Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 26, 2018

CLAIM NO. 201700078

ANTHONY GAMBRALL PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

FORD MOTOR CO. and
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Anthony Gambrall ("Gambrall") appeals from the Opinion and Order rendered August 21, 2017 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits (except for the time period Gambrall was engaged in union organizing activities), permanent partial disability ("PPD") benefits

based upon the 2% impairment rating assessed by Dr. David E. Tate, and medical benefits for a repetitive trauma injury Gambrall sustained to his left elbow while working at Ford. Gambrall also appeals from the September 21, 2017 order denying his petition for reconsideration.

On appeal, Gambrall argues the ALJ erred in relying upon the 2% impairment rating assessed by Dr. Tate, rather than the 8% impairment ratings assessed by both Dr. Warren Bilkey and Dr. Richard Dubou. He also argues the ALJ erred in not awarding TTD benefits from December 15, 2016 through March 31, 2017 when he was engaged in union organizing activities for which he was paid the base salary he would have earned while working at Ford, in addition to expenses. Finally, Gambrall argues the ALJ erred in failing to award 12% interest on all unpaid amounts awarded. We determine the ALJ did not err in relying upon the impairment rating assessed by Dr. Tate, in refusing to award TTD benefits during the period Gambrall was working for the union earning *bona fide* wages, and in awarding 6% interest on all amounts due and owing after June 29, 2017. Therefore, we affirm.

Gambrall filed a Form 101 on January 12, 2017 alleging he injured his left upper extremity (excluding the clavicle and scapula) on October 7, 2015 due to repetitive work activities. Gambrall's work history includes working as

a press operator, as a laborer, and at Ford in assembly since February 11, 2000.

Gambrall testified by deposition on May 9, 2017, and at the hearing held on June 21, 2017. Gambrall is a resident of Louisville, Kentucky. He was born on October 11, 1964. Gambrall completed high school, and took some college courses, although he did not obtain a degree. He also has a CDL. Gambrall continues to work for Ford, and only missed one day due to the injury. Gambrall testified he underwent bilateral carpal tunnel surgeries in 2006, while working at Ford, from which he fully recovered. In 2011, he underwent left cubital tunnel and trigger finger surgery, and he was also treated for carpal tunnel syndrome. He testified he fully recovered from those conditions.

On October 7, 2015, Gambrall reported to his supervisor he was having tingling and numbness in his left little and ring fingers. His symptoms had arisen a couple of months previously, but progressively worsened to the point he felt he should report it. He testified his symptoms were different from those he experienced in 2006 and 2011. He attributed his condition to the repetitive work he performed at Ford. Gambrall was referred to the Ford medical department and he ultimately underwent left cubital tunnel surgery by Dr. Tate. He continued to work at his regular job until the

day of his surgery. He missed work only on the day the surgery was performed.

The day after the surgery, Gambrall returned to light duty, to what he classified as a "make work" situation, until December 15, 2016 when he was "loaned" to the United Automobile Workers ("UAW") union, to which he belonged as a member, to participate in organizing activities. He testified those activities included working with a computer, data entry, telephone calls and meeting with individuals. Gambrall testified that during the period he was performing organizing activities, he received his base pay along with mileage and *per diem*. He did not receive any overtime pay while either working light duty at Ford, or while working for the union. Gambrall eventually returned to a regular job, with a twenty-five pound lifting restriction. He is earning at least the same pay that he was earning prior to the injury. He testified he continues to experience numbness and tingling in his little and ring fingers. He also experiences pain with the numbness, and has difficulty sleeping.

In support of his claim, Gambrall filed Dr. Tate's January 13, 2016 record. Dr. Tate noted he had previously cared for Gambrall in 2006 for complaints of tingling and numbness in each hand. He noted Gambrall had undergone upper extremity surgeries in 2006 and 2011. He additionally noted

Gambrall had worked for Ford for over fifteen years at the time of the office visit. Gambrall complained of numbness and tingling in his hands, primarily in the little and ring fingers of the left hand. Gambrall stated he noted these symptoms while walking, and they caused sleep interference.

Gambrall also filed Dr. Bilkey's April 5, 2017 report. Dr. Bilkey noted the history of surgery by Dr. Tate in 2006, and Dr. Michelle Palazzo in 2011. Gambrall reported his symptoms resolved after each procedure. Gambrall reported a gradual onset of the return of symptoms in 2015 on the left side. He is right hand dominant. He initially treated with the Ford medical department, and eventually underwent left cubital tunnel surgery by Dr. Tate on September 15, 2016. According to Gambrall, he did not have as good of a result from that procedure as he had from his previous surgeries. At the time of the examination, Gambrall had returned to work at a different position. He continued to complain of symptoms in the left upper extremity involving the ulnar side of the hand and forearm. Dr. Bilkey opined Gambrall had reached maximum medical improvement ("MMI"), and recommended no additional treatment. He restricted Gambrall from lifting greater than twenty-five pounds occasionally, and avoid the repetitive use of air guns. He assessed an 8% impairment rating pursuant to the 5th Edition of the American

Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Gambrall also filed the report of Dr. Richard Dubou who evaluated him on March 31, 2016. Dr. Dubou noted the previous upper extremity issues and surgeries in 2006 and 2011. Dr. Dubou diagnosed Gambrall with recurrent left cubital tunnel syndrome, and, to a lesser extent, right carpal tunnel syndrome. He related both conditions to Gambrall's work at Ford. He recommended a left anterior subcutaneous transposition of the ulnar nerve. Dr. Dubou stated Gambrall could continue to perform regular duty with his right hand, but could perform only light modified duty with the left hand. He opined Gambrall had not reached MMI, and would not do so until twelve to twenty weeks post-surgery.

Ford filed Dr. Tate's April 19, 2017 report. He provided the diagnosis of left cubital tunnel syndrome, and restricted Gambrall from lifting greater than twenty-five pounds. He also cleared Gambrall to use air guns while working. Ford also filed Dr. Tate's May 31, 2017 letter, which addressed Gambrall's impairment rating. He assessed a 2% impairment rating pursuant to the AMA Guides, and stated Gambrall could work at jobs with a heavy physical demand level.

Ford filed Dr. Dubou's May 16, 2017 report. He noted Gambrall did not sustain a single traumatic event. His symptoms began in 2014 and worsened until he reported them in 2015. Dr. Dubou opined Gambrall had still not reached MMI, but would likely qualify for an 8% impairment rating pursuant to the AMA Guides. He also stated Gambrall had a 2% prior active impairment rating for his previous conditions/ surgeries. Dr. Dubou stated Gambrall does not require any additional surgery.

Ford also filed treatment records from Kleinert and Kutz for eleven office visits between July 27, 2011 and January 8, 2012. Those records reflect Gambrall's treatment for the symptoms which onset in 2011 requiring additional surgery.

A Benefit Review Conference ("BRC") was held on June 6, 2017. The BRC Order and Memorandum reflects the issues to be decided included whether Gambrall retains the physical capacity to return to the type of work performed on the date of the injury, benefits per KRS 342.730, unpaid or contested medical expenses/future medical benefits, TTD, return to work wages, and pre-existing active disability and impairment.

The ALJ rendered an Opinion and Order on August 21, 2017. The ALJ noted there was no dispute that Gambrall

sustained a work-related injury. The ALJ awarded TTD benefits from September 16, 2016 through December 14, 2016, and again from April 1, 2017 through April 15, 2017. He excluded the period of December 15, 2016 through March 31, 2017 when Gambrall was engaged in union organizing activities and received the regular pay he would have earned at Ford, along with travel expenses and *per diem*. The ALJ also awarded PPD benefits based upon the 2% impairment rating assessed by Dr. Tate, and found the three-multiplier pursuant to KRS 342.730(1)(c)1 was not applicable. The ALJ additionally found if Gambrall ceases to earn an average weekly wage equal to or greater than his pre-injury wage after returning to the same or greater wages, he is entitled to the application of the two multiplier pursuant to KRS 342.730(1)(c)2. The ALJ also found Gambrall was entitled to interest at the rate of 12% on all past due amounts up to June 28, 2017, and 6% on all amounts thereafter. The ALJ also awarded medical benefits pursuant to KRS 342.020.

Gambrall filed a petition for reconsideration arguing, as he does on appeal, the ALJ erred in awarding PPD benefits based upon the 2% impairment rating assessed by Dr. Tate, rather than the 8% assessed by Drs. Bilkey and Dubou. He also argued the ALJ erred in not awarding TTD benefit for the period of time he was conducting union organizing

activities. Finally, Gambrall argued the ALJ erred in finding he was only entitled to interest at the rate of 6% on all past due amounts after June 29, 2017, and he is entitled to an award of 12% interest on all past due amounts. On September 21, 2017, the ALJ entered an order denying the petition for reconsideration.

As the claimant in a workers' compensation proceeding, Gambrall had the burden of proving each of the essential elements of his cause of action, including extent and duration of disability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Gambrall was unsuccessful in his burden regarding the extent of his disability, 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 that which 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 based on the evidence 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 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 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); 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, 708 S.W.2d 641 (Ky. 1986).

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 which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. 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, supra.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court held the proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. Where there are conflicting opinions from medical experts as to the appropriate percentage, it is the ALJ's function as fact-finder to weigh the evidence and select the rating upon which permanent disability benefits, if any, will be awarded. Knott County Nursing Home v. Wallen, 74 S.W.3d 706, 710 (Ky. 2002). In George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004), the Court further held that while an ALJ is not authorized to independently interpret the AMA Guides, he may as fact-finder consult them in the process of assigning weight and credibility to evidence. Although assigning a permanent impairment rating is a matter for medical experts, determining the weight and character of medical testimony and drawing reasonable inferences therefrom are matters for the ALJ. Knott County Nursing Home, supra.

Gambrall argues the ALJ erred in adopting the 2% impairment rating assessed by Dr. Tate since there is no indication the rating was assessed in accordance with the AMA Guides. Our review of the evidence leads us to conclude this is not a case where the ALJ was presented with overwhelming evidence the impairment rating calculated by Dr. Tate is not

in accordance with the AMA Guides. *See* Central Baptist Hospital v. Hayes, 2012-SC-000752-WC, August 29, 2013, designated not to be published. Rather, the ALJ exercised his discretion in choosing to rely upon Dr. Tate's impairment rating. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). If Gambrall had wished to challenge the impairment rating assessed by Dr. Tate, the proper method would have been through deposing the physician, or offering a medical opinion addressing the propriety of the rating. While Drs. Bilkey and Dubou offered different impairment ratings, Dr. Tate assessed a 2% impairment rating and stated it was based upon the AMA Guides. No medical evidence was introduced challenging Dr. Tate's assessment of impairment, or that he improperly used the AMA Guides. Furthermore, we believe the ALJ provided sufficient analysis in setting forth why he relied upon the impairment rating assessed by Dr. Tate. Dr. Tate's impairment rating constitutes substantial evidence upon which the ALJ could rely, and no contrary result is compelled. Therefore, we affirm the ALJ's award of PPD benefits.

We likewise affirm the ALJ's award of TTD benefits. Gambrall continued to perform his normal job until the surgery was performed in September 2016. Thereafter, the ALJ awarded TTD benefits through April 15, 2017 when he resumed normal

work, except for the period of time he was performing union organizing activities for the UAW. Gambrall testified that during the period from December 15, 2016 through March 31, 2017, he was engaged in union organizing activities and received the regular pay he would have earned at Ford, along with travel expenses and *per diem*. We believe the ALJ performed the proper analysis in refusing to award TTD benefits during that period.

In Trane Commercial Systems v. Tipton, 481 S.W.3d 800, the Kentucky Supreme Court addressed whether an employee was entitled to TTD benefits upon returning to light duty work prior to reaching MMI. The Court noted:

> We take this opportunity to further delineate our holding in *Livingood,* and to clarify what standards the ALJs should apply to determine if an employee "has not reached a level of improvement that would permit a return to employment." KRS 342.0011(11)(a). Initially, we reiterate that "[t]he purpose for awarding income benefits such as TTD is to compensate workers for income that is lost due to an injury, thereby enabling them to provide the necessities of life for themselves and their dependents." *Double L Const., Inc.,* 182 S.W.3d at 514. Next, we note that, once an injured employee reaches MMI that employee is no longer entitled to TTD benefits. Therefore, the following only applies to those employees who have not reached MMI but who have reached a level of improvement sufficient to permit a return to employment.

> As we have previously held, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type [of work] that is customary or that he was performing at the time of his injury." *Central Kentucky Steel v. Wise,* 19 S.W.3d at 659. However, it is also not reasonable, and it does not further the purpose for paying income benefits, to pay TTD benefits to an injured employee who has returned to employment simply because the work differs from what she performed at the time of injury. Therefore, absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; *and* the employee has actually returned to employment. We do not attempt to foresee what extraordinary circumstances might justify an award of TTD benefits to an employee who has returned to employment under those circumstances; however, in making any such award, an ALJ must take into consideration the purpose for paying income benefits and set forth specific evidence-based reasons why an award of TTD benefits in addition to the employee's wages would forward that purpose.
> Id. at 807.

That said, we believe the ALJ's analysis and refusal to award TTD benefits during the period of time Gambrall was engaged in union organizing activities was appropriate. The ALJ determined during that period of time Gambrall was performing legitimate *bona fide* work activities for which he received his regular pay, and expenses. The

analysis performed by the ALJ was appropriately performed pursuant to the guidance set forth in Trane Commercial Systems v. Tipton, supra, and his determination will not be disturbed.

Finally, Gambrall argues the ALJ erred in failing to award 12% interest on all past due and owing benefits. Again, we disagree. The applicable statute is KRS 342.040. Prior to June 29, 2017, that provision of the statute read, in relevant part, as follows:

> All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid, . . .

Effective June 29, 2017, the Kentucky legislature amended KRS 342.040 to read, in relevant part, as follows:

> All income benefits shall be payable on the regular payday after seven (7) days after the injury or disability resulting from an occupational disease, with interest at the rate of six percent (6%) per annum on each installment from the time it is due until paid, except that if the administrative law judge determines that a denial, . . .

In Stovall v. Couch, 658 S.W.2d 437 (Ky. 1983), the Court of Appeals resolved the very issue raised by Gambrall on appeal. Couch was found totally occupationally disabled due to coal workers' pneumoconiosis ("CWP"). The issue on

appeal was whether the Board erred in awarding interest at the rate of 12% on all past due benefits. On the date of last injurious exposure to CWP, the statute allowed 6% interest on unpaid benefits. However, the statute was subsequently amended effective July 15, 1982, increasing the interest rate to 12% per annum on each installment from the time it is due until paid. In determining the employer owed 6% interest on all past due installments through July 14, 1982, and 12% on all unpaid installments thereafter, the Court of Appeals concluded as follows:

> On this appeal, appellants contend that KRS 342.040, governing the rate of interest on past due installments, was misapplied. On the date of last injurious exposure, that statute allowed 6% interest on such benefits. However, the provision was amended, effective July 15, 1982, increasing the rate of interest to 12% per annum on each installment *from the time it is due* until paid. To uphold the Board's award would amount to retroactive application of the amendment, appellants contend.
>
> As this particular application of KRS 342.040 has yet to be the topic of an appellate decision, both sides in this controversy look for analogy to the case of *Ridge v. Ridge,* Ky., 572 S.W.2d 859 (1978). *Ridge* dealt with the application of an amendment to the statute governing the legal rate of interest on judgments. The Kentucky Supreme Court decided:
>
> > ... to adopt the position that the rate of interest on judgments is a statutory

> rather than a contractual matter. We therefore hold that the increase of the legal interest rate applies prospectively to prior unsatisfied judgments, the new rate beginning with the effective date of the amendment. *Id.* at 861.

Appellants assert that, employing the logic of *Ridge,* the 12% rate of interest should begin on the effective date of the statutory amendment, July 15, 1982, and that prior to that date, interest should be 6% as per the old statute. Appellee Couch looks to the language in *Ridge,* namely that the new rate of interest "applies prospectively to prior unsatisfied judgments," thus concluding that the rate of interest is controlled by the date of judgment and not the date of accrual of the cause of action, and that the 12% rate in effect upon the date of judgment is applicable.

In *Campbell v. Young,* Ky., 478 S.W.2d 712, 713 (1972), the then Court of Appeals discussed the question of when interest was to begin accruing on unpaid compensation benefits. That court held that interest was due from the date *the claim for compensation was filed.* In the instant case, when Couch filed his claim, the interest rate in effect was 6% per annum. In our opinion, the plain wording of KRS 342.040 dictates that appellants may only be assessed interest on unpaid benefits at 6% prior to July 15, 1982, and at 12% thereafter. Consequently, the Board's award to the contrary and the lower court's affirmation thereof was in error.

Id. at 437-438.

The same logic applies here. This Board has recently rendered numerous decisions finding 12% interest was applicable for due and owing benefits through June 28, 2017, and 6% thereafter, as found by the ALJ. We agree Gambrall's entitlement to income benefits vested at the time of his injury. Therefore, as of the date of injury and up through June 28, 2017, Gambrall is entitled to 12% interest on all past due benefits prior to that time. Gambrall is entitled to 6% interest on income benefits accrued from and after June 29, 2017.

We find no support for Gambrall's contention he is entitled to 12% interest on all unpaid amounts subsequent to June 29, 2017. Therefore, we affirm the ALJ's decision regarding the applicable interest rate.

Accordingly, the August 21, 2017 Opinion and Order and the September 21, 2017 order on petition for reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED.**

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARATE OPINION.

RECHTER, Member. I agree with the majority that the ALJ was entitled to rely upon Dr. Tate's impairment rating, and assessed the proper interest rate on past due income benefits.

However, I would remand this claim for further analysis regarding Gambrall's entitlement to TTD benefits during the period he performed union activities.

Regarding this period, the ALJ concluded:

> However, during the time from December 15, 2016 through March 20, 2017, plaintiff was pulled from his light duty work with Ford to perform organizing work on behalf of his union, the UAW. Although it appears he still earned less wages then [sic] he did pre-injury, he testified he was earning his regular rate of pay and working 40 hours per week and that he performed legitimate, bona fide organizing activities on behalf of the union. The ALJ is persuaded this work constituted bona fide employment such that plaintiff was not entitled to TTD benefits during this intervening period.

Referencing Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016), the majority explains, "The ALJ determined during that period of time Gambrall was performing legitimate bona fide work activities for which he received his regular pay, and expenses. The analysis performed by the ALJ was appropriately performed pursuant to the guidelines" set forth in Trane. I disagree, as this is not the analysis set forth in Trane.

When a claimant has not reached MMI yet and has returned to some form of employment, as here, Trane and KRS 342.0011(11)(a) require the ALJ to determined whether the claimant has returned to "employment." The Trane Court

explained a “returned to employment” means a return to “customary employment; i.e. work within her physical restrictions and for which she has the experience, training, and education.” Trane does not ask the ALJ to determine whether the claimant is performing “bona fide” work, as was the conclusion reached in this claim.

I would remand this claim with instructions to determine whether Gambrall’s work at a different employer constituted a return to customary employment within his physical restrictions and for which he has the experience, training and education.

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