Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 30, 2022

CLAIM NO. 202101213

ELMINGTON PROPERTY GROUP PETITIONER

VS. **APPEAL FROM HON. THOMAS G. POLITES, ADMINISTRATIVE LAW JUDGE**

BRANDON FARLEY
and HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

STIVERS, Member. Elmington Property Group ("Elmington") appeals from the April 18, 2022, Opinion, Order, and Award and the June 20, 2022, Order of Hon. Thomas G. Polites, Administrative Law Judge ("ALJ"). The ALJ awarded Brandon Farley ("Farley") temporary total disability benefits, permanent partial disability benefits, and medical benefits for a work-related left knee injury.

On appeal, Elmington asserts two arguments. First, it claims the ALJ erred by relying upon Dr. James Owen's impairment rating, since the ALJ was not authorized "to create a separate and distinct" impairment rating from that originally assessed by Dr. Owen. Secondly, Elmington asserts the ALJ erred by including Farley's housing discount and lease renewal bonuses into his pre-injury average weekly wage ("AWW") calculation.

The Form 101, filed on August 26, 2021, alleges Farley sustained work-related injuries on September 1, 2019, to "multiple lower extremities" in the following manner: "Fall from height." Under "Cause of Injury" is the following: "Struck or injured by fellow worker, patient or other person."

Farley was deposed on September 20, 2021. He began working for Elmington as a maintenance supervisor at Park Thirty99 Apartments in February 2017.

Regarding the rent discount and his quarterly bonuses, Farley testified as follows:

> Q: First of all, you mentioned that at Elmington you received a discount off your rent; is that accurate?
>
> A: Yes, sir.
>
> Q: What kind of an apartment did you live in during that time before the injury?
>
> A: It was a two bedroom, two bath.
>
> Q: And what was the normal market value of that apartment?
>
> A: I can't remember. I know I was paying like 760 a month, and so it'd be the 760 plus the 20%.

> Q: Okay. And was that discount discussed at the time you were hired by Elmington?
>
> A: Yes.
>
> Q: And was that part of the terms of your working there?
>
> A: Yes, sir.

Farley testified that he was not required to live onsite but doing so made it easier for him to perform certain duties such as opening and closing the pool.

Farley also testified concerning the work completion and lease renewal bonuses he received:

> Q: Okay. Now, you mentioned you also received quarterly bonuses; is that right?
>
> A: Yes, sir.
>
> Q: How much were those bonuses?
>
> A: They ranged pretty widely, but on average they were 1,500 to 2,000 quarterly; and then we had monthly bonuses that were 100- to $200.
>
> Q: Okay. And what did you have to do to receive one of those monthly or quarterly bonuses?
>
> A: They based it off of work completion and also the renewals for the property.
>
> Q: What are 'renewals'?
>
> A: It's for people resigning [sic] their leases.
>
> Q: Okay. Is that something that you had an impact on with your work?
>
> A: Yes, sir.
>
> Q: How did your work affect whether people renewed their leases?

A: If I would complete their work orders in a timely manner and just be professional and kind to the tenants that were living there.

Q: Okay. So, in your opinion, were those bonuses based on productivity based on your work?

A: Yes.

Farley testified at the February 16, 2022, hearing regarding the bonuses he received:

Q: How often did you receive those bonuses?

A: I believe they were monthly.

Q: Okay. And what was the nature of those bonuses? Why would you receive those?

A: There was a few different factors, if I recall correctly, on the bonus structure. I know one of them was on the renewal rates on the apartments. And then we also got bonus off of if we could complete the work orders within 48 hours. And then I believe there was one for – from time of move out getting the terms completed within five days.

Q: Okay. So the – the one regarding the – the length of time of your work orders, that was directly related to the – I guess the speed of your work; correct?

A: Absolutely.

Q: And what about the – the renewal rates, how did that – how – how was the tenant renewal rate tied to your, I guess, work activities?

A: I guess it's more of an incentive for us to complete work orders on time, be friendly with the tenants, go above and beyond for them to try to get them to stay rather than moving out when their lease was expired.

Q: I see. If you did a bad job, would tenants be more likely to not renew?

A: I know I would.

Q: Fair enough. So in your opinion, was there a relationship between the quality of your work and the tenant renewal rate?

A: Yes, that definitely played a huge role in it I felt like.

Regarding the 20% rent discount, Farley testified as follows:

Q: Now, we have filed a lease, let's see, between you, Mr. Brandon Farley, and Park Thirty99. Can you tell me a little bit about that lease and – and how that was negotiated?

A: I basically took the apartment – and they offered a 20 percent discount for all employees who lived onsite.

Q: Okay.

A: With the understanding that if I quit or got terminated before the lease ended I think I had a week to get out.

Q: I see. And according to the lease, it looks like that was a 20 percent market rate discount; is that correct?

A: Yes, sir.

Q: Okay. And did you say that was given to all employees who lived onsite?

A: If they chose to live onsite; yes, sir.

Q: Okay. Would they all have been employees of Elmington Property Management?

A: Yes, they would have to to be receiving that discount.

Q: Okay. What – what is the relationship between Elmington and Park Thirty99?

A: They were the management company that managed the property.

…

Q: Earlier you discussed bonuses, and we've submitted those wage records into evidence, but I kind of just wanted to get a little more clarification. On there there's a category called bonus. Would I be correct in saying that that bonus is based on work completion?

A: Yes. I'm sorry.

Q: Right. And what determined whether you got a bonus for work completion? You said timeliness?

A: Yes. I believe it was 2 – you have 48 hours to complete service tickets for the tenants that were there. We called them work orders. You had 4 – 48 hours after they were submitted to have them completed.

Q: Okay. Did your co-workers receive the same bonus?

A: I believe so; yes.

Q: So was the bonus based on work completion for the maintenance crew as a whole?

A: Yes.

Q: Now, there was also a category called commission. Would that be based on the lease renewals?

A: I'm not sure how they coded it, honestly. I was just told to fix their stuff.

Q: But you don't know what-all went into your bonuses each month, specifically?

A: I mean, I would just get a – pretty much a – a whole other paycheck for the bonus part of it.

Q: And you don't know how much of that was for work renewals or for lease renewals – I'm sorry, work completion or lease renewals?

A: No. No. I got one check for my hourly wage with my overtime and stuff like that on it, and I would receive a completely different deposit for the bonus part of it.

> Q: Now, if a tenant renewed their lease because they liked the layout of the apartment, would that be included in lease renewals?
>
> A: I would say so because they're renewing their lease.

Farley filed the December 4, 2018, "Apartment Lease Contract" he and Park Thirty99 executed which reflects the following: "20% market rate of $839 ($161.80 off per month)."

Farley also filed Dr. Owen's September 7, 2021, Independent Medical Evaluation ("IME") report. After performing a physical examination and a medical records review, Dr. Owen diagnosed the following: "Status post ACL reconstruction with left medial meniscus repair and left lateral meniscus repair with a left PCL grade I injury and a left medial collateral ligament tear." He opined the September 1, 2019, work event led to the above-cited diagnoses and Farley had reached maximum medical improvement ("MMI"). Regarding an impairment rating, Dr. Owen opined as follows: "The impairment rating would be per page 546, Table 17-33, partial meniscectomy medial and lateral is 4% whole person and ACL severe or collateral ligament laxity is 10%. Whole person impairment therefore is combining 10 and 4 is 14%."

Attached to Farley's Form 101 is the October 7, 2019, Operative Report of Dr. Austin Stone with UK HealthCare which notes the following procedures were performed:

> 1. Left knee arthroscopically assisted anterior cruciate ligament reconstruction with bone-patellar-tendon-bone autograft.
>
> 2. Left medial meniscus repair, all inside.

3. Left lateral meniscus repair, all inside.

The postoperative diagnoses are as follows:

1. Left anterior cruciate ligament tear.

2. Left medial collateral ligament tear.

3. Left medial meniscus tear.

4. Left lateral meniscus tear near root equivalent.

Elmington filed Dr. Jerry Magone's December 1, 2019, IME report. After performing a physical examination of Farley and a medical records review, Dr. Magone diagnosed a left knee injury including "an anterior cruciate ligament disruption, a grade 1 medial collateral ligament injury, and medical/lateral meniscal tears" caused by the September 1, 2019, work incident. Dr. Magone further opined Farley attained MMI four months after his October 7, 2019, surgery. Regarding an impairment rating, Dr. Magone stated as follows:

> He underwent meniscal repair successfully, so there would be 0% impairment for the medial and lateral meniscal work. He did not have a posterior cruciate ligament injury and does not have currently collateral ligament laxity. His current laxity is mild anterior cruciate ligament laxity, which places him at 3% whole person impairment. This is based upon Table 17-33 of the AMA Guides to the Evaluation of Permanent Impairment.

Dr. Magone critiqued Dr. Owen's calculation of an impairment rating:

> **5. Dr. Owen assessed 4% impairment based on Table 17-33 for a partial medial and lateral meniscectomy, though the patient underwent a meniscal repair. Do you agree with Dr. Owen's assessment of 4% impairment for a partial medial and lateral meniscectomy? Please explain.**
>
> I do not agree with Dr. Owen's assessment as the claimant did not undergo a partial medial and lateral

meniscectomy. He underwent successful meniscal repair. Therefore, he is appropriately assigned 0% impairment.

6. Dr. Owen assessed 10% impairment based on Table 17-33 for moderate cruciate and collateral ligament laxity. Do you agree with Dr. Owen's assessment of 10% impairment for moderate cruciate and collateral ligament laxity? Please explain.

I do not agree as based on my physical examination he had mild anterior cruciate laxity and no laxity of the collateral ligament.

…

15. Please outline in detail any differences of opinions you have from those of Dr. James Owen addressed in his August 31, 2021, report.

As noted above there are differences, but Dr. Owen may not have been provided the operative report wherein it is documented the claimant did not undergo meniscectomies and as well he may not have had at that time the opportunity to review both the physical examination from physical therapy and the operating surgeon's report regarding the collateral ligament, noting the only current residual laxity is in the anterior plane commonly seen with ACL reconstructions.

The January 11, 2022, Benefit Review Conference Order and Memorandum lists the following contested issues: "Notice," "AWW," "TTD benefits," "KRS 342.730 benefits," "AMA Guides' proper use," and "unpaid or contested medical expenses."

In the April 18, 2022, Opinion, Order, and Award, the ALJ set forth the following findings of facts and conclusions of law:

PPD BENEFITS

Plaintiff is entitled to PPD benefits as a result of his injury. Dr. Owen assessed a 14% impairment rating and

Dr. Magone assessed a 3% rating. Having reviewed and considered the testimony from the two medical experts in regard to the most appropriate impairment rating, the ALJ is persuaded that Dr. Owen's impairment for the ACL injury is the most credible. However, Dr. Magone's criticism of Dr. Owens's assessment of 4% for partial medial and lateral meniscectomies is supported by the AMA Guides and therefore Dr. Owen's assessment of 4% impairment for the meniscectomies will be deducted from his 14% rating leaving a net 10% whole person impairment. A review of the operative note confirms Dr. Magone's opinion that Plaintiff underwent repair of his medial and lateral menisci but it does not reflect that any of the meniscus was excised or removed. The AMA Guides allow impairment for removal of part or all of the meniscus but there is no impairment provided for repair of the meniscus.

While Dr. Magone's criticism of Dr. Owen's assessment of 10% impairment for "ACL severe or collateral ligament laxity" was considered, having reviewed Table 17–33 on page 546 of the Guides, a 10% rating is appropriate if a finding of severe laxity is made and it is reasonable to believe that Dr. Owen found that Plaintiff suffered from severe laxity post his ACL reconstruction. While Dr. Magone only found mild laxity, this is a difference of opinion between medical experts and Dr. Magone's finding of mild laxity is an acknowledgment that Plaintiff does suffer some degree of laxity following his surgery. Given Plaintiff's testimony regarding the significant symptoms he continues to experience in his knee, including instability, it is reasonable to conclude that he suffers from a more severe problem as Dr. Owen indicated as opposed to a lesser problem as supported by Dr. Magone. As such, Plaintiff shall be awarded PPD benefits based upon a 10% whole person impairment.

…

AVERAGE WEEKLY WAGE

The parties were unable to stipulate an average weekly wage. Plaintiff argues in his brief that his preinjury average weekly wage should be found to be $999.45 based upon $962.11 for his hourly wage and bonuses plus $37.34 in discounted rent. The Defendant argues to

> the contrary that the preinjury AWW should be found to be $906.23 as it asserts that the bonuses and discounted rent are not properly includable. Having reviewed the testimony in regard to average weekly wage, it is hereby determined that Plaintiff's preinjury AWW shall be found to be $999.45 as both the bonuses and discounted rent are includable in the calculation of average weekly wage pursuant to KRS 342.140.

On April 27, 2022, Elmington filed a Petition for Reconsideration asserting the same arguments it now makes on appeal. In the June 20, 2022, Order, the ALJ furnished the following additional findings which are set forth *verbatim*:

> …
>
> It is hereby ORDERED that the Defendant's Petition for Reconsideration is OVERRULED save for the additional findings of fact and conclusions of law set forth below.
>
> The Defendant has petitioned regarding the propriety of the ALJ's reliance on the impairment rating of Dr. Owen and the determination of Plaintiff's average weekly wage.
>
> In regard to Dr. Owen's impairment rating, the ALJ has the authority and discretion to consider part of a physician's impairment rating, in this case Dr. Owens, to be compensable and part of it not to be compensable. As such, the Defendant's Petition is overruled on this point. As to whether Dr. Owen's impairment rating was based upon the AMA Guides, the Opinion contains the reasons why the ALJ considered Dr. Owen's assessment of 10% impairment for ligament laxity to be credible and why it was relied on and as such, the Defendant's argument that such was inappropriate is a re-argument of the merits of the claim and is therefore overruled.
>
> As to average weekly wage, the Defendant argues that Plaintiff's apartment rental discount and bonuses should not have been included in the average weekly wage. Plaintiff testified that he was paid bonuses for work completion and lease renewals for the property and based upon this credible testimony it was concluded that the bonuses he received were based upon his output or

> work and therefore were includable in his AWW. Plaintiff's testimony was considered credible and was relied on by the ALJ on this issue, especially in light of the lack of contrary testimony in the record. As to the discounted rental rate, again, Plaintiff's testimony on this issue that he was provided a rental housing discount due to his employment was considered to be credible, regardless of the timing, and was relied on by the ALJ on this issue. The ALJ would further note that rent is specifically included as part of an AWW calculation pursuant to KRS 342.140(6).

Elmington first asserts the ALJ erroneously calculated a 10% whole person impairment rating for the injury in question. It argues the ALJ agreed with Dr. Magone's opinion that Dr. Owen's 14% impairment rating was not in accordance with the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Relying upon RCS Transportation v. Malin, 2010-CA-001229-WC, rendered September 23, 2011 (Designated Not to be Published), Elmington asserts the ALJ improperly created an impairment rating by assessing a 10% whole person impairment rating, a rating neither assessed by Dr. Magone nor Dr. Owen. On this issue, we affirm.

In the April 18, 2022, Opinion, Award, and Order, the ALJ disagreed with Dr. Owen's impairment rating only to the extent that Dr. Owen added a 4% impairment for meniscectomies which Dr. Stone's October 7, 2019, Operative Report indicates did not occur. As the ALJ correctly noted in the June 20, 2022, Order, "the ALJ has the authority and discretion to consider part of a physician's impairment rating, in this case Dr. Owen, to be compensable and part of it not to be compensable."

Elmington's comparison to RCS Transportation v. Malin, supra, is misplaced. In Malin, the ALJ *recalculated* the impairment rating assessed by Dr. Stacie Grossfeld, as explained by the Kentucky Court of Appeals:

> The ALJ then noted, however, that "Dr. Grossfeld's range of motion measurements are not in dispute." He then applied these measurements to "the tables and figures set forth in Chapter 16 of the AMA Guides" and determined that Malin "has a 5% upper extremity impairment which equates to a 3% whole person impairment rating using Dr. Grossfeld's otherwise credible range of motion measurements[.]"
>
> As a result of this recalculation, the ALJ awarded Malin temporary total disability benefits at a rate of $646.47 per week from January 16, 2007 through May 12, 2009 and permanent partial disability benefits at a rate of $28.36 per week for 425 weeks beginning May 13, 2009. Malin subsequently filed a petition for reconsideration asserting that the ALJ had erred by recalculating the 10% impairment rating assessed by Dr. Grossfeld. However, this petition was denied by the ALJ.

Slip Op. at 3.

The Board had vacated the ALJ's recalculation of Dr. Grossfeld's impairment rating and remanded the claim directing the ALJ to choose an impairment rating contained within the record. In affirming the Board, the Court held as follows:

> This precedent leads us to conclude that an ALJ does not have the discretion to arrive at a separate and distinct impairment rating from that offered by a physician in those cases where medical witnesses specifically assess such ratings. As noted by the Board, this is not a case in which the ALJ was required to pick from an impairment range or to determine an impairment after being provided a classification in the AMA Guides within which Malin fell. Instead, the parties provided the ALJ with impairment ratings assessed by physicians based upon their interpretations

> of the Guides. Under these circumstances, we do not believe that an ALJ may take on the role of the physician and make an independent determination regarding an impairment rating where such ratings have been provided by medical witnesses. Instead, the ALJ may only consider the AMA Guides in determining the weight to be accorded conflicting opinions.

Slip Op. at 5.

Here, the ALJ did not recalculate Dr. Owen's impairment rating but merely subtracted that portion of the impairment rating (4%) assessed for partial medial and lateral meniscectomies, procedures that were never performed. This action by the ALJ certainly does not rise to the level of the actions undertaken by the ALJ in Malin, in which the ALJ, utilizing Dr. Grossfeld's range of motion measurements, "applied these measurements to 'the tables and figures set forth in Chapter 16 of the AMA Guides.'" Id. However, the fact-finder may not interpret the AMA Guides, which is a matter reserved for expert testimony. Kentucky River Enterprise, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003). In the case *sub judice*, the ALJ did not impermissibly interpret the AMA Guides, but, as stated, subtracted that portion of Dr. Owen's impairment rating erroneously assessed for partial medial and lateral meniscectomies that were never performed. Thus, we find no error.

Elmington next asserts the ALJ erred by including Farley's work completion and lease renewal bonuses as well as his 20% rental discount in calculating the AWW. On this issue, we affirm the ALJ.

KRS 342.0011(17) defines "wages" as follows:

> 'Wages' means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, fuel, or similar advantages received from the employer, and gratuities received in the course

> of employment from persons other than the employer as evidenced by the employee's federal and state tax returns.
>
> Similarly, KRS 342.140(6) defines "wages" as follows:
>
> The term "wages" as used in this section and KRS 342.143 means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer to the extent the gratuities are reported for income tax purposes.

The purpose of arriving at an AWW is to achieve a fair result for all parties. *See* C & D Bulldozing v. Brock, 820 S.W.2d 482 (Ky. 1991); Cantrell v. Stambaugh, 420 S.W.2d 677 (Ky. 1967). In calculating AWW, the ALJ enjoys the discretion to tailor the AWW calculation to the unique facts and circumstances of each case. Huff v. Smith Trucking, 6 S.W.3d 819 (Ky. 1999). The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings 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).

Regarding the work completion and lease renewal bonuses Farley received, the ALJ determined that, based upon Farley's credible deposition and hearing testimony, both bonuses were based upon his "output or work." At the hearing, Farley testified that the work completion bonuses were based upon the speed of his work. Farley testified the work completion bonuses were based on whether "we could complete the work orders within 48 hours." He explained, they were "an incentive for us to complete work orders on time." Farley also testified that

the lease renewal bonuses were based upon how many tenants renewed their lease. During his deposition, Farley testified that completing work orders "in a timely manner" and being "professional and kind to the tenants" directly affected whether tenants renewed their leases. At the hearing, Farley reiterated the relationship between the quality of his work and the tenant renewal rate. Based upon Farley's credible testimony, the ALJ concluded "that the bonuses he received were based upon his output or work and therefore were includable in his AWW."

Similarly, regarding the discounted rental rate, the ALJ found Farley's testimony on this issue credible. During his deposition and at the hearing, Farley testified that he received a 20% rental discount as a *condition of his employment* with Elmington and choosing to live onsite. Relying upon this testimony, the ALJ concluded that Farley was provided the rental discount due to his employment *regardless of the timing*, and correctly noted that rent is included in the AWW calculation pursuant to KRS 342.140(6). Indeed, Elmington concedes in its brief that "rent can be included in AWW if same is actually offered as a condition/incentive for employment." That said, Elmington's argument on appeal appears to hinge on the timing of the discounted rental rate as compared to when Farley was hired. However, Farley's testimony regarding the discount provided to employees who choose to live onsite certainly *can* constitute substantial evidence in support of the conclusion that it was offered as a condition or an incentive for employment for all employees who decided to live onsite, a mutually beneficial arrangement to both employee and employer in the case *sub judice.*

"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). The ALJ, as fact-finder, is free to pick and choose whom and what to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003). Further, 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 discretion to determine 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). Although a party may note evidence that would have supported a different outcome than that 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). As an appellate tribunal, this Board 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 that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). On this second issue raised on appeal, we also find no error.

Accordingly, on all issues raised on appeal, the April 18, 2022, Opinion, Order, and Award and the June 20, 2022, Order are **AFFIRMED**.

ALL CONCUR.

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