Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 25, 2016

CLAIM NO. 201500071

UNITED MECHANICAL, INC. PETITIONER

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

JEFFREY M. CRUMP
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
VACATING IN PART AND REMANDING
* * * * * *

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

STIVERS, Member. United Mechanical, Inc. ("United Mechanical") appeals from the July 24, 2015, Opinion and Order and the September 2, 2015, Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD) benefits, permanent partial disability ("PPD") benefits,

and medical benefits. On appeal, United Mechanical argues the ALJ's findings of a work-related injury and a permanent impairment rating are not supported by substantial evidence.

The Form 101 alleges Jeffrey Crump ("Crump") injured his neck on both October 2, 2013, and August 27, 2014, in the following manner: "08/27/2014- Catching an extension ladder. On or about 10/02/2013- Carrying an air compressor on shoulder."

The May 27, 2015, Independent Medical Report of Dr. Warren Bilkey was introduced by Crump. In the report, Dr. Bilkey set forth the following "impression":

> 1. 10/2/13 work injury cervical strain, aggravation of cervical spinal stenosis. Cervical radiculopathy. Mr. Crump has undergone ACDF surgery at C5-6.
>
> 2. 8/27/14 work injury cervical strain, cervical radiculopathy. Mr. Crump has undergone ACDF surgery at C6-7 with operative date 2/24/15.
>
> 3. Myofascial pain involving scapular musculature.

Dr. Bilkey further opined as follows:

> Mr. Crump appears to have had 2 straightforward injuries. The first was a lift injury of a compressor and these are quite heavy. The second was him catching a ladder that the wind had taken and started to fall toward

> electric power lines. Both of these produced an acute injury and both of these produced cervical radiculopathy for which he had undergone 2 surgeries now with benefit. Mr. Crump has returned to work in a light duty capacity.
>
> In my opinion, the above diagnoses are due to the work injuries whose dates are specified. The evaluation and treatment procedures that have been carried out appear to have been reasonable, medically necessary and work injury related. There is no evidence that Mr. Crump had an active impairment affecting his neck or upper limbs prior to 10/2/13.

Dr. Bilkey opined Crump is not at maximum medical improvement ("MMI") and could not be considered to be at MMI until February 25, 2016. Nonetheless, Dr. Bilkey assessed a 28% whole person impairment rating utilizing the DRE Method and a 29% whole person impairment rating utilizing the Range of Motion method, both pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He opined as follows regarding the tenuous nature of the 28% impairment rating calculated pursuant to the Range of Motion methodology:

> After one year subsequent to the second surgery, Mr. Crump may prove to have a higher level of impairment according to the Range of Motion method and this impairment rating would have to be

> calculated at that time to apply. The Range of Motion method however may also show a lower impairment rating than 28% whole person impairment. In that event, according to the rules of the Guides, when there are pertinent but competing methods to calculate impairment, the highest is utilized. Therefore if at the one year anniversary the Range of Motion method yields a lower impairment rating than the DRE method, the DRE method impairment would apply.

The June 11, 2015, Benefit Review Conference ("BRC") order lists the following contested issues: work-relatedness/causation; notice; benefits per KRS 342.730; credit for unemployment; "injury" as defined by the Act; TTD (overpayment/underpayment); pre-existing active; and medical benefits. Under "other" is "compensability of surgeries."

In the July 24, 2015, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law regarding "injury" as defined by the Act and permanent impairment:

> **A. Work-relatedness/causation; injury as defined by the Act.**
>
> KRS 342.0011(1) defines “injury” to mean any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines

"objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.

I saw and heard Mr. Crump testify at the Hearing. I sat a few feet from him and carefully observed his facial expressions, carefully listened to his voice tones, and carefully observed his body language during his testimony. I am the only decision maker who actually saw and heard him testify in person. He was a candid and stoic witness. I make the determination that he was a credible and convincing lay witness and that his testimony rang true.

This case calls to mind the Opinion of the Kentucky Court of Appeals in *Jeffries v. Clark & Ward*, 2007 WL 2343805 (Ky. App. 2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to <u>life experiences</u>" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "<u>life experiences</u>" in making that determination.

Based upon the plaintiff's credible and convincing lay testimony

as covered above, and the persuasive, compelling and reliable medical evidence from both Dr. Finizio, the plaintiff's treating neurosurgeon, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Bilkey, the examining physician, as covered above, I make the determination that Mr. Crump sustained serious work-related injuries to his neck while employed by the defendant on both October 2, 2013 and again on August 27, 2014.

...

D. Benefits per KRS 342.730; temporary total disability.

KRS 342.0011(11)(a) defines "temporary total disability" to mean 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.

In *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed 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.

Id. at 580-581.

In *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979), the Kentucky Supreme Court

stated that what it had in that case was lay testimony descriptive of and supportive of a permanent disability, together with medical testimony that was not in conflict with the lay testimony. The high court stated that where the medical evidence clearly and unequivocally shows the actual body condition, then the lay testimony is competent on the question of the extent of disability which has resulted from the bodily condition. The high court further stated that where there is medical testimony from which the decision maker could have concluded that the plaintiff did suffer from a work-related trauma, then, having reached that conclusion, the decision maker could then use the lay testimony to determine the extent, if any, of the occupational disability.

Based upon the plaintiff's credible and convincing lay testimony, as covered above, and the persuasive, compelling and reliable medical evidence from the plaintiff's neurosurgeon, Dr. Finizio, as covered above, as well as the persuasive, compelling and reliable medical evidence from Dr. Bilkey, the examining physician, as covered above, I make the determination that the plaintiff is entitled to recover from the defendant temporary total disability benefits beginning on November 27, 2013 and extending to and including March 17, 2014, for his first injury and surgery, and again beginning on September 11, 2014 and extending to and including May 18, 2015, for his second neck injury and surgery.

Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) requires that I perform an analysis of the provisions of KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2. Step 1 is to determine whether KRS

342.730(1)(c)1 is applicable? In other words, does the worker have the physical capacity to return to the type of work he was performing at the time his injury? Based upon the plaintiff's sworn testimony, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Finizio, I make the determination that what we have in this case is Mr. Crump being involved in successive injuries, and returning to work for the defendant. Dr. Finizio performed surgery at the C5-6 level of Mr. Crump's neck on November 27, 2013. Thereafter, Dr. Finizio placed upon the plaintiff restrictions of no lifting greater than 5 pounds. Dr. Finizio allowed the plaintiff to return to full duty work for the defendant on March 18, 2014. The defendant's proof was that the plaintiff's job was hard work and that the defendant did not have any light duty available. Mr. Crump continued at his regular work until August 27, 2014, at which time he injured his neck. Dr. Finizio performed a second surgery on the C6-7 level of the plaintiff's neck on February 24, 2015.

Based upon the above evidence, I make the determination that when Mr. Crump returned to work for the defendant on March 18, 2014, he was not actually physically capable of performing his former job with the defendant, which resulted in his second neck injury on August 27, 2014 and his second neck surgery.

Step 2 of the analysis is to determine whether KRS 342.730(1)(c)2 is applicable? In other words, did the worker return to work at equal or greater wages than at the time of his injury? Based upon Mr. Crump's credible and convincing lay testimony and the

wage records filed by the defendant, and giving the defendant the benefit of the doubt, I make the determination that after Mr. Crump's return to work for the defendant on March 18, 2014, he returned to work at equal or greater wages than he had at the time of his October 2, 2013 work injury.

Step 3 is to resolve the question of whether the worker is unlikely to be able to continue earning a wage that equals or exceeds the wage which he earned at the time of his October 2, 2013 injury for the indefinite future in any employment? In other words, we need to determine whether the injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. The plaintiff's wage records from Alpha Mechanical show that his gross weekly wage has ranged from a low of $804.00 per week to a high of $1,499.13 per week.

It is important to remember that under the holding of the Kentucky Court of Appeals in *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky. App. 2004), the *Fawbush* analysis includes a broad range of factors, only one of which is the plaintiff's ability to perform his current job. We know that Mr. Crump's job with Alpha Mechanical is preventative maintenance in HVAC work, which is a lighter job than his work for the defendant. He continues to suffer neck pain and radiating pain and takes prescription pain medication and over-the-counter pain medication for his painful symptoms. Under the *Adkins* case, the standard for the decision is whether the plaintiff's injuries have permanently altered his ability to earn an income and whether the application of KRS 342.730(1)(c)1 is appropriate,

> where the individual returns to work at the same or greater wage but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. Based upon the credible and convincing lay testimony from Mr. Crump and based upon the persuasive, compelling and reliable medical evidence from Dr. Bilkey, all of which is covered above, I make the determination that the third prong of the *Fawbush* analysis applies here and that Mr. Crump's October 2, 2013 work injuries have permanently altered his ability to earn an income and that he is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. I, therefore, make the determination that the third prong of the *Fawbush* analysis applies here and that under that application Mr. Crump is entitled to the 3 multiplier based upon Dr. Bilkey's 28% permanent whole person impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, cervical DRE Category IV, Table 15-5.
>
> In making the above determination, I also rely upon the decision of the Kentucky Supreme Court in *Adams v. NHC Healthcare*, 199 S.W.3d 163 (Ky. 2006).

United Mechanical filed an August 7, 2015, "Motion to Recuse and Petition for Reconsideration," both overruled by order dated September 2, 2015.

United Mechanical's first argument is the ALJ's finding of work-related injuries is not supported by substantial evidence. We disagree and affirm this finding.

The May 27, 2015, IME report of Dr. Bilkey is substantial evidence in support of Crump having sustained work-related injuries on October 2, 2013, and August 27, 2014. Dr. Bilkey examined Crump, evaluated medical records, and provided diagnoses of Crump's medical condition. Dr. Bilkey then opined that his diagnoses are "due to the work injuries whose dates are specified."

Crump had the burden of proving each of the essential elements of his cause of action, including whether he sustained work-related injuries on the alleged dates. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). As the fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Here, the ALJ relied upon the opinions of Dr. Bilkey to determine Crump sustained work-related injuries on October 2, 2013, and August 27, 2014. Dr. Bilkey's opinions constitute substantial evidence; hence, the ALJ's determination of work-related injuries will not be disturbed.

That said, and in response to United Mechanical's second argument on appeal that substantial evidence does not support a permanent impairment rating, we vacate the ALJ's findings of permanent partial disability, the award of PPD benefits, and the award of medical benefits and remand for additional findings.

It is clear from the language of both the July 24, 2015, Opinion and Order and the September 2, 2015, Order on Reconsideration that the ALJ relied upon a 28% impairment rating assessed by Dr. Bilkey. However, what is also clear is Dr. Bilkey opined Crump had not reached MMI at the time he assessed the two impairment ratings. In fact, in the May 27, 2015, IME report, Dr. Bilkey opined Crump could not be considered at MMI until February 25, 2016, and at that time, pursuant to the Range of Motion methodology, his impairment rating may be higher or lower than 28%.

On remand, the ALJ must review the medical evidence and determine if there is evidence regarding an MMI date that *pre-dates* May 27, 2015, the date Dr. Bilkey assigned his impairment ratings. *It is important to note that there are no other impairment ratings in the record.* Thus, an award of PPD benefits based upon Dr. Bilkey's impairment rating can only be rehabilitated through other medical evidence relating to MMI that pre-dates the date upon which Dr. Bilkey assigned his impairment ratings - May 27, 2015. If the ALJ is unable to discern that medical evidence supports an MMI date which satisfies this requirement, permanent income benefits cannot be awarded.

In the event an award of permanent income benefits is not supported by the evidence in the record, on remand, the ALJ may find that the medical evidence supports Crump having sustained temporary injuries on October 2, 2013, and August 27, 2014. In the event the ALJ determines Crump sustained temporary injuries, the ALJ must evaluate Crump's entitlement to reasonable and necessary medical benefits, both past and future, according to the applicable law. *See* FEI Installation, Inc. v. Williams, 214 S.W.3d 313, (Ky. 2007).

Significantly, the language utilized by Dr. Bilkey in his May 27, 2015, report demonstrates Crump

sustained "2 straightforward injuries." Thus, the ALJ must enter separate awards for Crump's two injuries. If the ALJ determines MMI was attained prior to Dr. Bilkey's examination, entering separate awards may be difficult, as the only impairment rating in the record was assessed by Dr. Bilkey who failed to make a distinction between the first and second injury in assessing a single impairment rating. Nonetheless, on remand, if the ALJ is able to rehabilitate the impairment rating assessed by Dr. Bilkey, he may not combine the award of PPD benefits.

We also note the parties do not contest the propriety of the award of TTD benefits. In its brief to this Board, United Mechanical appears to be satisfied with the award of TTD benefits by asserting as follows in its argument:

> ALJ Rudloff terminated claimant's award of temporary total disability benefits when he returned to work for Alpha Mechanical in May 2015. However, a return to work does not mean that a claimant has reached maximum medical improvement. There is a big difference between reaching maximum medical improvement and no longer being temporarily totally disabled. The fact that claimant is no longer temporarily totally disabled does not mean that he has reached maximum medical improvement.

Finally, in a one-sentence assertion embedded in United Mechanical's argument against the award of PPD benefits, it asserts as follows: "On remand the Administrative Law Judge must determine whether claimant sustained a temporary injury and if so whether he is entitled to medical benefits through the May 18, 2015 temporary total disability benefits award." We have already addressed this argument.

Accordingly, to the extent the ALJ found Crump sustained work-related injuries as defined by the Act, the July 24, 2015, Opinion and Order and the September 2, 2015, Order on Reconsideration are **AFFIRMED**. The ALJ's determination Crump is permanently partially disabled and the award of PPD and medical benefits are **VACATED**. This claim is **REMANDED** to the ALJ, as designated by the Chief Administrative Law Judge, for additional findings and entry of an amended decision in conformity with the views set forth herein.

ALL CONCUR.

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