OPINION ENTERED: June 21, 2013

CLAIM NO. 201097913

TURNER INDUSTRIES GROUP PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

RANDY ARNETT and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Turner Industries Group ("Turner") seeks review of the opinion and award rendered January 11, 2013 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") awarding permanent partial disability ("PPD") benefits, and medical benefits to Randy Arnett ("Arnett"). Turner also appeals from the February 20, 2013 order on reconsideration.

On appeal, Turner argues the ALJ erred in combining the impairment rating for the left shoulder injury with the impairment rating assessed for the hearing loss claim into one award of PPD benefits. Turner also argues the three multiplier pursuant to KRS 342.730(1)(c)1 should not apply to the hearing loss claim. Because the ALJ erred in combining the award, we vacate the award of PPD benefits pursuant to KRS 342.730(1)(e), and remand for the ALJ to determine the appropriate award. We also *sua sponte* determine the ALJ failed to address any period of temporary total disability ("TTD") benefits, although a period of such benefits was stipulated by the parties at the Benefit Review Conference ("BRC"). On remand, the ALJ shall determine the applicable multipliers pursuant to KRS 342.730(1)(c)1, and shall review the claim for any appropriate award of TTD benefits.

Arnett filed a Form 101, Application for Resolution of Injury Claim, on January 11, 2011 alleging on January 18, 2010, he sustained left shoulder and back injuries when he tripped and fell onto his left side while entering the break trailer at the jobsite in Catlettsburg, Kentucky. At the time of the injury, Arnett was working as a pipefitter/welder. He had worked through the union for various facilities as a pipefitter since 1982. He

subsequently filed a motion to amend his claim to include the allegation of a work-related hearing loss. Hon. Caroline Pitt Clark, Administrative Law Judge, issued an order amending the claim to include the allegation of a hearing loss on July 15, 2011. The claim was later reassigned to the ALJ.

Arnett testified by deposition on March 14, 2011 and August 18, 2011. He also testified at the hearing held November 14, 2012. Arnett is a high school graduate, and attended college for one year. He has vocational training in welding, and worked as a pipefitter or welder from 1982 until the accident in January 2010. Prior to 1982, he worked as a gas station attendant, rodman for an engineering firm, brush cutter, coal miner, and as a farm laborer. He has neither worked since the accident nor applied for work.

His work as a pipefitter consisted of using chainfalls, cranes, rigs, hammers and wrenches. He stated the work was heavy, and required him to lift fifty to sixty pounds, climb, squat, bend, tug and pull. Arnett worked through a union, and had worked for Turner at Marathon Oil's Catlettsburg, Kentucky facility since September 2009.

At the time of the accident, Arnett was entering the break trailer when he tripped and fell. Prior to the accident, he had been hanging pipe. He stated he

experienced an immediate onset of left shoulder pain when he hit the floor. He sought treatment at the Occupational Health and Urgent Care Center in Huntington, West Virginia the day after the accident. He followed up with his family physician, Dr. Scott Arnett, who took him off work and ordered an MRI of the left shoulder. After the MRI, Arnett was referred to Dr. Kevin Pugh, an orthopedic surgeon in Pikeville, Kentucky. Dr. Pugh prescribed medications and physical therapy. When these modalities did not improve Arnett's condition, surgery was recommended.

Arnett requested to be seen by Dr. Martin Favetto, an orthopedic surgeon in Lexington, Kentucky, who had previously treated him for unrelated maladies. Dr. Favetto performed surgery on July 7, 2010 at St. Joseph Hospital in Lexington, Kentucky. Arnett stated the surgery did not completely resolve his shoulder pain, and he still has symptoms. Dr. Favetto released him to return to regular duty work on December 10, 2010, despite continuing shoulder problems. Arnett further stated he is physically unable to return to the same type of work he performed at the time of the accident. Arnett continues to take Ibuprofen, nightly apply heat to his left shoulder, and perform daily exercises. He stated his left arm is very weak, he has no

grip strength, and he does not believe he can hold a welding rod due to his inability to hold up his left arm.

In addition to the left shoulder injury, Arnett amended his claim to include the allegation of a work-related hearing loss. He stated he was exposed to loud noise throughout his work as a pipefitter. He stated at work he was exposed to loud grinding, banging on metal with hammers, and pipe hitting steel. He explained everything on a construction job is noisy. He stated hearing aids have been recommended. He has to turn the volume up to a high level on the television to hear it. He has also been advised he talks very loudly. He first noted a ringing in his ears in the fall of 2009.

In support of his claim, Arnett filed the utilization review report prepared by Dr. Kimberly Middleton dated February 8, 2010. Dr. Middleton denied the request for a lumbar MRI.

A left shoulder MRI was performed on January 30, 2010 at the Highlands Regional Medical Center. The MRI revealed a fracture of the humeral head and neck, partial tear of the supraspinatus tendon, downward sloping of the acromion producing mild lateral arch impingement, but no labral tears.

The January 26, 2010 note from the East Kentucky Physical Therapy reflects Arnett presented with signs and symptoms consistent with a left shoulder strain, with possible rotator cuff and labral tear. The therapist noted increased pain, decreased active range of motion, decreased strength, and decreased posture and body mechanics.

Dr. Arnett's records dated January 19, 2010 and February 2, 2010 noted persistent left shoulder pain, increased with external rotation. Arnett also complained of lumbar pain. Dr. Arnett referred Arnett to see Dr. Pugh.

Dr. Warren Bilkey, from Louisville, Kentucky, evaluated Arnett on August 24, 2010. Dr. Bilkey diagnosed a left shoulder contusion injury, fractures of the left humeral head and neck, and a rotator cuff tear all stemming from the January 18, 2010 work injury. Dr. Bilkey stated Arnett had undergone left shoulder surgery. He opined Arnett had reached maximum medical improvement ("MMI"), and assessed a 13% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He restricted Arnett to sedentary work for the left upper extremity, avoid lifting over fifteen pounds bilaterally, or over five pounds with the left upper extremity, and no repetitive overhead work.

In a supplemental report dated May 5, 2011, Dr. Bilkey stated he had reviewed Dr. Phillip Corbett's report and his opinions remained unchanged. In another supplemental report dated August 18, 2011, Dr. Bilkey stated he disagreed with the work restrictions assessed by Dr. Corbett on July 5, 2011, and again stated his opinions remain unchanged. Finally, in his report dated October 15, 2012, Dr. Bilkey stated he had reviewed Dr. Favetto's records and his opinions remain unchanged.

Arnett submitted the Form 107-I report prepared by Dr. Bruce Gruberman dated April 12, 2011. Dr. Gruberman diagnosed chronic post-traumatic strain of the left shoulder with fracture of the humeral neck, and status post decompression, all caused by the work-related injury. He assessed an 8% impairment rating pursuant to the AMA Guides. Dr. Gruberman restricted Arnett from climbing, overhead work, crawling, repetitive use of the left arm, and lifting, pushing or pulling with his left arm of more than ten pounds occasionally, or over five pounds frequently.

Arnett filed the vocational report prepared by Mr. Dwight McMillion dated April 16, 2011. Mr. McMillion performed a vocational evaluation on March 9, 2011. He stated Arnett perceives himself to be totally vocationally disabled due to pain and limitations resulting from the work

injury. He stated Arnett is unable to return to work as a pipefitter or welder, and would have difficulty performing even sedentary work on a sustained basis. Mr. McMillion stated Arnett would only be able to perform some limited light or sedentary work.

In a supplemental report dated August 10, 2011, Mr. McMillion disagreed with the opinions rendered by Dr. Ralph Crystal in his June 23, 2011 report. Mr. McMillion stated based upon the functional capacity evaluation ("FCE") administered by Mr. Rick Pounds, Arnett is unable to perform his previous work.

In support of his hearing loss claim, Arnett filed Dr. Robert Manning's June 7, 2011 report. Dr. Manning noted Arnett's twenty-nine year history of exposure to loud noise while employed as a steamfitter. He stated Arnett complained of hearing loss and ringing in his ears. Dr. Manning assessed a 13% impairment rating based upon the AMA Guides. Dr. Manning advised Arnett to wear hearing protection. In a supplemental report dated June 28, 2011, Dr. Manning opined Arnett's hearing loss was caused by his exposure to loud noise while working for Turner. He further stated Arnett cannot localize sound, and has difficulty communicating with co-workers in the presence of workplace noise.

A university evaluation was performed at the University of Kentucky on January 5, 2012 by Drs. Matthew L. Bush, M.D., and Abby B. Mattingly, Au.D. The report reflects Arnett has a work-related hearing loss due to the repetitive exposure of hazardous noise over his period of employment. Arnett was assessed a 10% impairment rating pursuant to the AMA Guides. Arnett was advised to use hearing protection, and Dr. Bush stated, "I also believe that he is a good candidate for amplification and have recommended that he obtain hearing aids."

Dr. Corbett evaluated Arnett on April 19, 2011. He diagnosed "an avulsion of a portion of the insertion of the supraspinatus tendon of his left shoulder, and persists with pain in the left shoulder reflective of chronic impingement." He assessed a 3% impairment rating pursuant to the AMA Guides. Dr. Corbett requested an FCE. In his July 5, 2011 report, Dr. Corbett stated because Arnett is deconditioned, he can only perform a full range of light work. He further stated successive strengthening activities could allow a return to work at the medium exertional level.

Turner filed Dr. Favetto's treatment records from May 13, 2010 through May 24, 2011. Dr. Favetto performed surgery on Arnett's left shoulder on July 7, 2010. On August 20, 2010, he opined Arnett could return to one-handed

work with no repetitive gripping. On October 1, 2010, he opined Arnett could work if he was not required to reach overhead. On December 10, 2010, Dr. Favetto stated Arnett could continue range of motion exercises at home, and could return to regular activities. On May 4, 2011, he opined Arnett had reached MMI and could perform moderate activity with no overhead lifting. On May 24, 2011, Dr. Favetto assessed a 2% impairment rating pursuant to the AMA Guides, and stated Arnett could lift up to fifty pounds maximum, and twenty-five pounds frequently, with no overhead work.

Dr. Ralph Crystal performed a vocational evaluation on June 23, 2011. He noted Arnett was not working, and reported he was unable to hunt or fish. Dr. Crystal opined Arnett is not totally disabled, and demonstrated the ability to perform gainful activity with his level of intellectual functioning, aptitudes and academic abilities.

A BRC was held September 11, 2012. The BRC order and memorandum reflects the only issue preserved was "benefits per KRS 342.730", and also reflects the back claim was withdrawn.

In the opinion rendered January 11, 2013, the ALJ listed the following stipulations:

STIPULATIONS

1. Jurisdiction under the Act.

2. An employment relationship existed between Plaintiff and Defendant Employer at all times herein relevant.

3. Plaintiff sustained a work-related injury on January 18, 2010.

4. The Defendant Employer received due and timely notice of Plaintiff's injury.

5. **Temporary total disability benefits were paid at the rate of $711.79 per week from January 20, 2010 through December 9, 2010 for a total of $32,945.72.**

6. The Defendant Employer paid medical expenses in the amount of $32,281.99.

7. Plaintiff's average weekly wage was $1174.66.

8. Plaintiff's date of birth is April 18, 1960.

9. Plaintiff' has a 12th grade education and some college.

10. Plaintiff has no vocational or specialized training.

(Emphasis added).

The ALJ then found as follows:

> The employee has the burden of proof and the risk of nonpersuasion to convince the trier of fact of every element of his workers compensation claim. *Snawder v. Stice* 576 SW2d 276 (Ky. App. 1979) similarly, the ALJ has

the sole authority to judge the weight and inferences to be drawn from the evidence. *Luttrell the Cardinal Aluminum Co.*, 909 SW2d 418 (Ky., 1985).

Benefits per KRS 342.730. While several physicians have presented opinions on the extent and duration of Plaintiff's impairment, regarding the physical injury, I am more convinced by the opinion of Dr. Bilkey who assessed a 13% whole person impairment pursuant to the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.*

As for Plaintiff's hearing loss, I am more persuaded by the opinion of the University Evaluator, Dr. Bush, who assessed a 10% whole person impairment pursuant to the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition* and recommended hearing protection if Plaintiff is going to be exposed to loud noise.

Plaintiff states that he cannot return to any work. KRS 342.0011(11)(c) defines "permanent total disability" as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as the result of an injury. More than sufficient evidence is presented that Plaintiff is unable to return to his former job as a pipe fitter/welder, the type of work he performed at the time of the injury. However, I am not persuaded that he has a complete and permanent inability to perform any type of work as the result of an injury. Therefore, while Plaintiff has not met his burden of proof that he is permanently totally disabled as a result of the work injury, he has met his burden of proving that he cannot return to the

type of work he was performing at the time of the injury and, thus, the multiplier of 3 will apply to his award.

Plaintiff's award is calculated as follows:

711.79 x 23% x 1.15 x 3 = $564.81

AWARD AND ORDER

1. Plaintiff, Randy Arnett, shall recover from Defendant Employer, Turner Industries Group, and/or its insurance carrier, the sum of $564.81 per week, from January 18, 2010, as permanent partial disability benefits, and continuing thereafter for so long as Plaintiff is so disabled but not to exceed 425 weeks, with Defendant Employer taking credit for benefits already paid and with 12% interest per annum on any past due amounts.

2. Plaintiff shall recover from Defendant Employer, and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances, as may be reasonably required for the cure and relief from the effects of the work-related injury which does not include psychological injury. The obligation of Defendant Employer shall be commensurate within the limits set by the Kentucky Medical Fee Schedule.

3. Any motion for approval of attorney's fees shall be filed within thirty (30) days after final disposition of this award.

Turner filed a petition for reconsideration arguing the ALJ inappropriately utilized $711.79, rather than $533.84, in calculating the award of PPD benefits. Turner also argued the ALJ erred by combining the impairment ratings for the shoulder injury and hearing loss claims which should have been calculated separately. Turner argued even if the ALJ was permitted to combine the awards, the result should have been 22% instead of 23% pursuant to the AMA Guides. Finally, Turner argued the ALJ erred in enhancing the award with the three multiplier.

In her February 20, 2013 order on reconsideration, the ALJ found as follows:

> 1. Regarding the combined award, the ALJ believes she can, in fact, combine the awards. The date of injury was January 18, 2010, the same as the date of injury for the hearing loss since the date for hearing loss is the date of last exposure.
>
> 2. The ALJ also finds the 3x multiplier applies to the hearing loss since, among other things, Dr. Manning found it would be extremely difficult to communicate with supervisors and coworkers in the presence of workplace noise. Therefore, the hearing loss alone would be enough to prevent a return to the same work.
>
> 3. Defendant Employer is, however, correct that the combined value of the 13% rating and the 10% rating should be 22% and the Opinion is **AMENDED** to reflect that rating.

> 4. Regarding the ALJ's use of the maximum PPD rate of 711.79, the parties agree, as does the ALJ that award should have been based on the maximum rate of 533.84.
>
> **WHEREFORE,** considering all the above, the Opinion, Award and Order of January 11, 2013 is so **AMENDED** to reflect the following: 1,174.66 x 2/3 = 783.15 → 533.84 (max) x 22% x 1.15 x 3 = 405.18 per week.

On appeal, Turner argues the ALJ erred by combining the impairment rating for the left shoulder with that assessed for the hearing loss to arrive at the award of PPD benefits. Turner also argues the ALJ erred in applying the three multiplier to the hearing loss claim.

As the claimant in a workers' compensation proceeding, Arnett had the burden of proving each of the essential elements of his cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002).

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 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 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 supporting a different outcome than 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 ALJ's 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 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 which otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

With that said, we find the ALJ erred in combining the impairments for Arnett's left shoulder and

hearing loss in awarding PPD benefits. KRS 342.730(1)(e) states as follows:

> For permanent partial disability, impairment for nonwork-related disabilities, conditions previously compensated under this chapter, conditions covered by KRS 342.732, and **hearing loss covered in KRS 342.7305 shall not be considered in determining the extent of disability or duration of benefits under this chapter.** (emphasis added).

Based upon this statute, the ALJ is prohibited from combining the impairment for the hearing loss and injury claims. We therefore vacate the ALJ's award of PPD benefits based upon a 22% combined impairment rating. On remand, the ALJ shall determine the appropriate awards separately for the left shoulder claim, and hearing loss, utilizing the appropriate factors pursuant to KRS 342.730(1)(b) for each.

Turner next argues the three multiplier should not apply to the hearing loss claim. That is a determination which must be made by the ALJ. Clearly, both the university evaluators and Dr. Manning indicated Arnett requires hearing protection and hearing amplification. It was also determined Arnett would have difficulty communicating on the job due to his hearing loss. On remand, if the ALJ determines Arnett is entitled to the enhancement by the

three multiplier for both the injury and hearing loss, she must determine the appropriate applicable multiplier for each condition separately. If she decides to assess the three multiplier for each condition, ample evidence exists to support such a determination.

Finally, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). At the BRC, as reflected in the ALJ's opinion, the parties stipulated to a payment of a period of TTD benefits, including the dates and amount of benefits paid. The ALJ awarded PPD benefits, but failed to address entitlement to TTD benefits in the award. She also allowed Turner to take credit for benefits paid. Neither party addressed this oversight in a petition for reconsideration. Because the parties stipulated TTD benefits were paid, we *sua sponte* vacate the ALJ's decision and direct her to consider whether Arnett was entitled to TTD benefits, and the appropriate time period and rate. Failure to address this would result in an inappropriate credit to the employer. Although neither party raised this issue, KRS 342.285 clearly grants the Board the authority to decide questions of law regardless of whether they are raised on appeal. It is within the Board's province on

appeal to assure orders and awards of an ALJ are in conformity with Chapter 342. In this case, the ALJ's award is not in conformity with the law.

Accordingly, the Opinion, Award and Order rendered January 11, 2013 by Hon. Jane Rice Williams, Administrative Law Judge, and the Order on reconsideration rendered February 20, 2013, are hereby **VACATED** and **REMANDED** for the ALJ to enter a decision consistent with the views expressed in this opinion.

STIVERS, MEMBER, CONCURS.

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