Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **January 19, 2018**

CLAIM NO. 201391370

GREYHOUND LINES, INC PETITIONER

VS.

APPEAL FROM HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE

KERRY SLIDER
AND HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

* * * * * *

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

RECHTER, Member. Greyhound Lines, Inc. ("Greyhound") appeals from the June 23, 2017 Opinion, Award and Order and the August 28, 2017 Order rendered by Hon. Tanya Pullin, Administrative Law Judge ("ALJ") finding Kerry Slider

("Slider") permanently partially disabled. On appeal, Greyhound argues the ALJ erred in relying upon an 11% impairment rating assessed by Dr. Ben Kibler. For the reasons set forth herein, we affirm in part, reverse in part and remand.

Slider was employed by Greyhound as a bus driver. She injured her shoulder on October 11, 2012 when she was loading a passenger who was in a wheelchair. The wheelchair lift would not go all of the way up, so she got underneath to push up on the lift. The passenger was loaded and Slider continued on her route. When the passenger in the wheelchair was being unloaded, the ramp dropped approximately a foot. Slider grabbed the back of the wheelchair to prevent the passenger from falling. She felt pain in her back and had numbness and tingling in her right arm.

Slider received extensive medical treatment for an injury to her right shoulder, including physical therapy, injections and work conditioning. On June 18, 2014, Dr. Kibler performed scapular muscle reattachment surgery on Slider's right shoulder. Further discussion of Slider's treatment following her right shoulder injury is not relevant to the issues on appeal. Slider also alleged an injury to her spine, which is not the subject of this appeal.

Dr. Thomas Loeb performed an independent medical evaluation ("IME") on February 10, 2015. Dr. Loeb diagnosed scapular detachment syndrome of the right shoulder with suspected neuropraxia of the 7th nerve root from a stretch injury on October 11, 2012. Dr. Loeb opined Slider reached maximum medical improvement ("MMI") in December 2014. Based upon her current range of motion findings, Dr. Loeb assigned a 16% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), entirely related to the work injury. Dr. Loeb recommended examination under anesthesia with right shoulder manipulation and lysis of adhesions if possible. He felt there was potential for improving her condition. If she obtained markedly improved range of motion, she would be reassessed.

Dr. Jeffrey Fadel performed an IME on March 10, 2015. Dr. Fadel diagnosed status post scapular muscle detachment to the right shoulder, adhesive capsulitis of the right shoulder, and probable ulnar tunnel syndrome of the right wrist, all related to the October 11, 2012 injury. Dr. Fadel assigned a 6% impairment rating for decreased range of motion in the right shoulder. He also noted the AMA Guides do not permit the inclusion of weakness as a ratable portion

when the joint has ratable motion loss. Dr. Fadel thought her loss of motion could be improved by manipulation under anesthesia and vigorous physical therapy immediately afterwards. In a May 19, 2015 supplemental report, Dr. Fadel assigned an 8% impairment rating for the shoulder condition.

Dr. Frank Bonnarens performed an IME on February 8, 2016. Dr. Bonnarens diagnosed status post avulsion of the scapular stabilizers with surgical repair and limited range of motion of the shoulder related to the work injury. Slider also had evidence of carpal tunnel and ulnar compression at the wrist, not related to the work injury. Dr. Bonnarens assigned a 5% impairment rating for loss of range of motion in the right shoulder.

Dr. Kibler completed a Form 107 on May 19, 2016. He diagnosed scapular muscle detachment caused by the work injury and opined Slider reached MMI by June 1, 2016. Dr. Kibler assigned an 11% impairment rating for the right shoulder pursuant to the AMA Guides, though he did not specifically identify which portions he relied upon in reaching this rating.

The ALJ found as follows:

> In this specific instance after careful review of the lay and medical testimony, the ALJ finds persuasive the opinion of Dr. Kibler and finds Plaintiff

retains an 11% functional impairment rating pursuant to the Guides as a result of her October 11, 2012 work-related injury to her right upper extremity. Pursuant to KRS 342.730 (1) (b), the functional impairment is multiplied by a factor of 1 yielding an 11% permanent partial disability award.

While all the medical opinions have been considered by the ALJ, as evidenced by the preceding summaries, the opinion of Dr. Kibler was the most persuasive to the ALJ because he treated Plaintiff on numerous occasions. These multiple encounters, as well as the surgery which Dr. Kibler performed, gave Dr. Kibler a better and more informed vantage point from which to assess Plaintiff's injury and impairment than the other evaluating physicians had. While in his IME report Dr. Kibler did not cite the page numbers of the Guides, which he used to determine an impairment rating for muscle weakness, the Guides do allow for additional impairment rating for loss of strength of the upper extremity and instruct the practitioner on pages 507 through 511. The Guides note, "In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the *Guides*, the loss of strength may be rated separately." This Dr. Kibler has done. Because Dr. Kibler did extensive treatment of Plaintiff and consequently has considerable knowledge and understanding of Plaintiff's condition, the ALJ finds that this can be the "rare case" in which the examiner has determined that loss of strength represents an impairing factor that had not been otherwise considered.

> Dr. Kibler, Dr. Fadel, and Dr. Bonnarens all agreed that Plaintiff did not retain the physical capacity to return to the type of work which she performed at the time of the injury. Therefore, based on those opinions, and with no opinion clearly to the contrary, the ALJ finds that Plaintiff does not retain the physical capacity to return the type of work that she performed at the time of the injury. Therefore, her benefits shall be enhanced by the three-time statutory multiplier pursuant to KRS 342.730 (1) (c) 1.

Greyhound filed a petition for reconsideration challenging the ALJ's reliance on Dr. Kibler's rating, and seeking correction of a period of TTD benefits. The ALJ denied Greyhound's petition for reconsideration as it relates to the impairment rating, finding as follows:

> The ALJ reiterates that she considered all medical opinions in the record and the opinion of Dr. Kibler was most persuasive because he treated Plaintiff on numerous occasions. Additionally, Dr. Kibler performed surgery. These multiple treatment encounters and surgery gave Dr. Kibler a better and more informed vantage point from which to assess Plaintiff's impairment. The ALJ also reiterates that because Dr. Kibler was Plaintiff's treating physician he had considerable knowledge and understanding of Plaintiff's condition. Dr. Kibler determined that loss of strength represented an impairing factor that had not been otherwise considered. The ALJ reiterates that the AMA Guides were included in the consideration of the weight to be given to the medical

> evidence and still the ALJ found the opinion of Dr. Kibler to be most persuasive because he was Plaintiff's treating physician and surgeon.

On appeal, Greyhound argues the ALJ erred in relying upon the 11% impairment rating assigned by Dr. Kibler. It claims the AMA Guides do not permit a rating for lack of strength when decreased range of motion has been rated for the same joint, which is the method employed by Dr. Kibler. Further, Dr. Kibler combined 12% and 6% upper extremity impairments for an 18% upper extremity impairment, and converted this value to an 11% whole person impairment rating. Greyhound asserts, under the combined values chart, 12% and 6% upper extremity ratings combine for a 17% upper extremity rating that translates to a 10% whole person rating. Finally, Greyhound argues the ALJ improperly inferred the reasoning underlying Dr. Kibler's rating. Greyhound believes Dr. Kibler's report is insufficient to support the ALJ's inference that he considered Slider to be a rare case justifying the inclusion of strength loss as a ratable condition.

As noted by the ALJ, the AMA Guides do not absolutely prohibit the inclusion of a rating for loss of strength. Page 507 of the AMA Guides provides:

> In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the Guides, the loss of strength may be rated separately. … If the examiner judges that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with other impairments, only if based on unrelated etiologic or pathomechanical causes. Otherwise, the impairment ratings based on objective anatomic findings take precedence. Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts (e.g. thumb amputation) that prevent effective application of maximal force in the region being evaluated.

Greyhound vigorously argues this provision prohibits a loss of strength rating where decreased motion has been rated. However, this is a medical question properly left to the examining physicians. The proper interpretation of the AMA Guides and any assessment of an impairment rating in accordance with the AMA Guides are medical questions. Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003).

Furthermore, the proper way to challenge a doctor's impairment rating is to present medical testimony concerning the impropriety of an impairment rating or cross-examine the doctor. In this case, no physician directly critiqued Dr.

Kibler's impairment rating, nor was his deposition taken. As Greyhound emphasizes, Dr. Fadel explained the rationale for his rating and noted that he would not assign additional impairment for weakness in the presence of loss of motion. However, his reports were not provided in direct response to Dr. Kibler's rating, and there is no indication he reviewed the Form 107. Greyhound did not object to the admission of Dr. Kibler's opinion.

As such, the opinions of Dr. Kibler and Dr. Fadel constitute conflicting opinions as to the impairment rating and the proper application of the AMA Guides. Where there are conflicting opinions from medical experts as to the appropriate rating, it is the ALJ's function as fact-finder to weigh the evidence and select the rating upon which permanent disability benefits will be awarded. Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002). Though an ALJ is not authorized to independently interpret the AMA Guides, she may as fact-finder consult them in the process of assigning weight and credibility to evidence. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004) 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, id.

Moreover, the ALJ enjoys the discretion to choose whom and what to believe. Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001). A fact-finder does have the authority to consult the AMA Guides when determining the weight to be assigned the evidence, though he is not necessarily compelled to do so. Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003). Here, it appears the ALJ limited her review of the AMA Guides to the role of assisting her in determining the credibility of the physicians.

However, we do find it necessary to reverse the finding of an 11% impairment rating based upon the ALJ's failure to use the Combined Values Chart to correct Dr. Kibler's impairment rating. When no medical expertise is required to read a table such as the Combined Values Chart, the ALJ is authorized to make corrections. *See* Caldwell Tanks v. Roark, id. Here, the 12% and 6% impairment rating assessed by Dr. Kibler for the upper extremity clearly result in a 17% impairment pursuant to the Combined Values Chart, which results in the 10% whole person impairment rating pursuant to Table 16-3. Thus, the ALJ must amend the award to reflect a 10% impairment rating.

Accordingly, the June 23, 2017 Opinion, Award and Order and the August 28, 2017 Order rendered by Hon. Tanya Pullin, Administrative Law Judge, are hereby **AFFIRMED IN PART, REVERSED IN PART AND REMANDED** for entry of an award based upon a 10% impairment rating.

ALL CONCUR.

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