

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ORIGINALLY ENTERED: June 17, 2022
OPINION WITHDRAWN: June 27, 2022
OPINION RE-ENTERED: June 27, 2022

CLAIM NO. 201994759

ASPLUNDH TREE EXPERT SERVICE

PETITIONER

VS. **APPEAL FROM HON. AMANDA M. PERKINS,
ADMINISTRATIVE LAW JUDGE**

JONATHAN HOWELL and
HON. AMANDA M. PERKINS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

MILLER, Member. Asplundh Tree Expert Service (“Asplundh”) appeals from the January 5, 2022 Opinion, Award and Order and the January 21, 2022 Order on Petition for Reconsideration rendered by Hon. Amanda M. Perkins, Administrative

Law Judge (“ALJ”). The ALJ found Jonathan Howell (“Howell”) sustained permanent injuries to his neck, middle, and low back along with psychological impairment resulting in a combined value of a 33% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). The ALJ awarded permanent partial disability (“PPD”) benefits, temporary total disability (“TTD”) benefits, and medical expenses. Benefits related to the psychological claim were awarded but are not the subject of this appeal. The ALJ also found Howell is entitled to a vocational rehabilitation evaluation as he cannot perform the type of work he previously trained for and performed.

On appeal, Asplundh asserts the award did not conform to the requirements of KRS 342.730 and the ALJ impermissibly interpreted the AMA Guides. It further argues the award is not supported by substantial evidence. Succinctly, Asplundh believes Dr. Russell Travis’s opinions regarding AMA ratings should have been utilized by the ALJ as opposed to Dr. Anthony McEldowney’s opinions. For the foregoing reasons, we affirm.

BACKGROUND

Howell filed a Form 101 alleging injuries to multiple body parts on January 15, 2019 as a result of a motor vehicle accident (“MVA”) while employed by Asplundh. On that day, Howell was a passenger in a work truck when a vehicle pulled out in front of them, causing a collision. Howell was transported to Pikeville Medical Center where he described his pain as radiating from his low back down to his left hip and leg.

Howell followed up with his primary care physician, Dr. Debra Hall, on January 17, 2019. Dr. Hall reported a decreased range of motion in Howell's cervical spine, tenderness with palpation in his cervical, thoracic, and lumbar spine, muscle spasms present, and a positive straight leg raise. Dr. Hall opined Howell's pain was likely a result of the MVA. She placed Howell off work and referred him to physical therapy. Dr. Hall ordered an MRI which revealed spurring at C3-C4, minimal multilevel spondylotic changes in the thoracic spine, including T10-11 minimal posterior disk osteophyte complex, a minimal annular bulge, mild bilateral facet arthropathy at L3-L4, a mild diffuse annular bulge, mild bilateral facet arthropathy, mild narrowing of the central canal at L4-L5, and bilateral facet arthropathy at L5-S1. After 12 physical therapy sessions, Howell did not report any significant improvement in his symptoms.

Dr. Hall saw Howell again on October 27, 2020. Howell continued to complain of back pain radiating to his lower extremities. He continued having difficulty with walking, standing, using stairs, changing positions, and performing activities of daily living. Dr. Hall opined Howell was at maximum medical improvement ("MMI"). She recommended osteopathic manipulative treatment.

Dr. Rick Lyon evaluated Howell on May 30, 2019. Dr. Lyon reviewed diagnostic reports and determined they failed to show any evidence of an acute injury. However, he opined Howell's neck and back complaints resulted from his work injury because of his lack of symptoms prior to the MVA. Dr. Lyon recommended a referral to pain management and found Howell would reach MMI

within 12 months of his injury. Dr. Lyon opined Howell could not return to his work at Asplundh but could return to a “strictly sedentary job.”

On July 21, 2019, Howell treated with Angela Collett (“Collett”), a Licensed Professional Clinical Counselor at Mountain Comprehensive Care. Howell reported increased depression because of his pain and inability to return to work. Collett diagnosed depressive disorder and PTSD.

Howell began treatment with Dr. David Bosomworth on September 20, 2019. Howell reported lumbar back pain radiating into his left leg with cervical pain radiating down between his shoulder blades. Dr. Bosomworth diagnosed spondylosis without myelopathy or radiculopathy and muscle spasms.

Dr. Travis evaluated Howell on September 30, 2020 at Asplundh’s request. He noted a history of low back pain affecting the lower extremities bilaterally, occasional mid-back pain, and resolved neck pain. Dr. Travis diagnosed cervical, thoracic, and lumbar strain/sprains, each of which he classified as DRE Category I and assigned a 0% permanent impairment. Dr. Travis opined Howell would reach MMI after four weeks of work conditioning, and he could return to work without restriction. Dr. Travis found Howell does not require future medical treatment.

Dr. McEldowney evaluated Howell on January 21, 2021 at the request of Howell’s attorney. Dr. McEldowney took a history of work injuries from a high-speed two-vehicle motor vehicle collision on January 15, 2019. Howell reported symptoms in his low back with bilateral leg pain, and pain in his mid-back region. Dr. McEldowney diagnosed a cervical sprain/strain, a lower thoracic sprain, and a

left-sided lumbar strain. He opined Howell reached MMI on January 15, 2020. He classified Howell's injuries as DRE II and assigned a 7% impairment rating to the lumbar spine, a 5% impairment rating to the thoracic spine, and a 5% impairment rating to the cervical spine in accordance with the AMA Guides. Dr. McEldowney assigned restrictions of no frequent or repetitive bending, no simultaneous twisting with bending, and no lifting, carrying, pushing, or pulling over 12 pounds. He also advised Howell to avoid prolonged standing, walking, sitting, or driving. He opined Howell is unable to return to his previous job with Asplundh.

Howell treated with Dr. Megan Green for his psychological symptoms. Dr. Green diagnosed Howell with an adjustment disorder with mixed anxiety and depressed mood. She classified Howell as having a Class II impairment and assigned a 20% impairment rating for his psychological condition pursuant to the AMA Guides, 2nd Edition. She opined Howell's work injury caused his impairment, and he can return to work from a mental health standpoint.

Dr. Paul Ebben evaluated Howell on June 21, 2021. Dr. Ebben diagnosed adjustment disorder with anxiety, depression, and unspecified somatic symptom disorder indirectly related to the work injury. He also diagnosed PTSD, Class II, and assigned a 10% impairment rating. Dr. Ebben related the PTSD to the work injury. Dr. Ebben believed Howell's psychological condition does not prevent him from returning to work.

Dr. Ralph Crystal performed a vocational evaluation. He opined Howell can perform a wide range of jobs. Dr. Crystal stated Howell is a good candidate for short-term training.

Asplundh now appeals the ALJ's finding that Howell qualified for impairment ratings per DRE Category II for the cervical, thoracic, and lumbar region. Asplundh maintains Howell only qualified for Category I ratings, asserting the ratings by Dr. McEldowney do not conform to the AMA Guides. There is no appeal of the impairment rating for the psychological condition stemming from the work injury or the ALJ's finding that Howell is unable to return to his pre-injury work.

ANALYSIS

In this claim, the party with the burden of proof, Howell, was successful. Therefore, the issue on appeal is whether substantial evidence supported that determination. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). The crux of the inquiry is whether the finding by the ALJ was so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. Id. at 643.

Asplundh appeals the ALJ's decision to accept Dr. McEldowney's opinion concerning Howell's impairments over that rendered by Dr. Travis. All parties appear to recognize that the proper interpretation of the AMA Guides is a medical question reserved to medical witnesses. It is not for the fact-finder or this Board to interpret the AMA Guides, as clearly this is a matter reserved for expert testimony. Kentucky River Enterprise, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003).

Hence, the question becomes: Was Dr. McEldowney's opinion grounded in the AMA Guides? To be grounded in the AMA Guides does not require strict adherence, but rather, general conformity with them. An ALJ cannot

utilize an impairment rating from a medical opinion that is not based on the AMA Guides, but strict adherence to the AMA Guides is not required. Plumley v. Kroger, Inc., 557 S.W.3d 905, 912-13 (Ky. 2018). The essential point is that the assigning of impairment ratings must be left to the physicians. The authority to select an impairment rating assigned by an expert medical witness rests with the ALJ. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001); KRS 342.0011(35)-(36).

The ALJ clearly found the work-related MVA occurred, and Howell was injured because of it. This is a distinct injury. The DRE is the appropriate method to determine impairment when there is a distinct injury. AMA Guides, p. 379. The question in this claim is the severity of the injury and whether it is permanent. Dr. Travis assessed Category I ratings, while Dr. McEldowney assessed Category II ratings based on the same DRE tables and pages for the cervical, thoracic, and lumbar injuries.

The ALJ sufficiently explained why she chose to accept Dr. McEldowney's opinion in conjunction with the credible testimony of Howell. When physicians genuinely express medically sound but differing opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe, so long as the opinion is based on the AMA Guides. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Dr. McEldowney took a history from Howell, reviewed diagnostic tests, conducted an examination, used measurements of strength, flexion and extension, and tested reflexes and range of motion. Dr. McEldowney assessed an impairment rating, citing the table and page he utilized.

While Dr. Travis's opinions could have led to a different finding by the ALJ, the reliance by the ALJ on another medical opinion is not a sufficient basis for reversal. McCloud v Beth -Elkhorn Corp., 514 S.W.2d 46,47 (Ky. 1974). This appeal is couched in terms that the medical expert did not conform his opinion to the AMA Guides, when in fact it is the interpretation of the AMA Guides by the physician that is at issue.

In virtually every litigated claim, there are varying interpretations of the severity of the worker's injury and the appropriate impairment rating to assign under the AMA Guides. We are mindful of Dr. Travis's quote in his report that "medicine is both an art and a science." Assigning impairment ratings must be left to the professionals who have the expertise required to assess the injured worker. Dr. Travis is a neurosurgeon who conducted his examination at Asplundh's request. Dr. McEldowney is an orthopedic surgeon who has additional training through the American Board of Independent Medical evaluators in the fields of causation and impairment ratings. He performed his examination at Howell's request. It is presumed both physicians are fully versed in the AMA Guides and had differing opinions as to the severity of Howell's condition resulting from the work injury and the appropriate impairment rating.

The ALJ found Howell's testimony regarding his continued symptoms credible and consistent with the opinion of Dr. McEldowney, who conducted the most recent assessment. The ALJ cited to the AMA Guides DRE Category II for the exact language in the tables for the cervical, thoracic, and lumbar spine. The ALJ did not interpret the AMA Guides; rather in her opinion, she cited to the AMA

Guides as one of her reasons for accepting Dr. McEldowney's opinions. It is for the physicians, not the ALJ, to determine the appropriate ratings, and thereafter, the ALJ is free to choose between the conflicting opinions. Certainly, choosing from conflicting medical opinions is within the province of the ALJ and subject to their sole authority. Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003) (citing Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977)). Here, both doctors cite to the same AMA Guides tables but disagree on the correct category rating. The ALJ's explanation as to why she found the opinion of Dr. McEldowney more persuasive was strictly to fully apprise the parties of how the claim was decided and was not an independent interpretation of the AMA Guides.

A rating or award may not conform to KRS 342.730 or the AMA Guides when utilizing the wrong edition or clearly adding separate impairment ratings when the AMA Guides explicitly state this is not to be done. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004); Central Baptist Hospital v. Hayes, 2012-SC-00752-WC, 2013 WL 4623489 (Ky. Aug. 29, 2013). Neither occurred in the present case.

The impairment ratings are grounded in the Guides and the ALJ's award is, therefore, supported by substantial evidence. Accordingly, the Opinion, Award and Order dated January 5, 2022 and Order on Petition for Reconsideration dated January 21, 2022 are **AFFIRMED**.

This Opinion was withdrawn and re-entered for the correction of clerical errors. Asplundh was originally referred to as "Howell" in the second paragraph on page 2. This Opinion has been edited to refer to the correct parties.

ALL CONCUR.

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