

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: April 24, 2020

CLAIM NO. 201761845

CLEVELAND CONSTRUCTION

PETITIONER

VS.                   **APPEAL FROM HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE**

JOSHUA SHACKLEFORD AND  
HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**ALVEY, Chairman.** Cleveland Construction (“Cleveland”) appeals from the December 16, 2019 Opinion, Award, and Order, and the January 13, 2020 Order overruling its petition for reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ awarded Joshua Shackleford (“Shackleford”) temporary total disability (“TTD”) benefits (for the period already

paid), permanent partial disability (“PPD”) benefits, and medical benefits for a work-related hernia injury sustained on October 1, 2017.

On appeal, Cleveland argues the ALJ erred in relying upon Dr. Jared Madden’s 12% impairment rating because it was not assessed in accordance with the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Because substantial evidence supports the ALJ’s determination, we affirm.

Shackleford filed a Form 101 alleging he developed a hernia on October 1, 2017 as he was moving a bucket of drywall mud while working for Cleveland as a drywall finisher.

Shackleford testified by deposition on November 29, 2018, and at the final hearing on November 1, 2019. Shackleford, a resident of London, Kentucky, was born in July 1984. He began working for Cleveland in 2017 as a drywall finisher for a large project at Berea College. His job required taping, applying coats of drywall mud, and sanding. Shackleford lifted and carried five-gallon buckets of drywall mud weighing between forty-five and sixty pounds.

On October 1, 2017, Shackleford was moving five-gallon buckets of drywall mud when he felt a pull and tear in the right side of his groin. He was sent to an urgent care facility the same day, and later underwent an ultrasound. The ultrasound was negative, and Shackleford was not initially diagnosed with a hernia. Shackleford’s right-sided pain worsened, causing him to seek additional treatment with Dr. Alan Graham in July 2018. Dr. Graham had previously surgically repaired a left-sided hernia Shackleford had sustained in 2002, from which he had fully

recovered. Dr. Graham surgically repaired the right-sided hernia in February 2019. He released Shackelford to return to work without restrictions in March 2019. Shackelford has not actively treated for his right-sided hernia since his release, and he does not take any medication.

Shackelford was terminated from his position with Cleveland the day after the work injury. Shackelford was off work for approximately two or three months. He was subsequently hired by C&N Construction to perform similar drywall work, but he was not required to lift and carry buckets of mud. He worked for C&N Construction for six to eight months, and eventually ceased working there because of his right-sided symptoms. Shackelford worked at a cookie factory in August 2018, but ceased his employment after two weeks due to his right-sided symptoms. After the February 2019 hernia repair, Shackelford worked as an independent drywall contractor in July 2019.

Shackelford described his condition since Dr. Graham's February 2019 hernia repair surgery. He continues to have problems when he stands for six hours or more, or if he lifts fifty or more pounds. He is able to sit without difficulty. Shackelford stated his condition has improved since the surgery, and he estimated he is at "eighty percent." At the hearing, Shackelford stated he has no protrusions in his abdomen or groin area.

Cleveland filed the October 11, 2017 ultrasound report which showed no evidence of testicular mass or torsion. Dr. Graham first saw Shackelford on July 18, 2018 for right groin pain and swelling due to his work injury. Dr. Graham determined Shackelford had a right inguinal hernia. Although Dr. Graham

surgically repaired the right inguinal hernia, his surgical report was not filed into the record. Dr. Graham restricted Shackelford from work until March 25, 2019.

Shackelford filed Dr. Madden's August 29, 2018 report. Dr. Madden evaluated him prior to the February 2019 surgery. Dr. Madden noted the October 1, 2017 work incident of lifting and moving buckets of drywall mud resulting in lower abdominal pain radiating into the right groin. His examination demonstrated, "right inguinal hernia, visible defect, very large and easily palpable. Reducible with manual pressure but defect immediately returns once pressure released." Dr. Madden diagnosed a right inguinal hernia due to a workplace injury and recommended surgical repair. Dr. Madden assessed a 19% impairment rating pursuant to AMA Guides, but found he had not attained maximum medical improvement ("MMI").

Dr. Madden re-evaluated Shackelford on April 19, 2019, after the February 2019 surgery. He noted the surgical repair of the right inguinal hernia with mesh implantation. Shackelford reported some alleviation of pain in the right groin after a six-week recovery period. Shackelford reported continued pain with lifting, bending, and twisting. Dr. Madden noted the following from his examination: "right inguinal hernia, previously visible and palpable defect, now repaired and incision well healed."

Dr. Madden diagnosed a right inguinal hernia, status-post surgical repair. Dr. Madden noted Shackelford has chronic pain consistent with and directly related to the October 1, 2017 work injury. He opined the right inguinal hernia, regardless of surgical repair, restricts Shackelford's ability to work as a heavy laborer.

He noted even slight exertion and positional changes can result in severe pain exacerbations or create additional pathology in the right inguinal region. He noted episodic problems with routine activities of daily living during pain exacerbations are commonly associated with chronic pelvic and/or surgically repaired hernia pain. He opined Shackleford is at an increased risk for additional or worsening herniation in both the left and right inguinal regions. Dr. Madden restricted Shackleford from lifting over twenty pounds, repetitive bending or twisting, and to minimal pushing, pulling, stooping, and crouching.

Dr. Madden assessed a 12% impairment rating pursuant to the AMA Guides noting, “Class 2 Impairment due to Herniation 12% WPI (10-19% possible), Table 6-9, Page 136.” Dr. Madden opined Shackleford had reached MMI by the time of his re-evaluation, and he does not retain the physical capacity to return to his former type of work.

Cleveland filed Dr. Greg Snider’s June 24, 2019 report. Dr. Snider noted the work injury and subsequent treatment, including the February 7, 2019 open repair of an indirect right inguinal hernia by Dr. Graham. He noted Shackleford reported no further swelling or pain at rest, but complained of pain with prolonged periods of activity. Shackleford reported he is able to work five to six hours a day, five days a week. With prolonged hours, Shackleford complained of burning and sharp pain, gradually improving. His examination revealed, “a well-healed right inguinal scar, soft and nontender. There was no testicular tenderness. No hernia was noted at rest, with position change, or with modified Valsalva maneuver.” Pursuant to the AMA Guides, Dr. Snider assessed a 0% impairment

rating for the surgically repaired/resolved hernia. He opined Shackleford had an excellent surgical outcome, is able to return to work without restrictions, and requires no additional treatment.

Dr. Snider prepared an October 10, 2019 supplemental report after reviewing Dr. Madden's April 19, 2019 report. He reiterated his opinions contained within his June 24, 2019 report, and stated as follows regarding Dr. Madden's assessment of impairment:

Dr. Madden's evaluation took place over two months prior to that evaluation; thus, there is certainly room for symptomatic improvement, as one would expect, during that interval. Dr. Madden did not note any deficiencies in the repair of Mr. Shackleford's hernia site. Nonetheless, he assessed 12% WPI based on Class 2 hernia by Table 6-9 of the *AMA Guides*, 5<sup>th</sup> Edition.

In my opinion, Dr. Madden's impairment assessment method is inappropriate and inaccurate. Table 6-9 requires a palpable defect for impairment assessment of herniation to be applicable. Mr. Shackleford no longer has a hernia. In fact, the *AMA Guides* provides an example of a persistent hernia described as "only mildly annoying" and without limitation in activities for which 0% WPI is assessed. (original emphasis)

At the Benefit Review Conference held November 1, 2019, the parties stipulated Shackleford sustained a work-related injury on October 1, 2017, and that Cleveland paid TTD benefits from February 7, 2019 to March 24, 2019, along with medical expenses. The parties identified benefits per KRS 342.730, average weekly wage, ability to return to work, wages on return to work, proper use of the *AMA Guides*, and entitlement to medical benefits as contested issues.

The ALJ awarded PPD benefits based upon the 12% impairment rating assessed by Dr. Madden, stating as follows:

After careful review of the evidence, the ALJ finds that Shackleford sustained a 12% impairment due to the October 1, 2017 hernia injury. Shackleford sustained a hernia, which required surgical intervention. He continues to have symptoms with activities. Shackleford testified if he lifts anything or stands over six hours, that he has burning pain. The ALJ finds Dr. Madden's opinion most persuasive and supported by Shackleford's testimony.

Dr. Madden assessed a 12% whole person impairment. Dr. Madden advised slight exertion and positional changes can result in severe pain exacerbations or could create additional pathology in the right inguinal region. He further explained episodic problems with routine activities of daily living during pain exacerbations are commonly associated with surgically repaired hernias. Further, although Dr. Snider assesses no impairment, he does acknowledge Shackleford may have residual symptoms with exertion for a least a short time.

Based on the foregoing, the ALJ finds Shackleford sustained a 12% impairment due to the work related injury on October 11, 2017.

The ALJ determined Shackleford retains the physical capacity to return to the work he performed at Cleveland. The ALJ awarded TTD benefits as already paid, PPD benefits, and medical benefits for the right inguinal hernia.

Cleveland filed a petition for reconsideration, making the same argument it raises on appeal. The ALJ overruled the petition, finding it amounted to a request to re-weigh the evidence, and reiterated her reliance upon Dr. Madden's opinion.

On appeal, Cleveland argues the ALJ's finding of a 12% impairment rating is clearly erroneous and unsupported by probative evidence. It argues the 12% impairment rating assessed by Dr. Madden is inconsistent with the criteria mandated by the AMA Guides. Cleveland argues an impairment rating based upon Chapter 6

of the AMA Guides requires two elements: 1) a palpable defect in the supporting structures of the abdominal wall; and 2) frequent or persistent protrusion at the site of the defect with increased abdominal pressure, manually reducible or frequent discomfort, precluding heavy lifting but not hampering some activities of daily living.

Cleveland asserts Dr. Madden did not discuss a palpable defect in his April 19, 2019 report, and Shackleford testified there were no protrusions at the time of the final hearing. Cleveland asserts the lack of a palpable defect prevents a finding of a Class 2 hernia, even if, arguably, the second element can be established pursuant to the AMA Guides. Therefore, Cleveland argues the ALJ erred in relying upon Dr. Madden's assessment of impairment since it is not in conformity with the AMA Guides. Cleveland relies upon Ormsco, Inc. v. Gary Blackburn, et al, 2018-SC-000543-WC, 2019 WL 4073399 (rendered August 29, 2019) (unpublished) and Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006) in support of its argument.

As the claimant in a workers' compensation proceeding, Shackleford 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 he 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). If the ALJ's rulings are reasonable under the evidence, they may not be disturbed on appeal.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003), the Kentucky Supreme Court explained that the extent of a worker's impairment at particular points in time and the proper interpretation of the AMA Guides are medical questions solely within the province of medical experts. In George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004), the Court additionally held, while an ALJ is not authorized to independently interpret

the AMA Guides, he or she may as fact-finder consult the Guides 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 v. Wallen, 74 S.W.3d 706 (Ky. 2002). Moreover, authority to select an impairment rating assessed by an expert medical witness rests with the ALJ. See KRS 342.0011 (35) and (36); Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

The AMA Guides clearly states its purpose is to provide objective standards for the “estimating” of permanent impairment ratings by physicians. The Kentucky Court of Appeals has instructed that as long as a physician’s opinion concerning impairment is “grounded in the AMA Guides,” the rating may be relied on by the fact-finder for purposes of determining PPD. Jones v. Brasch-Barry General Contractors, *supra*. This Board has routinely held that except under compelling circumstances where it is obvious even to a layperson that a gross misapplication of the AMA Guides has occurred, the issue of whether a physician’s impairment rating is properly assessed and credible, is a matter of discretion for the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

The parties stipulated Shackleford sustained a work-related injury on October 1, 2017. However, there are differing assessments of impairment, both purportedly in accordance with page 136, Table 6-9 of the AMA Guides. Dr. Madden determined Shackleford qualified for a Class 2 herniation for which he assessed a 12% impairment rating while Dr. Snider determined he did not qualify for

an impairment rating. Dr. Madden clearly stated he assessed the impairment rating pursuant to the AMA Guides, citing to the specific page number and table. The ALJ provided a sufficient explanation of her reasons for accepting Dr. Madden's impairment rating. While we acknowledge it is unclear in Dr. Madden's report whether there was a palpable defect in the supporting structures of the abdominal wall at the time of his April 19, 2019 evaluation, we note he was not cross-examined. Dr. Snider's critique of Dr. Madden's assessment goes to the weight of the evidence and does not compel a contrary result.

Because we determine Dr. Madden's permanent impairment rating was grounded in the AMA Guides, we cannot say the ALJ's reliance on his opinion was beyond the scope of her discretion as fact-finder or unreasonable as a matter of law. Speedway/Super America v. Elias, 285 S.W.3d 722, 730 (Ky. 2009); Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). Therefore, it was permissible to rely upon that rating as a basis for the award of PPD benefits. We will not disturb the ALJ's determination based upon Dr. Madden's assessment of impairment, which we determine constitutes substantial evidence.

Accordingly, the December 16, 2019 Opinion, Award, and Order, and the January 13, 2020 Order on petition for reconsideration by Hon. Monica Rice-Smith, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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