Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 11, 2022

CLAIM NO. 201801315

CARLSON ENVIRONMENTAL CONSULTANTS PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

JEFFEREY LANE and
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

MILLER, Member. Carlson Environmental Consultants ("Carlson") appeals from the September 8, 2021 Opinion and Award and the October 5, 2021 Order denying its Petition for Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"). The ALJ awarded temporary total disability ("TTD") benefits from June 1, 2018 through February 23, 2019 at the rate of $788.90; permanent

partial disability ("PPD") benefits based on 10% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Impairment Rating ("AMA Guides") with no multipliers for 425 weeks with interest of 6% per annum on all due and unpaid installments of such compensation. The ALJ also awarded medical expenses related to the work injury per KRS 342.020.

Background

Jefferey Lane ("Lane") was born on November 24, 1964 and lives in Georgia. He began working for Carlson in November 2016 as a land technician installing gas pipelines, gas wells, and performing labor associated with landfill gas. Lane testified it is a strenuous job which includes dragging heavy pieces of pipe, moving operating equipment, and lots of straining and pulling on all types of slopes and surfaces, including ditches. He had to lift bags of Bentonite weighing 50 pounds when setting wells. The work also involved travel away from home, sometimes for as long as three months at a time.

Lane alleges an injury on May 16, 2018 to his left shoulder, while working at the Blue Ridge Landfill in Irvine, Kentucky. He was lifting and throwing bags of Bentonite around the hole where the well was located. At his deposition on April 23, 2020, Lane testified:

> A: I was just standing and just throwing the bags and I felt something kind of pop in there and move and it went---you know, just getting sore.
>
> Q: Did you report it to your supervisor.
>
> A: Yes, sir. I told Mr. Freshcorn that I had something, you know, moved in my shoulder and that it didn't---you know, it was sore.

The supervisor was on site.

There is a dispute as to what was reported to Carlson. Regardless, Lane saw Dr. Don Aaron, an orthopedic surgeon, in Georgia. An MRI was performed, and surgery was scheduled. Light duty restrictions were recommended. The surgery did not occur in August 2018 as originally scheduled and the claim was denied. Surgery occurred on November 15, 2018. Lane used his personal health insurance and received disability related benefits.

Lane last saw Dr. Aaron on February 23, 2019 with no specific restrictions. Lane never returned to work for Carlson after his first visit with Dr. Aaron. He currently works on the family farm in Georgia. The clam was denied, and no benefits, indemnity, or medical were paid.

Dr. Aaron performed surgery on Lane on November 15, 2018 consisting of left shoulder arthroscopic debridement of inferior labral tear with peri-labral cyst decompression, distal clavicle excision, and subacromial decompression. Attached to the Form 101 was an office note of July 10, 2018. Additional office notes from November 15, 2018 through February 23, 2019 were filed. Dr. Aaron could not state the left shoulder condition was the result of a work injury, rather he stated the intraoperative findings were consistent with chronic wear and tear on the shoulder. Lane maintained his job doing repetitive activities at work caused the pain in his shoulder, and that prior to doing repetitive activities at work, he had no shoulder pain.

Dr. Aaron's deposition was taken by Carlson's counsel on February 19, 2021. The initial visit was in June 2018 and Lane saw the physician assistant.

Lane said he had some falls at work on the ice in the winter but did not recall any specific fall that started the pain. He also said he had to repetitively toss 50-pound bags. The first visit filed under workers' compensation was in July 2018. Dr. Aaron found based on the MRI and at the time of surgery, the findings were due to chronic repetitive wear and tear type injuries, as opposed to a single traumatic event. In a December 18, 2018 letter, Dr. Aaron sated, "I cannot say that Mr. Lane's medical condition involving his left shoulder is related or a result of an "on the job" injury." No restrictions were assigned as of his last visit. He subsequently stated he could not definitively state the injury was not work-related.

Dr. Jeffrey Fadel examined Lane at the request of his counsel on March 18, 2021. Dr. Fadel stated in his report:

> It is my medical opinion that Mr. Lane possessed a pre-existing dormant condition in the form of acromioclavicular arthritis involving his left shoulder. The actions at work on May 16, 2018 obviously aroused the symptoms, which eventually required the surgical treatment that was necessary as stated earlier in this report. I have no medical records in my possession or history from Mr. Lane to suggest otherwise.

Dr. Fadel assigned a 10% whole person impairment rating pursuant to the AMA Guides and restrictions based on Range of Motion testing and the distal clavicle excision. Dr. Fadel assigned the date of maximum medical improvement ("MMI") to be February 2019.

Dr. Morgan Budde completed a Form 107 at the request of Lane's counsel. Dr. Budde examined Lane on July 22, 2019. He believed Lane had a dormant arthritic condition in the left shoulder, which was likely aroused by the

physical work he performed. Dr. Budde assigned MMI as of February 13, 2019, with an 8% whole person impairment rating pursuant to the AMA Guides.

Vince Coleman gave his deposition on December 6, 2018. He is the vice president of Carlson and oversees construction projects. He was not at the Kentucky site. Coleman testified Lane told him in a conversation on May 29, 2018 that "It's been about three weeks ago or better I think I hurt it when I was at Blue Ridge, which is a job in Kentucky." Coleman has known Lane for a long time and was not told of any prior shoulder problem before the conversation.

Charles Freshcorn testified by deposition on December 10, 2018. He is the drilling director for Carlson. He worked with Lane at the Kentucky site on May 16, 2018. He stated they only worked four hours that day loading a trailer and thereafter he and Lane drove to Florida to another job site. A couple of days later, he drove Lane to his home in Georgia. Freshcorn stated employees were told if they got hurt on the job, to report the incident within the first 24 hours so the initial paperwork can be completed. The first time Freshcorn heard about Lane's shoulder injury was when he called Lane to come back to work after the May rotation break following the drive back to Georgia. Lane reported to Freshcorn, "I have to go to the other doctor for my shoulder, because I hurt my shoulder up in Kentucky." Later, when they were on the phone with other company personnel, Lane stated, "he hurt himself in Kentucky, but he wasn't sure if he hurt himself in Kentucky or if it was up in Fitchburg, Massachusetts, when he was when he was working up there in the wintertime."

ANALYSIS

This claim was filed on September 10, 2018. The claim was originally assigned to Hon. Tonya Pullin, Administrative Law Judge ("ALJ Pullin") on September 18, 2018. The claim was reassigned to the ALJ on October 15, 2019. Carlson filed a Petition for Reconsideration arguing the ALJ struck and disregarded the rulings of ALJ Pullin, and the claim should be dismissed. Carlson argues there was error in the procedural rulings allowing proof times. Carlson also contends ALJ Pullin issued "bench" rulings which would have won the case without any additional proof. Finally, Carlson argues that notice of the injury was not reported as Lane testified.

Carlson appeals to this Board, raising two things. First, the striking of initial procedural rulings of ALJ Pullin was error, and second, whether Lane gave timely notice of the injury per KRS 342.185.

Carlson has forcefully maintained a reliance on "bench" orders from ALJ Pullin that it believes caused it prejudice. The Board has reviewed the records, including all the Orders by ALJ Pullin and thereafter when the claim was reassigned to ALJ Coleman. Initially, it is problematic to prove a "bench" order if indeed it can truly be characterized as an Order. A conversation between the ALJ and counsels is strictly that, and clearly cannot be viewed as an Order. Suffice, the record constitutes the filings on LMS. There are no recordings, video or audio at the Benefit Review Conference ("BRC") or status conferences. For parties to base appeals on non-verifiable discussions, regardless of their accuracy would throw the whole appellate process in to the realm of speculation.

The procedure for proof time and granting or denying extensions is clearly within the discretion of the ALJ. Fundamentally, procedural rulings should be issued in a fair manner and geared toward allowing both parties the opportunity to prove their positions.

1. On November 16, 2018 ALJ Pullin passed to the BRC the Motion of the Employer to Reschedule the Formal Hearing, Bifurcate the Claim, and place the claim in abeyance.

2. On December 10, 2018, ALJ Pullin passed Carlson's Motion to Dismiss to the BRC.

3. On January 4, 2019, ALJ Pullin passed another Motion to Dismiss the claim to the BRC.

4. On January 8, 2019, ALJ Pullin ordered the claim placed in abeyance on motion of Lane at an in-person status conference.

5. On July 15, 2019, ALJ Pullin ordered the claim to remain in Abeyance, denying the motion of Lane. ALJ Pullin agreed with Carlson that the claim should remain in abeyance until Lane is at MMI and this also would allow further proof to be taken.

6. On September 16, 2019, ALJ Pullin requested status reports be filed.

7. On September 30, 2019, ALJ Pullin denied another of Carlson's Motion to Dismiss the claim.

8. On September 30, 2019, ALJ Pullin denied Lane's request to set a BRC until after Carlson is able to depose Lane.

9. The Final Order of ALJ Pullin, dated October 15, 2019, reassigned the injury claim to the ALJ.

These are the Orders ALJ Pullin filed on LMS. This is the record. Arguments as to what an ALJ said at conferences is hearsay, but that point aside, the Board can only review the record as filed on LMS. As the ALJ wrote in his Opinion, "both parties have been given the right to complete their evidence despite the complications from having out-of-state parties and the interruption of the Covid-19 pandemic." The deposition of Dr. Aaron was filed as evidence. Any Orders striking Opinion testimony of Dr. Aaron absent his deposition being taken is a moot issue as the deposition was taken and filed into evidence. There is no reversible error found in the rulings by the ALJ.

The second ground for appeal concerns Notice pursuant to KRS 342.185. The pertinent parts of the statute are listed:

> (1) Notice of the accident shall have been given to the Employer as soon as practicable after the happening thereof.
>
> (2) In cumulative trauma injury claims, the right to compensation shall be barred: unless: notice of the cumulative trauma injury is given within (2) years from the date the employee is told by a physician that the cumulative trauma injury is work-related.

There was differing testimony as to when and what Lane told Carlson regarding his injury. The ALJ stated:

> I am persuaded that Lane's injury occurred on or about May 16, 2018 and that notice was given on the date of injury by Lane to his immediate supervisor, Freshcorn. Two weeks later Lane advised Coleman that he was awaiting treatment for the left shoulder which was injured while working in Kentucky. The fact that Lane

> advised Coleman that he was still awaiting treatment confirms his testimony that he had previously reported the condition to his supervisor and I find the testimony to be persuasive on this issue.

As the claimant in a workers' compensation proceeding, Lane had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Lane was successful in that burden, the question on appeal is whether substantial evidence supports 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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 that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

The parties offered conflicting evidence as to when Lane notified Carlson of the injury and what he told his supervisors. The ALJ set forth the evidence he reviewed and the basis for his determination. Because the decision is supported by substantial evidence, we affirm. It is not for this Board to substitute its judgment for that of the administrative law judge as to the weight of the evidence on questions of fact. KRS 342.285(2).

Accordingly, the September 8, 2021 Opinion and Order, and the October 5, 2021 Order on Petition for Reconsideration, rendered by Hon. John B. Coleman are **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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