

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 1, 2021

CLAIM NO. 201954743

ANTHONY PATRICK

PETITIONER

VS. **APPEAL FROM HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE**

HANSON TRANSPORTATION and
HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Anthony Patrick (“Patrick”) appeals from the May 15, 2021 Opinion, Award and Order and the June 4, 2021 Order overruling his Petition for Reconsideration rendered by Hon. John H. McCracken, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits for a work-related right biceps injury he sustained on November 11, 2019.

On appeal, Patrick argues the ALJ erred in finding the three-multiplier pursuant to KRS 342.730(1)(c)1 is not applicable. Because substantial evidence supports the ALJ's determination and a contrary result is not compelled, we affirm.

Patrick filed a Form 101 alleging he injured his right bicep on November 11, 2019 while throwing lines over his flatbed. At the time of the accident, Patrick worked as a truck driver for Hanson Transportation ("Hanson"), hauling flatbed trailers. The Form 104 indicates Patrick began working as a truck driver in 1989, and he worked for Hanson from October 2019 through March 2020.

Patrick testified by deposition on January 18, 2020 and at the final hearing held March 17, 2020. Hanson, a resident of Morning View, Kentucky, was born in 1974. He worked for STI from 1989 to March 2017 driving wreckers and flatbeds. He then drove a grease truck for Darling Ingredients from March 2017 to October 2019. Patrick testified he bought his own truck in February 2020, which he leased to Hillsboro Transportation and he began driving a dedicated route, five days a week, in May 2020 as an owner/operator.

Patrick hauled a flatbed trailer for Hanson. He was required to pull straps or chains, use binders, drag heavy tarps across some loads, and secure loads pursuant to DOT specifications. Patrick climbed on top of trailers and pulled tarps weighing 75 to 100 pounds across the top of the loads, which he then unrolled. Patrick testified he felt a pop in his right arm and immediate pain from his right shoulder to his right elbow on November 11, 2019 as he was throwing straps overhead to secure a load. Patrick initially treated at the emergency room and St. Elizabeth Business Health, and he was then referred to OrthoCincy. Dr. James

Baker performed a bicep tendon repair on November 26, 2019. Patrick also completed post-operative physical therapy. Dr. Baker released Patrick to full duty work without restrictions on March 2, 2020. Patrick has not received any additional treatment or physical therapy for his right arm, nor is he taking any prescription medication. Patrick testified he has only regained 25% of the strength in his right arm since his surgery, and he cannot lift as much as he could prior to his injury. He continues to experience pain and has difficulty gripping with his right hand.

Patrick has not returned to Hanson since the injury despite his release to return to full duty work without restrictions by Dr. Baker on March 2, 2020. Patrick does not believe he is able to throw straps, pull the heavy tarps, manipulate chains, or use the binders. Patrick similarly testified he is unable to return to work for Hanson hauling flatbed trailers due to his current condition.

Patrick began driving a closed trailer for Hillsboro in May 2020. He drives a dedicated route each day, five days a week, hauling parts from Dry Ridge, Kentucky to Sheffield, Ohio. Although Patrick now earns approximately \$2,885.00 in gross wages per week, he testified his net wages are significantly less than what he earned at Hanson. Patrick testified his current job with Hillsboro is less physically demanding since he is only required to shut the door, and drop and hook a trailer once a day.

The parties filed treatment records from St. Elizabeth emergency room, St. Elizabeth Business Health, OrthoCincy, and physical therapy. A November 25, 2019 MRI of the right elbow demonstrated a complete tear of both heads of the distal biceps tendon. Patrick was referred to OrthoCincy. Dr. Adam

Metzler noted Patrick sustained a bicep injury while throwing straps over a truck. Dr. Baker performed a repair of the right distal bicep tendon on November 26, 2019. Patrick underwent post-operative physical therapy and followed up with Dr. Baker and his physician's assistant through March 2, 2020. Dr. Baker gradually lessened Patrick's restrictions and anticipated a full return to work. The following was noted on March 2, 2020:

The patient returns today for routine follow-up. He has been recommended for discharge from physical therapy. He states he is doing well and is ready to return to full duty. He has been able to lift himself into his truck. He has no complaints or concerns today.

Dr. Baker's examination demonstrated full painless range of motion in his right elbow, non-tender to palpitation, and no neurological deficits to the medial, radial, and ulnar nerves. Dr. Baker diagnosed a right bicep tendon repair, and he found Patrick had reached maximum medical improvement ("MMI"). Patrick was released to full duty work without restrictions, and he was advised to return on an as-needed basis. The physical therapy records indicate Patrick completed 21 visits and he was discharged on February 28, 2020.

Hanson filed Dr. Robert Jacob's May 13, 2020 medical records review report. Dr. Jacob assessed a 0% impairment rating for Patrick's right arm pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He opined Patrick is able to work without restrictions performing his normal job responsibilities.

Patrick filed Dr. Stephen Wunder's July 30, 2020 report. He noted the November 11, 2019 work incident and subsequent treatment. Dr. Wunder noted

Patrick was released to return to work in March 2020, but he was unable to return to his prior job hauling flatbed trailers. Patrick reported he is unable to strap loads, climb, lift, push, and pull as required by his prior job. Patrick reported he had purchased his own truck and started working for another employer. Dr. Wunder diagnosed a right distal bicep tendon tear surgically repaired on November 26, 2019. He opined Patrick attained MMI on March 2, 2020. Dr. Wunder assessed a 14% impairment rating pursuant to the AMA Guides. Dr. Wunder opined Patrick is unable to perform his prior job duties since he can no longer climb onto the flatbed to strap loads, and restricted him from lifting over five pounds with his right arm.

Hanson filed Dr. Frank Bonnarens' December 1, 2020 report. Dr. Bonnarens noted Patrick was a truck driver hauling flatbed trailers when he injured his right bicep on November 11, 2019. He noted Hanson hauled flatbed trailers from 1989 until his November 11, 2019 injury. Patrick demonstrated full range of motion of his right elbow with full pronation, supination, forward flexion, and extension. Dr. Bonnarens found no evidence of neurological dysfunction, but he noted Patrick's complaints of tenderness to palpitation. Dr. Bonnarens opined Patrick ruptured his right distal bicep on November 11, 2019, and he reached MMI on March 2, 2020. He assessed a 0% impairment rating pursuant to the AMA Guides. Dr. Bonnarens disagreed with Dr. Wunder's opinions, stating as follows:

Based upon the review of the records, the findings on physical examination today and review of the history with the examinee, there is no evidence that there should be any permanent work restrictions for this examinee. I respectfully disagree with Dr. Wunder. Dr. Wunder is hypothesizing that the musculocutaneous nerve is dysfunctional; however, there is no evidence to support musculocutaneous nerve dysfunction, or in fact,

any dysfunction of the axillary nerve, the median nerve, ulnar nerve, or radial nerve, which would be the five branches of the brachial plexus providing innervation to the arm, and with no evidence of any neurologic dysfunction, solely a complaint of pain with no physical findings to support it, there is no basis for restriction, nor is there a basis for impairment.

Dr. Bonnarens prepared a February 18, 2021 supplemental report after reviewing Dr. Jules Barefoot's January 21, 2021 report. He disagreed with Dr. Barefoot's impairment assessment. Dr. Bonnarens again found no basis for restricting Patrick's activities since he demonstrated normal strength and full range of motion on December 1, 2020. He also noted Patrick's treating physician released him to full duty work without restrictions. He noted Patrick continues to drive a local delivery truck. Dr. Bonnarens concluded Patrick's objective findings are consistent with a successful repair enabling him to resume his previous high level of function, which in his case, was driving a truck hauling flatbed trailers.

Patrick filed Dr. Barefoot's January 21, 2021 report. Dr. Barefoot noted Patrick worked as a truck driver hauling flatbed trailers at the time of his November 11, 2019 work injury, and he now works for a different company as a local truck driver. Dr. Barefoot diagnosed a distal right bicep tendon tear due to the November 11, 2019 work event requiring operative intervention. He opined Patrick attained MMI on March 2, 2020. He assessed a 16% impairment rating for the right upper extremity based upon strength deficit and grip strength pursuant to the AMA Guides. Dr. Barefoot noted his examination revealed significant weakness in the right elbow, and measurable marked loss of grip strength in right hand. Dr. Barefoot advised Patrick would have marked difficulty with repetitive lifting, grasping,

pushing, and pulling with his right upper extremity. He also noted Patrick could not safely work on ladders, scaffolding, or at unprotected heights, and he would have difficulty operating a manual transmission vehicle. Dr. Barefoot opined Patrick does not retain the physical capacity to return to his prior position as a driver/operator of a flatbed semi-tractor trailer noting his ongoing loss of strength in his right hand and his description of his workplace activities.

At the Benefit Review Conference (“BRC”) held on February 9, 2021, the parties stipulated Patrick sustained a work-related injury on November 11, 2019, for which Hanson voluntary paid TTD benefits from November 13, 2019 through March 3, 2020 and medical expenses. The parties also stipulated to a pre-injury average week wage of \$1,110.00. Included in the contested issues noted at the BRC was whether Patrick retains the physical capacity to return to the type of work performed at the time of the injury.

The ALJ determined Patrick sustained a work-related right bicep tendon tear on November 11, 2019 warranting a 9% impairment rating assessed by Dr. Barefoot for strength loss. The ALJ also determined Patrick attained MMI on March 2, 2020 and is entitled to TTD benefits from November 11, 2019 through March 2, 2020. The ALJ determined Patrick retains the physical capacity to return to the type of work he performed at the time of injury, stating as follows, *verbatim*:

The ALJ must decide whether or not Patrick is entitled to multipliers in accordance with KRS 342.730(1)(c)(1) or paragraph 2. Subparagraph 1 applies when the plaintiff lacks the physical capacity to return to the type of work being performed at the time of the injury and has not returned to earning same or greater wages. Essentially, it must be determined whether the injury has permanently altered the worker’s ability to earn an

income. Adams v. NHC Healthcare, 199 S.W.3d 163 (Ky. 2006).

Patrick testified that he has been a truck driver for well over 20 years. His job with Defendant required him to drive trucks hauling a flatbed trailer. He currently hauls a closed van five days a week. He described the difference between the physical requirements of hauling the two trailers.

Patrick stated that a flatbed driver has more responsibilities. He had to throw nylon straps up and over the load on the trailer. He has to secure the load for safety purposes. He had to lift and move tarps that weighed between 75 and 100 pounds. His current job driving a closed van does not require him to strap his load, climb on the trailer, or secure the load. Tarps are not used with a closed van trailer.

Patrick testified that his right arm strength was decreased by 70 percent. However, Dr. Baker's records, and those of physical therapy, are inconsistent with his statements. The ALJ is uncertain why the last treatment date of those records make no reference to the loss of strength Patrick stated existed. Dr. Baker's records indicate midway through treatment that Patrick had difficulty with some daily activities; however, there is no mention of those issues upon discharge. Both Dr. Wunder and Dr. Barefoot record grip strength issues. Dr. Wunder found no forearm atrophy with his right forearm measuring 32cm and the left measuring 31cm. Dr. Wunder measured a two-centimeter difference in the size of the right bicep as compared to the left bicep. He noted power grasp on the right was at 25 to 30 pounds on the right and between 100 and 105 on the left. Dr. Barefoot measured grip strength at 22 pounds on the right and 105 pounds on the left. Dr. Bonnarens observed full range of motion of the right elbow with strength at five out of five. Dr. Bonnarens examination occurred in early December 2020 and Dr. Barefoot's examination occurred in late January 2021. As previously stated, neither Dr. Baker nor the physical therapy records indicate loss strength on the last date of treatment to any degree expressed by Patrick.

Another factor is Patrick's job. He is first and foremost a truck driver. He had driven trucks for over 24 years. His job with Hanson required hauling a flatbed trailer. His current job requires him to haul a closed van trailer. However, he is still a truck driver. The ALJ does not know, other than his testimony, if he could perform his job on when released by Dr. Baker on March 2, 2020 because he never went back to work for Defendant. Patrick bought a semi-tractor to operate as an owner operator two weeks prior to Dr. Baker releasing him to full duty work. One question the ALJ has is that if he could not perform his work for Defendant, why are Dr. Baker's records silent on that concern. Likewise, the physical therapy records are silent on any concern that he did not have the strength to perform his job with Defendant. At one point, Patrick testified that was able to lift 40 pounds when discharged by Dr. Baker.

Currently, Patrick drives his commercial truck five days a week. This tells the ALJ that he is able to get in and out of his tractor and perform all inspections necessary for safe operations of the tractor.

There is conflicting evidence between Dr. Baker and Patrick's testimony, his buying a tractor prior to being released, and never going back to work for Defendant to see if he could perform the job. There is a wide disparity of his perceived physical abilities between his treating doctor, Dr. Baker, and the examining doctors, Dr. Bonnarens, Dr. Barefoot and Dr. Wunder. Dr. Jacob's did not personally examine Patrick. Because of this disparity, his buying a tractor prior to being released and not attempting to return to see if he could in fact perform the job, the ALJ finds that Patrick has not met his burden to convince the ALJ that he is entitled to a three multiplier pursuant to KRS 342.730(1)(c)(1). The ALJ relies on Dr. Baker and Dr. Bonnarens to find that Patrick retains the physical capacity to return to the type of work he performed at the time of injury.

Patrick filed a Petition for Reconsideration making the same arguments he now raises on appeal. Hanson filed a Petition for Reconsideration requesting the ALJ amend the award of medical expenses to reflect the most recent

version of KRS 342.020. In the June 4, 2021 Order, the ALJ overruled Patrick's Petition for Reconsideration as a re-argument of the merits, but he amended the award of medical benefits.

On appeal, Patrick argues the ALJ erred in considering the general type of work he performed at the time of injury and failing to consider whether he could perform his exact job duties in finding the three-multiplier is not applicable. Patrick points to his own testimony regarding his job requirements in hauling flatbed trailers, and his belief he is unable to return to his former job with Hanson. Patrick relies upon the opinions of Drs. Wunder and Barefoot. Patrick also asserts he is now earning less than he did at the time he was injured.

As the claimant in a workers' compensation proceeding, Patrick had the burden of proving each of the essential elements of his claim, including the application of the three-multiplier pursuant to KRS 342.730(1)(c)1. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Patrick was unsuccessful in his 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 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 inadequate 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. As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

KRS 342.730(1)(c)1 states as follows:

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall

not be construed so as to extend the duration of payments.

In Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky. 2004), the Kentucky Supreme Court held, “[w]hen used in the context of an award that is based upon an objectively determined functional impairment, ‘the type of work that the employee performed at the time of injury’ was most likely intended by the legislature to refer to the actual jobs that the individual performed.”

Therefore, the issue is whether the evidence compels a finding Patrick does not retain the physical capacity to return to hauling flatbed trailers. The ALJ acknowledged Patrick operated a truck hauling flatbed trailers, which he testified is more physically demanding than his current job. The ALJ also noted the treatment and physical therapy records are inconsistent with Patrick’s testimony he has substantially less right arm strength. Similarly, the ALJ noted the treatment and physical therapy records are silent regarding Patrick’s ability to return to work. The ALJ noted the conflicting opinions of Dr. Wunder, Dr. Barefoot, and Dr. Bonnarens, as well as their examination findings. He noted Patrick did not return to Hanson despite being released to full duty work by Dr. Baker, but instead bought his own tractor.

The ALJ relied upon Drs. Baker and Bonnarens to find Patrick retains the physical capacity to return to the type of work he performed at the time of injury. On March 2, 2020, Dr. Baker placed Patrick at MMI and released him to return to work without restrictions. In his December 1, 2020 report, Dr. Bonnarens acknowledged Patrick worked as a flatbed truck driver when he injured his right bicep on November 11, 2019. Dr. Bonnarens found no basis for permanent work

restrictions. In the February 18, 2021 supplement, Dr. Bonnarens again found no basis for restricting Patrick's activities based on his examination since his treating physician released him to full duty work without restrictions. He noted Patrick continues to work driving a local delivery truck. Dr. Bonnarens concluded Patrick's objective findings are consistent with a successful repair enabling him to resume hauling flatbed trailers. Dr. Baker's records and Dr. Bonnarens' reports constitute substantial evidence supporting the ALJ's determination, and a contrary result is not compelled.

Patrick relies upon his own testimony regarding his limitations due to the work injury and his belief he is unable to return to the work he performed at the time of the injury. When the issue is the claimant's ability to labor and the application of the three-multiplier, it is within the province of the ALJ to rely on the claimant's self-assessment of his ability to perform his prior work. *See* Ira A. Watson Department Store v. Hamilton, *supra*; Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). However, the ALJ was not compelled to rely on Patrick's testimony. The ALJ properly exercised his discretion, and his decision will not be disturbed.

Accordingly, the May 15, 2021 Opinion, Award and Order and the June 4, 2021 Order rendered by Hon. John H. McCracken, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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