 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). 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 (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, supra.

Here, the record contains substantial evidence supporting the ALJ's finding the September 5, 2010 incident produced only a temporary injury from which Wells attained MMI on December 1, 2011. In Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), the Kentucky Supreme Court held it is possible for a claimant to submit evidence of a temporary injury for which temporary income and medical benefits may be awarded, yet fail in the burden to prove a permanent harmful change to the human organism for which

permanent benefits are appropriate. Since the rendition of Robertson, this Board has consistently held it is possible for an injured worker to establish a temporary injury for which only TTD benefits and temporary medical benefits may be awarded, but not meet his or her burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized.

In the case *sub judice*, the ALJ relied upon Dr. O'Keefe's June 13, 2012 opinion which constitutes substantial evidence. Dr. O'Keefe reviewed the medical records, summarized Wells' previous injuries, as well as the September 5, 2010 injury and subsequent treatment, and performed a physical examination. He opined Wells' limited range of motion was due to her own voluntarily limited effect and is the cause of her current complaints. He found Wells reached MMI on December 1, 2011 and assigned a 0% impairment rating pursuant to the AMA Guides. He declined to recommend a permanent restriction due to the work incident and found Wells is capable of performing the type of work she did prior to September 5, 2010.

The record contains substantial evidence supporting the ALJ's finding the September 5, 2010 work incident produced only a temporary injury for which Wells reached MMI on December 1, 2011, and a contrary result is

not compelled. The ALJ properly considered all evidence of record, weighed that evidence, and reached a decision supported by substantial evidence and in conformity with the law. Thus, we are without authority to direct a different result.

Accordingly, the August 21, 2012 Opinion and Order and the September 21, 2012 order on petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

STIVER, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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