

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: July 17, 2020

CLAIM NO. 201682795

GERRI CRUME

PETITIONER

VS. APPEAL FROM HON. RICHARD E. NEAL,  
ADMINISTRATIVE LAW JUDGE

AMERICAN FUJI SEAL AND  
RICHARD E. NEAL,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AFFIRMING

\* \* \* \* \*

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

**BORDERS, Member.** American Fuji Seal (“Fuji Seal”) appeals from the Opinion, Award, and Order of March 19, 2020, and the Order of April 21, 2020, rendered by Hon. Richard Neal, Administrative Law Judge (“ALJ”). This claim involved work-related injuries, occurring on two different dates affecting different body parts. Claim number 2017-97061 concerned an alleged November 12, 2017 low back

injury, and was consolidated with claim number 2016-82795 concerning alleged May 13, 2016 bilateral shoulder injuries.

In the Opinion, the ALJ determined Gerri Crume (“Crume”) suffered two distinct work-related injuries. The ALJ awarded permanent partial disability (“PPD”) benefits based upon a 9% impairment rating due to her bilateral shoulder injuries. He also awarded temporary total disability (“TTD”) benefits, and medical benefits. Regarding the second injury of November 12, 2017, to her lumbar spine, the ALJ bifurcated the claim to determine whether Crume’s low back condition was causally related to the work incident of November 12, 2017, the compensability of proposed lumbar surgery, payment of TTD benefits, and travel expenses. The ALJ determined Crume had met her burden of proving her low back condition and the proposed surgery were work-related. Accordingly, the ALJ ordered Fuji Seal to pay for the proposed lumbar surgery and to institute TTD benefits until Crume achieves maximum medical improvement (“MMI”), returns to customary work, or an ALJ otherwise releases Fuji Seal from the obligation to pay TTD.

Fuji Seal filed a Petition for Reconsideration arguing the ALJ’s reliance on Dr. Jules Barefoot’s impairment rating for Crume’s shoulders was in error. Fuji Seal also argued the ALJ’s determination finding the low back injury compensable was likewise in error. The ALJ overruled the Petition for Reconsideration.

On June 29, 2020, this Board entered an Order placing this appeal in abeyance and partially remanding the consolidated claims to the ALJ for an Order deconsolidating these two claims, as the bilateral shoulder claim (2016-82795) was

final and appealable, while the low back claim (2017-97061) appeared to be interlocutory in nature and not ripe for appeal.

On June 29, 2020, the ALJ entered an Order deconsolidating the two claims. Thereafter, this Board entered an Order removing this claim from abeyance, placing it on the active docket, and submitting it for a decision. Therefore, this Opinion will only address claim number 2016-82795, the bilateral shoulder claim.

The proof considered by the ALJ regarding this claim consisted of the following;

Crume testified by deposition on two occasions and at the final hearing. Crume has worked at American Fuji Seal since approximately 2008. She worked as a “conversion worker” on an assembly line at the time of her injury. The job required her to load material, including 750 and 500-meter rolls of labels. She took the material off the line, inspected it, put it in a box, and labeled it. She lifted 25 pounds to 49 pounds depending on the material. She alleged that on May 13, 2016 she injured her shoulders while lifting 10-foot long cardboard cores. She noted the particular job required a lot of lifting overhead, bending, and carrying. She gave notice to her supervisor, Mr. Diaz, on the day of her injury, advising him her shoulders and hands were hurting and she might need help to complete her job duties. She continued to perform this job for seven or eight days in excruciating pain. She could not feel her hands and thought she was having a heart attack. On May 23, 2016, she told Mr. Diaz she was not getting any better and would like to see a doctor. She went to the clinic that day and was referred to Dr. Frank Bonnarens.

Crume acknowledged she drag raced motorcycles, and continued doing so after her accident until June 26, 2016. She estimated she had raced for four years, and had ridden motorcycles for 20 years. Crume practiced riding motorcycles at the Ohio Valley Race Track. She denied she practiced since her work injury. Crume stated the races are a quarter of a mile, and last approximately 5.9 seconds. The races are driven in a straight line. She denied that racing bothers or otherwise affects her upper extremities.

At the time of her second deposition on April 13, 2017, Crume had returned to work at Fuji Seal, working between 68-70 hours per week. Her job had not changed since May 2016, but her hours had increased. Crume was off work from May 23, 2016 through September 2, 2016, but missed no work afterward. Crume stated she had not ridden her motorcycle since her last deposition.

At the final hearing, Crume testified the conversion position involves several jobs including slitter, seamer, re-winder, belt, and core cutter. She performed all of these jobs except for the slitter. The core cutter position requires manipulation of cardboard cores that are 10 feet long and weigh between 15 to 20 pounds. She was required to repetitively lift the cores overhead. The seamer job involved pulling product off the line and putting it in boxes. She was required to lift from 20 to 65 pounds while performing this job. The rewind job involved a similar process, which required lifting product weighing 20 to 65 pounds. She only performed the belt job in 2008. A robot now performs that particular job.

On May 13, 2016, Crume was performing the core job to fill in for a vacationing co-worker. She performed that job for seven days prior to the May 13,

2016 incident. Dr. Bonnarens released her from care on August 11, 2016, but she continued to have pain in her arms. She could not comb her hair or raise her arms above her head. Her left shoulder was worse than her right. Crume eventually returned to work on September 6, 2016, but was unsure of the reason for the delay. Crume had a meeting with the manager on September 2, 2016 and was told she could come back to work if she signed a paper. She was able to return to her same job and was doing a little better. She continued to work as a seamer until January 19, 2017. The belt was not working, making it necessary for her to squat and forcefully push product weighing up to 65 pounds. She estimated the belt stopped working on approximately the 17th. She stated her back was hurting so bad by January 19, 2017, that she asked her supervisor if she could go to the doctor. Her doctor recommended aqua therapy, which she attended from April 24, 2017 until July 10, 2017. The aqua therapy did not help. Crume continued to work with difficulty. Crume changed jobs in August of 2017, “because I was hurting so bad in conversion that I thought it would be easier on my body if I changed jobs.” She changed jobs due to her shoulder condition. She stated her shoulders have gotten better, although they still hurt, but not as much as her back.

Crume’s current job involves cleaning the building. She took a reduction in pay for this job. Crume denied having any problems with her shoulders before May 13, 2016. Crume continues to race motorcycles. She participated in two races in 2016, two or three races in 2017, four races in 2018, and four races in 2019. She stated there is no vibration involved with riding her motorcycle, and it does not bother her shoulders. A race lasts approximately six seconds.

Crume treated at KentuckyOne Health on May 23, 2016, reporting the May 13, 2016 injury to her shoulders. Crume reported bilateral shoulder pain with paresthesias and weakness into her hands and forearms after performing her job duties. Crume stated her symptoms continued after returning to her regular job. She was diagnosed with bilateral shoulder pain with parasthesias, prescribed medication, and assigned work restrictions. On June 6, 2016, Crume reported her bilateral shoulder pain continued, but the parasthesias of the hands had resolved. The employer was unable to accommodate her restrictions, so she remained off work. On June 23, 2016, she remained unable to reach overhead or abduct.

Crume treated at KORT Rehabilitation on several occasions between June 8, 2016, and June 26, 2016. She continued to have bilateral shoulder pain. Crume discontinued therapy at her physician's direction.

Crume filed the report of High Field & Open MRI. A June 28, 2016 MRI of the left shoulder revealed tendinopathy/tendinitis in the distal supraspinatus tendon; sprain in the distal subscapularis muscle and tendon involving the superior fibers; thickening and extensive signal abnormality in the long head of the biceps tendon compatible with tendinopathy/tendinitis and probable partial intrasubstance tearing; mild subacromial subdeltoid bursitis; and mild degenerative changes in the acromial clavicular joint.

Crume was seen at Kentuckiana Rheumatology for evaluation of polyarthralgia on August 25, 2016. The assessment was primary generalized arthritis. It was noted her condition may be work-related mechanical arthritis.

Dr. Bonnarens initially saw Crume on July 7, 2016 for bilateral shoulder pain. Crume gave a history of an injury to her shoulders on May 13, 2016, after a week of performing a job she had not done for a while. On examination, Crume had mildly positive impingement signs and a mildly positive cross-arm test. She had tenderness in the area of the longhead of the biceps more on the right than on the left. Dr. Bonnarens reviewed Crume's MRI and noted it revealed tendinitis issues in addition to some AC joint arthropathy. He stated there was no surgical pathology present. Dr. Bonnarens diagnosed rotator cuff tendinitis bilaterally. He prescribed medications, ordered physical therapy, and restricted Crume to no overhead use of the arm and limited lifting to five pounds. On August 11, 2016, Crume returned with continued shoulder discomfort. She told Dr. Bonnarens that workers' compensation decided her problems were related to motorcycle racing and not due to work. Dr. Bonnarens noted she had good range of motion and good strength. Dr. Bonnarens recommended over-the-counter non-steroidal medication, a home exercise program, and returned her to regular duty on August 18, 2016. He stated Crume could return to him on a PRN basis.

Dr. Bonnarens testified by deposition on December 9, 2016. Dr. Bonnarens diagnosed bilateral rotator cuff tendinitis and had not seen her since August 11, 2016, when he returned her to regular duty. He talked with Crume about the role that vibration from riding motorcycles plays in the development of chronic problems with the hands, wrist, and shoulders. Dr. Bonnarens felt Crume had pre-existing tendinitis from motorcycle riding and she had a temporary flare-up because of work activities. He noted she had thickening of the biceps tendon that would

indicate her condition was chronic. He further stated, “[b]ut it’s temporary and it resolved by the time I was done treating her, which is why we discharged her.” He stated the condition bothered her when she was doing the job, and when she stopped doing that job her condition returned to her baseline tendinitis. Dr. Bonnarens stated the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) does not provide a rating for tendinitis. Dr. Bonnarens disagreed with Dr. Barefoot’s rating. Dr. Bonnarens noted Crume had normal range of motion at the time of his and Dr. Andrew DeGruccio’s examinations.

Dr. Daniel Kean treated Crume from April 10, 2017, to July 26, 2017, for complaints of general pain, stiffness, and tenderness of the shoulders, hands, and right lower back. On July 26, 2017, his assessment was chronic left shoulder pain. Dr. Kean referred Crume to Dr. Cyna Khalily.

Dr. Khalily evaluated Crume on August 10, 2017 for shoulder pain present for approximately one year. Dr. Khalily noted the symptoms began with heavy lifting and reaching at work. Dr. Khalily noted the dominant finding was tendinitis of the long head of the biceps which corresponded with Crume’s area of tenderness on examination. Dr. Khalily recommended oral anti-inflammatory medication and physical therapy.

Records of Frasier Rehab Institute indicate Crume was seen on April 24, 2017. Crume’s right shoulder had improved overall. Her left shoulder continued to give her the most discomfort. A discharge summary dated August 21, 2017, indicated Crume’s last session was on July 10, 2017. Crume reported her left

shoulder pain was 10/10 when lifting. Her current pain involved her left shoulder and low back. Her pain ranged from 0/10 to 10/10 when performing heavy lifting at work. On examination, Crume had decreased range of motion of the left shoulder. Crume's main complaint was left shoulder pain and decreased left shoulder range of motion. It was noted therapy was discontinued due to awaiting insurance approval.

Dr. Barefoot performed an Independent Medical Evaluation ("IME") on October 25, 2016. Dr. Barefoot reviewed the medical records and diagnostic studies and performed a physical examination. He diagnosed left shoulder tendinopathy/tendinitis of the distal supraspinatus tendon, sprain of the distal subscapularis muscle and tendon, tendinopathy/tendinitis and partial intrasubstance tearing of the long head of the biceps. He also diagnosed right shoulder tendinopathy/tendinitis of the distal supraspinatus tendon; sprain of the distal subscapularis muscle and tendon, tendinopathy/tendinitis and probable partial tearing of the long head of the biceps tendon; signal abnormality of the superior labrum, suggesting fraying or surface tearing; and degenerative changes of the AC joint. Dr. Barefoot related all of these diagnoses to her work activity. He indicated her symptoms were not due to motorcycle riding, stating "There is no activity in normal riding of a motorcycle that would give an individual shoulder issues that she describes." He also indicated after viewing video of her drag racing, the activity would not cause any ongoing shoulder condition. Dr. Barefoot assessed a 7% whole person impairment for diminished range of motion in the left shoulder and a 2% impairment for diminished range of motion in the right shoulder for a combined 9%

impairment pursuant to AMA Guides. Dr. Barefoot opined Crume had no active pre-existing condition.

Dr. DeGruccio of Orthopedic & Sports Specialists of Louisville, P.S.C. performed an IME on July 26, 2016. He stated there was no specific mechanism of a work injury and Crume's bilateral shoulder pain, as well as arm paresthesias, are likely due to arm vibration syndrome related to the drag racing and motorcycle riding. He stated the amount of vibration with those machines is significant. He reviewed two MRIs of the shoulders and advised that the findings suggest early signs of arthropathy of the AC joints. Dr. DeGruccio advised that there was no diagnosis related to the work injury. Dr. DeGruccio concluded all of Crume's upper extremity symptoms are related to her motorbike riding and racing and not the work event. She was at MMI as of the date of the examination. In a December 2, 2019 supplemental report, Dr. DeGruccio stated Crume has a 0% whole person impairment related to a work injury.

A Benefit Review Conference ("BRC") was held on January 28, 2020. At the BRC, the parties set forth the issues to be determined in this claim are whether Crume suffered an injury as defined by the Act; work relatedness; compliance with 5<sup>th</sup> Edition; extent and duration including multipliers; medical expenses; travel expense; co- payments and deductibles; and TTD and FMLA days. A Final Hearing was also held on January 28, 2020. In the March 19, 2020 Opinion, Award, and Order, the ALJ made the following findings of facts and conclusions of law:

## May 13, 2016, Injury

### INJURY UNDER ACT, CAUSATION, WORKRELATEDNESS, AND PRIOR ACTIVE CONDITION.

Pursuant to the Act, an injury is “any work-related traumatic event . . . arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” KRS 342.0011(1). The term “objective medical findings” means clinical findings, observations, and other standardized testing performed as part of a physical examination as well as sophisticated diagnostic tests. *Gibbs v. Premier Scale Co./Ind. Scale Co.*, 50 S.W.3d 754 (Ky. 2001). A diagnosis complies with the requirements of KRS 342.0011(1) and (33) if based upon symptoms of a harmful change confirmed by means of direct observation and/or testing applying objective or standardized methods. *Id.*

Medical causation must be proved to a reasonable medical probability with expert medical testimony . . . [however], [i]t is the quality and substance of a physician’s testimony, not the use of particular “magic words,” that determines whether it rises to the level of reasonable medical probability, i.e., to the level necessary to prove a particular medical fact.” *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004). The claimant bears the burden of proving causation.

Additionally, when work-related trauma arouses or exacerbates a preexisting condition, it has caused a harmful change in the human organism, i.e., an injury as defined by KRS 342.0011(1). Although impairment that results is compensable, the type and duration of benefits depends on whether the impairment is permanent or temporary. To the extent that the condition is active immediately before the trauma occurs, it cannot have been aroused by the trauma and, thus, to that extent cannot be compensable. “[T]o be characterized as active, an underlying preexisting condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to

the occurrence of the work-related injury.” *Finley v. DBM Technologies*, 217 S.W. 3d 261 (Ky. App. 2007). The employer bears the burden of proving the existence of a preexisting, active disability.

As applied to the instant case, the ALJ finds the Plaintiff has met her burden of proof as to a permanent work-related injury to her bilateral shoulders. In reaching this conclusion, the ALJ relies on the opinion of Dr. Barefoot.

The job the Plaintiff was working at the time of her work injury required her to her to manipulate cardboard cores that were 10 feet long and weighed between 15 to 20 pounds. She was required to lift this core overhead throughout the day. She stated she normally rotates through the job, but a particular worker was on vacation. She had performed this job for seven days up until the May 13, 2016, incident. She experienced pain in her shoulders that day and informed her supervisor. She continued to work the same job, but her pain became excruciating and she had to seek medical treatment.

The Plaintiff has continued to have pain in both shoulders since this incident despite conservative treatment. She believably testified that she has trouble lifting her arms above her head, left shoulder worse than right.

The Plaintiff’s imaging studies show she had objective bilateral shoulder pathology. Dr. Barfoot stated that an MRI of the Plaintiff’s right shoulder showed tendinopathy/tendinitis in the distal supraspinatus without evidence of disruption. There was also noted a possible strain of the superior fibers of the subscapularis muscle. Further, there was thickening and signal change of the longhead of the biceps tendon compatible with tendinopathy/tendinitis and improbable partial tearing. Dr. Barefoot stated there was a signal abnormality infrasubscapular superior labrum, suggesting fraying or surface tearing. Lastly, there was degenerative changes in the AC joint. An MRI of the left shoulder showed tendinopathy/tendinitis of the supraspinatus tendon.

There was also a sprain of the subscapular muscle and tendon involving the superior fibers. There is thickening and signal change in the longhead of the biceps indicative of tendinopathy/tendinitis and a probable infrasubscapular tear. Lastly, there were degenerative changes in the AC joint. The Plaintiff also had objective findings of pathology during her examination with Dr. Barefoot including diminished strength and diminished range of motion.

Dr. Barefoot diagnosed left shoulder tendinopathy/tendinitis of the distal supraspinatus tendon, sprain of the distal subscapularis tendon, tendon/tendinitis and partial infrasubscapular of the longhead of the biceps; and right shoulder tendon tendinopathy/tendinitis of the distal supraspinatus tendon, sprain of the distal subscapularis tendon, tendon/tendinitis and partial intra substance tearing of the longhead of the biceps; signal abnormality of the superior labrum suggesting fraying or surface tearing, and degenerative changes of the AC joint. He stated the diagnosis were related to the Plaintiff's work activities on May 13, 2016. He noted the Plaintiff had no active/pre-existing condition present in either shoulder at the time of the work-related injury. Dr. Barefoot stated it was clear from the Plaintiff's history, as well as the medical records, that her work-related activities brought her shoulder condition into its current symptomatic disabling reality. Again, the ALJ finds the opinion of Dr. Barefoot to be most persuasive, and it is adopted.

The ALJ would specifically note that he found the opinion of Dr. Bonnarens and Dr. DeGruccio that the Plaintiff's shoulder condition was caused by her motorcycle riding to be particular unpersuasive given the video evidence, the Plaintiff's testimony, and Dr. Barefoot's opinion that Plaintiff's motorcycle riding and motorcycle drag racing contributed zero to her current condition.

## **COMPENSABILITY OF MEDICAL TREATMENT AND TRAVEL**

KRS 342.020(1) states, “[i]n addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability.” The Kentucky Supreme Court, in *National Pizza Co. v. Curry*, 802 S.W.2d 949 (Ky. 1991), determined that because KRS 342.020(1) contains the term “and,” “cure and relief” means “cure and/or relief.” An employer’s liability, for medical benefits/expenses, exists “for so long as the employee is disabled regardless of the duration of the employee’s income benefits.” *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007).

As noted above, the Plaintiff’s left and right shoulder conditions are work-related. She is entitled to reasonable and necessary treatment for her left and right shoulder condition, as well as travel.

### **TEMPORARY TOTAL DISABILITY BENEFITS**

KRS 342.0011(11)(a) defines “temporary total disability” as “the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.” The Court has adopted a two-prong test to determine whether an employee is entitled to temporary total disability benefits. TTD benefits are payable only where both prongs are satisfied, i.e. where (1) the employee has not reached maximum medical improvement, and (2) the employee has not reached a level of improvement that would permit a return “to his job, or some other employment, of which he is capable, which is available in the local labor market.” *W.L. Harper Constr. Co., Inc. v. Baker*, 858 S.W.2d 202 (Ky. App. 1993).

The Plaintiff received TTD benefits paid at a rate of \$574.22 from May 24, 2016, through August 4, 2016, for a total of \$7,031.16. Her TTD was terminated after her

evaluation with Dr. DeGruccio. The Plaintiff's AWW for the 2016 injury has been stipulated at \$1,032.57, with a corresponding TTD rate of \$688.38. As such, there has been an underpayment as to rate. Concerning duration, Dr. Bonnarens released the Plaintiff from care on August 11, 2016. The ALJ finds that Dr. Bonnarens' release from care on August 11, 2016, is the most persuasive date as to MMI, and notes the Plaintiff did not have any additional significant treatment for her shoulders after that time. As such, there has also been a slight underpayment as to duration. In sum, the ALJ finds the Plaintiff is entitled to TTD at a rate of \$688.38 per week from May 24, 2016, through August 11, 2016. The Defendant is entitled to a credit for all benefits paid.

#### **EXTENT AND DURATION AND PROPER USE OF THE AMA GUIDES**

The only impairment rating in the record are the 0% whole person impairment assessed by Dr. DeGruccio, and the 7% whole person impairment for the left shoulder, and a 2% impairment for the right shoulder, for a 9% whole person impairment, assessed by Dr. Barefoot. The Plaintiff believably testified she continues to have difficulty with range of motion of her shoulders, especially with reaching overhead. Dr. Barefoot's impairment ratings for the Plaintiff was based on diminished range of motion. As such, the ALJ finds the opinion of Dr. Barefoot to be most persuasive. The ALJ specifically finds the Plaintiff has a 9% whole person impairment for her shoulder condition.

Concerning the multipliers, KRS 342.730(1)(c)1 provides, "[i]f, 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 . . . ." A worker's post-injury physical capacity and ability to perform the same type of work as at the time of injury are matters of fact to be determined by the ALJ. *Ford Motor Company v. Forman*, 142 S.W.3d 141, 144 (Ky. 2004). The Kentucky Supreme Court has construed, "the type of work that the employee performed at the

time of injury” to mean the actual jobs that the individual performed. *Id.* at 145. The phrase also has been construed to refer broadly to the various jobs or tasks that the worker performed for the employer at the time of injury rather than to refer narrowly to the job or task being performed when the injury occurred. *Miller v. Square D. Company*, 254 S.W.3d 810, 814 (Ky. 2008).

The Plaintiff continues to work for the Defendant. No treating physician currently has the Plaintiff under any restrictions for her bilateral shoulder condition. The ALJ finds the Plaintiff is not entitled to have her benefits enhanced by the three multiplier because she has the physical capacity to perform the job that she performed at the time of her work injury.

Concerning the application of KRS.730(1)(c)2, the two multiplier, it is undisputed that the Plaintiff has returned to work earning more than she did at the time of her work injury as displayed by the stipulated AWW for her 2017 injury. No current up to date wage records have been filed; however, the Plaintiff testified that in August of 2017 (did not specify day) she started working a new job in facilities that involved a reduction in pay. As such, she is entitled to have her benefits enhanced by the two multiplier from September 1, 2017, for as long as she continues to earn an AWW less than \$1,032.57 for reasons not attributable to her conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to herself or to another. Should she return to work earning \$1,031.57 per week or more, her benefits will not be enhanced by any multiplier for as long as she continued to earn the same or greater.

Plaintiff's benefits therefore calculate as follows from the date of injury through August 31, 2017:

$\$688.38 \times 9\% \text{ (imp)} \times .085 \text{ (grid)} \times 1 \text{ (mult)} = \$45.82$  per week. Beginning September 1, 2017, her benefits calculate as follows:

$\$688.38 \times 9\% \text{ (imp)} \times .085 \text{ (grid)} \times 2 \text{ (mult)} = \$91.64$  per week.”

Fuji Seal filed a Petition for Reconsideration arguing the ALJ erred in relying on the opinion of Dr. Barefoot in awarding PPD benefits based on his 9% impairment rating. Fuji Seal argued the failure of Dr. Barefoot to assess an MMI date for the shoulder injuries, and to specify what equipment he used in measuring Crume's range of motion in the shoulders, is an improper application of the AMA Guides, and therefore cannot constitute substantial evidence. Fuji Seal argued instead the ALJ should have relied on the opinions of Dr. Bonnarens and Dr. DeGruccio and determined Crume retained a 0% impairment rating for her bilateral shoulder conditions.

The ALJ rendered an Order dated April 21, 2020, overruling the Petition. In the Order, the ALJ ruled as follows concerning this claim;

Concerning the reliance on Dr. Barefoot's report, it should be first noted that the ALJ relied on the opinion of Dr. Bonnarens as to the issue of MMI regarding the shoulders. The ALJ found that Dr. Bonnarens' release of the Plaintiff from care on August 11, 2016, was the most persuasive date as to MMI, and noted the Plaintiff did not have any additional significant treatment for her shoulders after that time. This MMI date would have been prior to both the October 25, 2016, IME evaluation by Dr. Barefoot, as well as the second IME evaluation by Dr. Barefoot on January 16, 2019.

Concerning the impairment rating for the shoulders, the ALJ continues to adopt the 9% impairment rating assessed by Dr. Barefoot in his 2016 report, which involved a combination of a 7% whole person impairment for the left shoulder and a 2% whole person impairment for her right shoulder as calculated by him. The Kentucky Supreme Court has found, "[t]o be grounded in the Guides is not to require strict adherence to the Guides, but rather a general conformity with them." The Supreme Court further noted that the Court

of Appeals in BraschBarry did not require strict adherence to the Guides when they stated, “[a]n ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides.” The Supreme Court noted, “[a]n opinion that is based upon the Guides is different from one that strictly adheres to the Guides.” Plumley v. Kroger, Inc., 557 S.W.3d. 905 (Ky. 2018). The ALJ finds that Dr. Barefoot’s opinion is based upon, grounded in, and in conformity with the Guides. Further, his opinion was persuasive and is adopted by the ALJ. It is notable that the Dr. Barefoot again found that the Plaintiff had a 9% whole person impairment during his second evaluation in 2019, albeit under a slightly different calculus.

Fuji Seal thereafter filed this appeal. As the claimant in a workers’ compensation proceeding, Crume had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Crume was successful in her 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). 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.

Fuji Seal argues the ALJ's reliance on the opinions of Dr. Barefoot was erroneous as his findings cannot constitute substantial evidence. Fuji Seal argues Dr. Barefoot failed to determine the date Crume reached MMI. Instead, the ALJ in his Order on Reconsideration determined that Dr. Bonnarens' release of Crume from his care on August 11, 2016 was the most persuasive date as to MMI. This MMI date preceded the dates Dr. Barefoot saw Crume. Fuji Seal argues it was error for

the ALJ to rely on Dr. Bonnarens' opinion on MMI and Dr. Barefoot's opinion on assessment of impairment. Fuji Seal argues that Dr. Barefoot's assessment of impairment is fatally flawed and not in accordance with the AMA Guides, and cannot constitute substantial evidence. In addition, Fuji Seal argues the failure of Dr. Barefoot to use a goniometer in measuring Crume's range of motion was not in compliance with the AMA Guides, and therefore his opinion does not constitute substantial evidence. Fuji Seal argues the opinions of Dr. Bonnarens and Dr. DeGruccio must be adopted. Both physicians opined Crume retained a 0% impairment rating. Fuji Seal also argues the ALJ failed to consider the impact of drag racing motorcycles on Crume's upper extremities. We disagree.

The ALJ accepted Dr. Barefoot's opinion on assessment of impairment, and also determined Dr. Bonnarens' date of MMI, August 11, 2016, to be most persuasive, even though it preceded the dates Dr. Barefoot saw Crume. 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, *supra*; Whittaker v. Rowland, *supra*. Dr. Barefoot's assessment of impairment was in conformity with AMA Guides. In this instance, the ALJ expressed his authority to rely in part on both Dr. Barefoot and Dr. Bonnarens' assessments.

Here, the ALJ was confronted with conflicting evidence. Dr. Bonnarens and Dr. DeGruccio both opined Crume's bilateral shoulder problems were not caused by her incident at work, but instead were connected to drag racing motorcycles. Dr. Barefoot disagreed and opined Crume's shoulder problems were

caused by her work-related incident. All three doctors reviewed a video of Crume racing in reaching their respective conclusions. The ALJ likewise reviewed the video of Crume racing and did not appear impressed. The ALJ, after thoroughly reviewing the medical evidence, the testimony from Crume, and the applicable law, determined Crume met her burden of proving she suffered bilateral shoulder injuries as defined by the Act, and was therefore entitled to a PPD award based on a 9% impairment, along with appropriate TTD benefits and medical benefits. This determination was clearly supported by substantial evidence. The ALJ properly exercised his discretion in finding the opinions of Dr. Barefoot more persuasive than those of Dr. Bonnarens and Dr. DeGruccio. His findings are supported by substantial evidence and will not be disturbed on appeal.

Accordingly, the Opinion, Order and Award dated March 19, 2020 and the Order dated April 21, 2020, rendered by Hon. Richard Neal Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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