Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 6, 2016

CLAIM NO. 201379006

TERRY HAMILTON PETITIONER

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

BIG LOTS, INC.
JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Terry Hamilton ("Hamilton") seeks review of the December 17, 2015, Opinion and Order of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") dismissing his claim for an alleged work-related right shoulder injury. Hamilton also appeals from the January 26, 2016, Order denying his petition for reconsideration.

On September 30, 2014, Big Lots, Inc. ("Big Lots") filed a Form 101 stating that Hamilton injured his right shoulder within the course and scope of his employment on April 19, 2013. It described the injury as follows: "[s]trained right shoulder unloading truck taking some lawn and garden boxes off the stack of other boxes to place on pallet and when turned around a wall of boxes fell and pinned his right arm/shoulder between boxes off the truck." Big Lots acknowledged it received notice of the injury on April 19, 2013. The description of medical treatment was listed as follows: "MRIs, Bone Scans, Medications, Injections, Rotator Cuff Surgery, and Physical Therapy." The Form 101 was signed by Big Lots' counsel.

An October 14, 2014, Order scheduled a Benefit Review Conference ("BRC") on February 11, 2015.

On October 17, 2014, Big Lots filed a Form 111 denying the claim explaining as follows: "[t]he plaintiff has not presented any evidence of permanent injury or permanent disability to support an award of benefits. Fraud and misrepresentation are asserted as defenses."

On November 21, 2014, Hamilton filed a Form 101 alleging a work-related right shoulder injury on April 19, 2013. Hamilton described the injury as follows: "[u]nloading truck. Trying to unload a pallet of furniture.

Pallets fell pinned him between pallets and truck. Torn rotator cuff." Hamilton indicated he was seen in the emergency room on April 24, 2014, at Highlands Regional Medical Center and treated by Dr. Keith Hall, Dr. David Weber, and Dr. Anthony Deguzman. Hamilton attached to his Form 101 voluminous medical records from Pikeville Medical Center which included the records of Dr. Hall.[1] The September 17, 2013, surgical note was included within those records indicating Dr. Hall diagnosed a right shoulder rotator cuff tear. The procedure performed was right shoulder arthroscopic rotator cuff repair, right shoulder arthroscopic distal clavicle resection, and right shoulder arthroscopic subacromial decompression.

Hamilton testified at his December 10, 2014, deposition and at the October 20, 2015, hearing. At his deposition, Hamilton testified his position was furniture manager prior to and at the time of injury. He described the injury as follows:

> Q: Okay. Tell me, just kind of explain to me what happened, what you were doing, the events leading up to it and then what happened.
>
> A: Okay. I come to work and there was only three of us there. There was supposed to have been four or five. The

[1] By Order dated January 7, 2015, the ALJ sustained Hamilton's motion to file his Form 101.

manager didn’t schedule enough people. There was supposed to have been two of us in the back of the truck. Obviously there wasn’t, it was me. I started unloading the truck. I had to take everything out of the truck and set it down on the conveyor belt into the building, then we’ve got one or two of them that takes it off. It’s supposed to be four taking it off and putting it on pallets. Well, in the trucks they’re not stacked on pallets. It’s just boxes put in the back of the truck packed as high as they can get it. When you go to open them up, if you don’t move, you get knocked out by the boards.

Q: All right.

A: I got in, I made enough room into the truck where I could get a pallet up in there to start stacking stuff on pallets and sending it out. And I was loading a pallet of lawn and garden patio furniture. I had two boxes already on it and went to pick the third box up and put it on top of the other two and everything behind me collapsed with my arms up above my head and it jerked my right arm behind me and tore my rotator.

Q: Were the boxes that collapsed, were they in front of you or were they behind you?

A: They was behind me.

Q: Behind you?

A: They come in behind me and pinned me, my arms above my head like this into the pallet that I was loading up and to the side of the truck.

Q: Okay. So your right arm was pinned up against the truck?

> A: No. My right arm – my left arm was up against the truck.
>
> Q: Uh-huh (yes).
>
> A: My right arm was up against the patio boxes.
>
> Q: Okay.
>
> A: And everything was on my, toward my right side pushing me towards the left.
>
> Q: Okay. At that time did you feel any sort of pop or tear any noise or what were your symptoms?
>
> A: Like the pop, with the crunching sound, and then burning.

Hamilton was seen by Dr. Deguzman and when the tests confirmed a rotator cuff tear he was referred to Dr. Hall. Hamilton testified that prior to undergoing surgery he had no use of his shoulder and arm. Surgery was performed on September 30, 2013. Thereafter, Dr. Hall referred Hamilton to Dr. Weber for pain management. Hamilton testified he continued to experience severe pain when he used his shoulder. He experienced burning pain and swelling from the shoulders to the fingers. He was unable to do anything and his wife took care of the yard work. Hamilton was unable to raise his right arm over his head and could not reach forward or behind him. He had no strength in his right arm. Except for occasionally carrying soft drinks, he did not use his right arm.

Hamilton testified at the hearing that his condition is relatively unchanged since his deposition. He spent a substantial amount of time addressing a compilation of surveillance videos taken of him on June 30, 2014, July 5, 2014, July 11, 2014, and July 12, 2014.

In addition to medical records from Highlands Regional Medical Center, Hamilton introduced the Form 107 and an attached report from Dr. Anbu Nadar both dated March 23, 2015. Dr. Nadar's March 10, 2014, report was also introduced.

Big Lots relied upon the January 20, 2015, Independent Medical Evaluation ("IME") report of Dr. David Jenkinson, and the July 28, 2014, record and deposition of Dr. Weber. Big Lots introduced the December 22, 2014, deposition of Michael McSwain ("McSwain") who performed surveillance of Hamilton and obtained video footage of him on the four dates in June and July 2014 listed above.

The BRC Order and Memorandum reflects the parties stipulated Hamilton sustained an alleged work-related injury on April 19, 2013, Big Lots received due and timely notice of Hamilton's injury, temporary total disability ("TTD") benefits were paid at the rate of $304.54 per week from April 25, 2013, through July 30, 2014, totaling $20,099.64, and medical expenses totaling $23,851.78. The

contested issues were: “benefits per KRS 342.730; exclusion for pre-existing disability/impairment.”

In his December 2015 Opinion and Order, after summarizing Hamilton’s testimony, the ALJ provided the following summary of Dr. Nadar’s records:

> The medical records of Dr. Anbu Nadar were introduced into evidence on behalf of the Plaintiff. After performing a physical examination and reviewing medical records including diagnostic studies, Dr. Nadar found that the Plaintiff suffered a hyperextension type injury to his right shoulder with some stretching resulting in a rotator cuff strain and possible partial tearing. Dr. Nadar found that his current symptoms were due to the work injury of April 19, 2013, and that he would need continued medical care.
>
> In a letter pertaining to disability status on March 10, 2014, Dr. Nadar diagnosed the Plaintiff with a right shoulder strain with rotator cuff tendinitis and a partial cuff tear; status post-arthroscopy and rotator cuff repair; and rule out RSD. Dr. Nadar found that the Plaintiff’s current symptoms were due to the April 19, 2013, work injury and continued to be temporarily totally disabled at that time. Dr. Nadar recommended a 3 phase bone scan and sympathetic block to make a definitive diagnosis of RSD. The Plaintiff was not at MMI and his PPI rating was deferred.
>
> The Plaintiff was seen for an independent medical evaluation on November 4, 2014, with complaints of shoulder pain radiating down his arm. After performing a physical examination

> and reviewing medical records including diagnostic studies, Dr. Nadar diagnosed right shoulder strain with impingement; status post arthroscopy and cuff repair with residual stiffness. He found that the work injury caused permanent physical changes to soft tissues. Dr. Nadar assessed a [sic] 8% impairment pursuant to the AMA Guides and found that the Plaintiff does not retain the physical capacity to return to the type of work performed at the time of the injury. He further determined that the Plaintiff is limited with heavy lifting, pushing, pulling with his left arm and has difficulty with overhead activity.
>
> In a letter dated March 23, 2015, Dr. Nadar found that the Plaintiff was at maximum medical improvement secondary to his present treatment. He continued to have residual symptoms and would need periodic symptomatic care. The Plaintiff was noted to have limitations in work activity that requires heavy lifting, pushing, pulling with his left arm and has difficulty with overhead activity and at this time does not retain the physical capacity to return to his prior employment. Dr. Nadar assessed an 8% impairment pursuant to the AMA Guides.

The ALJ noted Dr. Weber stated Hamilton was under his care and could return to work unrestricted on July 30, 2014. The ALJ indicated he reviewed and considered the voluminous medical records attached to Hamilton's Form 101. The ALJ then provided the following summary of Dr.

Jenkinson's report and the medical records and deposition of Dr. Weber:

> The medical records of Dr. David Jenkinson were introduced into evidence on behalf of the Defendant. The Plaintiff was seen for an independent medical evaluation on January 20, 2015. After performing a physical examination and reviewing medical records including diagnostic studies, Dr. Jenkinson found no objective abnormality and stated that the Plaintiff could have incurred a minor sprain/strain of the right shoulder. The abnormalities in the MRI scan were degenerative changes commonly found in this age group. Dr. Jenkinson found that there was no evidence of a traumatic injury to the right rotator cuff and that his current presentation is consistent with symptom exaggeration. He also determined that there was no evidence that the Plaintiff sustained a harmful change to the right shoulder or arm. Dr. Jenkinson assessed a 0% impairment pursuant to the AMA Guides and added that the Plaintiff requires no work restrictions and retains the physical capacity to return to his prior employment. He also said that the Plaintiff requires no future treatment. Dr. Jenkinson reviewed the surveillance footage and found that the Plaintiff's condition is consistent with symptom magnification explaining that the Plaintiff would not have been able to perform those activities in the video if his symptoms were as he claimed. He concluded that the Plaintiff's symptoms are not medically credible.
>
> The medical records and deposition of Dr. David Weber taken on February 3, 2015, were introduced into evidence on behalf of the Defendant. Dr. Weber saw

the Plaintiff upon referral from Dr. Hall on November 20, 2013, for complex regional pain syndrome ("CRPS") of the right upper extremity, type II. He recalled the Plaintiff wearing a sling and being very guarded with his arm and hand. Dr. Weber stated that he recommended a spinal cord stimulator since the Plaintiff had already completed physical therapy under Dr. Hall. Dr. Weber stated that individuals with CPRS will show signs of osteopetrosis [sic] in the late stages, but not in all cases. He said that he was informed that the Plaintiff was seen in public moving his arm about and informed the case worker that surveillance should be performed. Dr. Weber recommended physical therapy on June 30, 2014, because no progress was being made. He also restricted the Plaintiff to no lifting or driving. The Plaintiff was last seen on July 28, 2014, with no improvement. Dr. Weber viewed the surveillance video on or around July 29, 2014, revealing full range of motion. Dr. Weber changed his diagnosis after viewing the video from CPRS to malingering. He also found that this was a form of insurance fraud because the video was inconsistent with the way the Plaintiff presented himself at the office. Dr. Weber found the Plaintiff to be fully functional and able to return to work without restrictions. In a note dated July 30, 2014, Dr. Weber allowed the Plaintiff to return to work unrestricted as of that date.

On cross examination, Dr. Weber stated that the tip he received about the Plaintiff came from one of his employees named Cheryl and that the employee saw the Plaintiff at the flea market carrying guns and sacks of potatoes. Again, Dr. Weber stated that

> the Plaintiff does not have CRPS or any limitations.

The ALJ entered the following findings of facts and conclusions of law:

> The ALJ is most persuaded by the medical opinions of Drs. Jenkinson and Weber in this matter and by their respective interpretations of the surveillance video. The ALJ finds in accordance with the opinions of both doctors that the Plaintiff has exhibited symptom exaggeration.
>
> The ALJ is most persuaded by the opinion of Dr. Jenkinson that there is no evidence that the Plaintiff sustained a harmful change to the right shoulder or arm and that he ultimately has sustained a 0% whole person impairment.
>
> **FRAUD**
>
> The video surveillance in this matter indicates that the Plaintiff has exhibited symptom exaggeration and malingering that may rise to the level of fraudulent dishonesty. This matter is hereby referred to the Commissioner of the Department of Workers Claims for an appropriate investigation.

Hamilton filed a petition for reconsideration arguing the ALJ's finding he sustained no impairment rating was erroneous since it was not based on substantial evidence. He asserted the ALJ erroneously relied on Dr. Weber, a pain management specialist, since he was in no position to diagnose or treat the rotator cuff tear caused by the April 19, 2013, work injury. Rather, Dr. Weber's

testimony was limited to a diagnosis and treatment of complex regional pain syndrome ("CRPS"). Therefore, Dr. Weber's testimony had no weight as to whether Hamilton's rotator cuff tear and subsequent repair left him with a permanent impairment.

Hamilton also asserted the ALJ erroneously relied upon the report of Dr. Jenkinson over the records and reports of Drs. Hall and Nadar as Dr. Jenkinson's report was not based on substantial evidence. Hamilton contends there is no dispute his rotator cuff tear was due to the April 19, 2013, work injury and it was repaired by a qualified orthopedic specialist. Hamilton maintained that two of the three orthopedists who examined him found he was left with permanent impairment resulting from his workplace injury. Hamilton noted Dr. Nadar assessed an 8% impairment rating. Consequently, he argued the ALJ erred in relying upon the report of Dr. Jenkinson and the unrelated testimony of Dr. Weber.

Hamilton asserted that although the ALJ may find him personally detestable, he could not ignore the voluminous medical records establishing he sustained a permanent impairment as a result of his injury. Therefore, he requested the ALJ correct the finding he suffered no permanent impairment. Significantly, Hamilton did not

request additional findings or request the ALJ find he sustained a work-related right shoulder injury meriting surgery to repair a rotator cuff tear and, at least, an award of TTD benefits and medical benefits.

Concluding the petition for reconsideration was a re-argument of the merits of the case, by order dated January 26, 2016, the ALJ summarily overruled the petition for reconsideration.

On appeal, Hamilton's argument mirrors much of his petition for reconsideration. He contends the ALJ's decision finding he sustained no impairment rating is erroneous on the basis of reliable probative and material evidence contained in the record. Hamilton argues the ALJ's reliance upon Dr. Weber was erroneous because he is a pain management specialist and was not in a position to diagnose or treat the rotator cuff tear caused by April 19, 2013, work injury. Hamilton maintains Dr. Weber's testimony was limited to diagnosing and treating CRPS and carries no weight concerning whether his rotator cuff tear and subsequent surgery left him with a permanent impairment.

Hamilton also argues the ALJ's reliance on the report of Dr. Jenkinson over the voluminous records and reports of Drs. Hall and Nadar is erroneous because it is

not based on substantial evidence. Hamilton notes there is no dispute he tore his rotator cuff due to the work accident of April 19, 2013, and surgery was performed by a qualified orthopedic specialist to repair the rotator cuff. In addition, Hamilton notes Dr. Nadar, who initially treated him at the request of Big Lots, concluded the injury and subsequent surgery resulted in an 8% impairment rating. Hamilton concludes by arguing as follows:

> The Administrative Law Judge's decision to place the singular report of Dr. Jenkinson, and the unrelated testimony of Dr. Weber over the opinions of two of [sic] three orthopedic specialists who examined Mr. Hamilton finding he was left with a permanent impairment as a result of his injury supported by voluminous records shows that the Administrative Law Judge failed to consider substantial evidence that would induce conviction in the minds of reasonable men that Mr. Hamilton was left with zero percent impairment when deciding Mr. Hamilton's claim. Although the Administrative Law Judge may find the claimant personally detestable it does not mean that he can ignore the voluminous medical records submitted by the claimant showing that the claimant sustained a permanent impairment as a result of his injury in order to make a finding based on less than substantial evidence.

As the claimant in a workers' compensation proceeding, Hamilton had the burden of proving each of the essential elements of his cause of action. Snawder v.

Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Hamilton was unsuccessful in that 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 evidence that 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 that 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 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 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). 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). 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). 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, 708 S.W.2d 641, 643 (Ky. 1986).

The December 22, 2014, deposition of McSwain indicates he was employed as a field investigator by Titan Investigative Alliance. He possessed a private investigator's license and engaged in surveillance of Hamilton. McSwain obtained video footage of Hamilton on June 30, 2014, July 5, 2014, July 11, 2014, and July 12, 2014, which was introduced at his deposition. McSwain also prepared a report containing pictures of his observations which was also introduced.

McSwain testified that on June 30, 2014, the first day he filmed Hamilton, Hamilton was entering Dr. Weber's office, and on that occasion he favored his right arm and performed all tasks with his left arm. When Hamilton left Dr. Weber's office he used his right arm. McSwain testified that on July 5, 2014, Hamilton used his right arm in the same manner as the left. He observed that Hamilton's use of his right arm at a flea market did not reflect restrictions in the use of his right arm. On July 11, 2014, the third day of video footage, McSwain observed Hamilton at the East Kentucky Physical Therapy Clinic. When Hamilton entered the office he used his left arm and when he went to a cell phone store thereafter he used his right arm the same as the left arm. Hamilton also went to a flea market and left carrying what appeared to be an assault rifle and a handgun in a case using both arms. Hamilton put the handgun on the roof of his pickup using both hands. McSwain also described the locations Hamilton visited on July 12, 2014, one of which was the flea market where Hamilton used both arms equally. There was no guarding of the use of the right arm. On that date, Hamilton also handled fire arms. At all other locations, Hamilton used both arms without any apparent restrictions. McSwain testified the only time Hamilton's use of the right

arm was guarded or limited was when he visited the doctor's office or physical therapy office. He obtained seven hours of surveillance video, and the majority of the footage shows Hamilton using his right arm as much as or more than his left. McSwain testified it did not appear Hamilton could not use his right arm. He admitted he was not close enough to hear whether Hamilton voiced any pain in the course of using his right arm.

The February 3, 2015, deposition of Dr. Weber was introduced. Dr. Weber testified his specialty is pain management. He saw Hamilton on referral from Dr. Hall for evaluation of CRPS of the right upper extremity. He first saw Hamilton on November 20, 2013, and Hamilton would not let him touch his right hand because he said it was painful to touch. Hamilton's right arm was either in a sling or close to his body. Hamilton was on opioid therapy and never improved during the time he saw him. Initially Dr. Weber believed Hamilton was unable to use his right arm. Because he received a tip from one of his employees that Hamilton was using his right arm normally and he suspected malingering, Dr. Weber called the case worker and suggested video surveillance of Hamilton. Dr. Weber testified he viewed the surveillance video introduced at McSwain's deposition. The video showed Hamilton had full range of

motion. As a result, Dr. Weber changed his diagnosis to malingering. Based on his review of the surveillance video, Dr. Weber offered the following testimony:

> A: I don’t know how – this patient was either well read or was instructed, but he seemed to know –
>
> MR. BENTLEY: Objection on that.
>
> A: -- he knew well enough to present with the same symptoms and was very consistent while here the numerous times he was at this clinic.
>
> Q: And some of the things that you mentioned on the video, and I know that the video that we have, there’s about seven hours of footage and we won’t go through all that this evening, but –
>
> A: I didn’t go through all of it. I saw enough with the car and that type of stuff.
>
> Q: Okay. So you mostly focused on getting in and out of the car and things like that, or opening and closing the door?
>
> A: I think he was opening a car door, taking his arm, lifting it up on the back seat, sitting in the car waiting. I think it was a pickup truck. I don’t remember which one it was. I have not seen the video since, in what nine months, eight months, but I remember that he might have been carrying something into the car and using that arm. That obviously was inconsistent with any exam that I had ever done and I actually was quite appalled because my opinion at that point was not only was he duping the insurance company, he had been duping me for the same amount of time.

MR. BENTLEY: Objection.

Q: Dr. Weber, was the individual that you observed in the surveillance footage, was that in fact the patient that you had been treating, Mr. Hamilton?

A: Yes, it was.

Q: And I wanted to show you just a few images here from the surveillance report that we had received. Doctor, if you would, take a look at this. I'm referring to page 11 of the surveillance report that we had received. The top right of that is a picture of him using, it looks like – let me ask you this, what do you see in that top right picture?

A: I see an individual who is holding with his left arm onto some type of table or something next to a pickup truck with his right arm fully extended, either pulling, pushing, or doing something else. I don't know exactly what he's doing. But I never saw him do that ever.

. . .

A: And when I got the tip, it was just like anything else, if somebody calls me and tells me that you're selling your drugs, I'm obligated to follow-up on that. And in this case, if it's somebody that's selling drugs, how do I do that? We bring them in, we give them their medications, we give them enough on the weekends, give them enough time, we call them in for a pill count. If they're dirty, they don't show and they're discharged. In this case, the only thing I could do was, you know, I was getting a little suspicious of this gentleman because he never seemed to improve. But when I heard that tip, I

called, and I called his case worker and said there’s a probability here, you need to send out – you need to check him out, investigate him.

Q: Because he was carrying a five pound gun?

A: Yeah. And I think obviously, in my opinion, he was either – somebody had told him quite well, he was well coached because his symptoms never changed and he knew how to do the game.

Q: Now are you insinuating that I had something to do with this?

A: I did not say that.

Q: That’s twice you’ve said that, Doctor.

A: That’s twice I’ve said that. But let me tell you something, I’m going to say it again. The man was well coached. That’s all I know. He either knew how to read well or somebody coached him. And I’m not saying it was his attorney, but I think the man got some information because he was well coached and his game never changed here. But I can tell you right now, this is a pure case, in my personal opinion, professionally, of insurance fraud. Plain and simple.

Q: Move to strike that again for the third or fourth time. What restrictions did he have prior to you seeing his surveillance? What did you place on him?

A: I didn’t want him lifting anything.

Q: Okay.

Q: But then I sent him to physical therapy and he didn’t do that either.

So, you know, the man had nothing wrong with him. Plain and simple.

Q: So the MRI's were wrong? Is that right?

A: I'm not saying that. I'm saying the man doesn't have complex regional pain syndrome.

Q: That's all you were treating him for, right?

A: That's right. I'm not doing his shoulder. I'm not an orthopedic surgeon.

Q: Any restrictions regarding the shoulder and the –

A: Ask the orthopedist.

Q: Not you, someone else, right?

A: Orthopedist.

Q: Okay. So your testimony today is based only on the CRPS and nothing else, correct?

A: That and the videos.

Q: Based on his CRPS or your so-called malingering –

A: He does not have CPRS [sic] and it doesn't appear to me he has any limitations of range of motion of his shoulder by being able to lift up, lift the table up. But you can ask his orthopedist if he thinks he has any limitations based on that video.

In addition, Dr. Weber's July 28, 2014, note contains the following:

ADDENDUM 7/30/14

> Mr. Hamilton was seen 7/28/14 for RSD right upper extremity. Patient was unable to move his arm or tolerate touch due to severe pain symptoms that have been unchanged since his initial visit. Since his treatment here, he has always had RUE flexed at 90 degrees and guarding. On Tuesday 7/29/14 I received surveillance video from numerous locations from Work Comp showing essentially normal range of motion of the right upper extremity without any guarding as the patient was noted to have lifted and pushed and opened doors without difficulty. Given this information patient had symptom magnification which is inconsistent with his presentation to us.
>
> NEW ASSESSMENT
>
> 1 Malingering
>
> Plan: discontinue PT and medical management no weaning required. Patient's fully functional to return to [work] without limitations.
>
> Discharge from Pain Management without any additional treatment required.

In his January 20, 2015, report, Dr. Jenkinson set forth a history of the injury, Hamilton's present symptoms, and his activities of daily living. Dr. Jenkinson's physical examination of the right shoulder revealed the following:

> Mr. Hamilton is 5'10" and his weight is 235 pounds with a body mass index of 33.7. When offered a greeting handshake he held his right arm close to the side and offered the left hand. During the history he sat with a pained expression

> and held his left hand on the right shoulder.
>
> He has scars consistent with shoulder arthroscopy and mini-open rotator cuff repair. He winced and cried out as if with pain in response to minimal pressure over the anterior deltoid. He resisted all movements and had active flexion and abduction to 45 degrees. With the arm abducted internal rotation was normal and external rotation was approximately 60 degrees. He had 30 degrees of extension but he complained of pain with all attempted movements of the shoulder. The examination was accompanied by wincing and heavy breathing. He cried out "Oh god, you're hurting me" and strength testing about the shoulder was not reliable due to complaints of pain. Upper limb reflexes were non-responsive but symmetrical. With testing grip strength he gave a much weaker grip on the right than the left and stated "I have no strength or power." There was no muscle wasting and measurement indicated that his right upper arm was 2 centimeters larger than the left which is consistent with him being right hand dominant. His right forearm was 2 centimeters larger than the left which again is consistent with him being right hand dominant. It was noted that both hands were callused consistent with hands currently involved in manual labor and there was no difference between the right and the left.
>
> He had no complaints in his lower limbs or lumbar spine and detailed examination was not undertaken.

Dr. Jenkinson reviewed x-rays of the right shoulder, cervical spine, and thoracic spine performed on

April 25, 2013. He also reviewed a May 2, 2013, CT of the right shoulder and a May 23, 2013, 3-phase bone scan, and a July 1, 2013, MRI of the right shoulder. Dr. Jenkinson reviewed the April 25, 2013, record of Highlands Regional Medical Center, Dr. Deguzman's April 30, 2013, note, and multiple office notes of Dr. Hall. He also reviewed the last record of Dr. Weber dated July 30, 2014. Dr. Jenkinson viewed the surveillance video obtained by McSwain on the four dates in June and July 2014.

Dr. Jenkinson concluded the abnormalities reported on the MRI scan are consistent with age related degeneration commonly found in Hamilton's age group. There is no evidence Hamilton had an acute traumatic injury to his rotator cuff. Hamilton underwent arthroscopic surgery and afterwards reported severe pain resulting in a diagnosis of RSD.[2] Dr. Jenkinson stated it appears this diagnosis was based on the complaints of severe pain but the physicians did not describe any of the other abnormalities usually associated with that controversial diagnosis. He noted Hamilton continued on pain management and was prescribed narcotics and reported severe pain and inability to use his right arm. Dr. Jenkinson stated the

[2] RSD is also known as CRPS.

physical examination he performed of Hamilton was characterized by multiple non-physiological signs and pain behaviors consistent with symptom exaggeration. Although Hamilton stated he had been unable to use his right arm for almost two years, Dr. Jenkinson's examination revealed no muscle wasting, and both hands were callused consistent with hands currently involved in manual labor.

Dr. Jenkinson believed there was no objective abnormality which would form the basis for a specific diagnosis. Based on Hamilton's history, Dr. Jenkinson concluded it was possible Hamilton had a minor sprain or strain of the right shoulder. Dr. Jenkinson found no evidence Hamilton had a traumatic injury to his right rotator cuff, and believed his current presentation is consistent with gross symptom exaggeration. There was also no evidence Hamilton sustained a harmful change to the right shoulder or arm; however, it was possible he sustained a sprain or strain to the right shoulder but there is "no objective evidence for a specific injury." Dr. Jenkinson opined Hamilton had no permanent impairment rating for the alleged right shoulder injury based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He noted impairment for the shoulder is usually assigned based

on range of motion measurements. Here, Hamilton demonstrated gross symptom exaggeration, and it is apparent from the surveillance video he has normal use of the right arm. Therefore, Hamilton had no permanent impairment rating. In addition, Hamilton had no work restrictions, was capable of returning to his former employment, and required no further medical treatment. Based on the video surveillance, Dr. Jenkinson believed Hamilton engaged in symptom magnification. He also believed Hamilton would not have been able to perform any of the activities observed in the surveillance footage if his symptoms were as claimed.

Contrary to Hamilton's assertions, the testimony of Drs. Weber and Jenkinson as well as the testimony and exhibits of McSwain constitute substantial evidence upon which the ALJ was free to rely in reaching a decision on the merits. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939).

While Dr. Weber did not offer an opinion as to whether Hamilton sustained a rotator cuff injury, he unequivocally opined Hamilton had normal range of motion, was fully functional, and had no limitations. Dr. Weber's opinion has a direct bearing on whether Hamilton had an impairment rating for two reasons. First, his statement

Hamilton had a normal range of motion and is fully functional bears on whether Hamilton had an impairment rating. As Dr. Jenkinson pointed out "an impairment for the shoulder is usually assigned based on range of motion measurements." Second, the finding of normal range of motion of the right shoulder bears directly on the credibility of Dr. Nadar's findings regarding Hamilton's range of motion of the right shoulder and the impairment rating he assessed based on Hamilton's range of motion. Consequently, the ALJ's reliance upon the opinions of Dr. Weber would have a direct bearing upon his determination regarding the applicable impairment rating.

The ALJ, as fact-finder, determines the doctor upon whom he will rely. It is within the province of the ALJ to reject the voluminous medical records and reports of Drs. Hall and Nadar, and this Board has no authority to invade the ALJ's province. Contrary to Hamilton's representation, there was a dispute as to whether Hamilton tore his rotator cuff as a result of the work place accident as Big Lots merely stipulated to an alleged work-related injury on April 19, 2013. Given the obvious problems with Hamilton's credibility as revealed by the surveillance videos, we believe the ALJ was free to reject the evidence pointing to a rotator cuff injury on April 19,

2013, and conclude Hamilton did not sustain the rotator cuff injury in the course of his employment with Big Lots. Dr. Jenkinson's report unequivocally expresses an opinion Hamilton did not sustain a harmful change to the right shoulder on April 19, 2013. The ALJ was free to accept Dr. Jenkinson's opinion over those of Dr. Nadar.

Even though Dr. Hall's records contain a history, they do not contain a diagnosis of a work-related injury. Contrary to Hamilton's assertions, Dr. Hall never assessed an impairment rating pursuant to the AMA Guides for a work-related shoulder injury. The only physician who assessed an impairment rating greater than zero was Dr. Nadar.

While Hamilton is correct the contrary opinion espoused by Dr. Nadar could have been relied on by the ALJ to support a different outcome in his favor, in light of the remaining record, the views articulated by Dr. Nadar represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003).

The testimony of Drs. Weber and Jenkinson and McSwain along with the video surveillance amply support the finding Hamilton did not sustain a harmful change to the right shoulder and arm and he has zero impairment rating as a result of the alleged work-related injury of April 19,

2013. This same evidence also supports a finding Hamilton engaged in symptom exaggeration.

Finally, there is no dispute Hamilton underwent surgery performed by Dr. Hall, and Big Lots incurred substantial expenses in the form of TTD benefits and medical benefits for the treatment of Hamilton's shoulder. However, on appeal Hamilton does not argue in the alternative that he is entitled to at least an award of the TTD benefits and medical benefits already paid by Big Lots as a result of a work-related rotator cuff injury. Dr. Jenkinson expressed the opinion there was no evidence Hamilton sustained a traumatic injury to his right rotator cuff, and he did not sustain a harmful change to the right shoulder or arm as a result of the April 19, 2013, incident. Thus, the opinions of Dr. Jenkinson support the ALJ's decision to dismiss in total Hamilton's claim. Big Lots did not stipulate Hamilton sustained a work-related injury on April 19, 2013. It only stipulated Hamilton sustained an alleged injury on April 19, 2013.

As previously stated, where the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky.

1977). Because the outcome selected by the ALJ is supported by the record and the evidence does not compel a different result, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

Accordingly, the December 17, 2015, Opinion and Order and the January 26, 2016, Order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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