Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 4, 2020

CLAIM NO. 201792429

HOBBY LOBBY STORES, INC. — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

ANGELA GOURLEY — RESPONDENT/ CROSS-PETITIONER
AND
HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Hobby Lobby Stores, Inc. ("Hobby Lobby") appeals and Angela Gourley ("Gourley") cross-appeals from the January 21, 2020 Opinion, Award, and Order, and the February 18, 2020 Orders on Petitions for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). The ALJ awarded permanent partial disability ("PPD") benefits enhanced

by the 3.4 multiplier contained in KRS 342.730(1)(c)1, and medical benefits for injuries Gourley sustained while working for Hobby Lobby on February 8, 2017.

On appeal, Hobby Lobby argues the ALJ erred in determining Gourley sustained a work-related concussion on February 8, 2017. Hobby Lobby also argues the ALJ should have relied upon the opinions expressed by Dr. Joseph L. Zerga. On cross-appeal, Gourley argues the ALJ erred in finding she is not permanently totally disabled. We determine that although the ALJ did not cite to the holding in City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015), his analysis sufficiently addresses the criteria directed by the Kentucky Supreme Court. Because we find no error in the ALJ's determination and analysis, we affirm.

Gourley filed a Form 101 on January 17, 2019 alleging she sustained a concussion/brain injury on February 8, 2017 from striking her head on an open cabinet drawer when she attempted to stand up after examining the authenticity of a one-hundred dollar bill. Gourley's Form 104 reflects her work history consists of employment as a cashier/clerk for retail establishments, and as a department manager for Hobby Lobby.

Gourley testified by deposition on April 23, 2019, and at the hearing held November 25, 2019. Gourley, a resident of Cunningham, Graves County, Kentucky, was born on September 29, 1957. Gourley alleged she injured her head on February 8, 2017 when she struck it on a cabinet door when she arose after inspecting money as part of her job duties as a department head/cashier at Hobby Lobby. She testified there was a problem with the door opening on its own, which she had reported to her supervisor more than a month before the accident. In

addition to previous retail positions involving stocking and cashiering duties, she worked briefly as a waitress. Gourley began working in the framing department for Hobby Lobby in 2006. Hobby Lobby eventually promoted her to head of the floral department, and then moved her to the wearable art/jewelry department. Gourley's job required her to stock shelves and wait on customers. She also ordered merchandise, and worked as a cashier.

Gourley continued to work after the accident until September 2018 when she was sent home due to hallucinations she was having about customers and imaginary dogs in her home. Gourley experienced immediate sharp pain in her head after she struck it on the cabinet. She stated the wound bled a little, and she became nauseated a half-hour after the incident. She reported the accident, and stated it was confirmed by store video. She returned to work the morning after the incident, although she had a headache and experienced some dizziness. She did not seek medical treatment until February 18, 2017, when she went to the emergency room at Baptist Health in Paducah, Kentucky. She had previously seen Dr. Richard Wilson, her family doctor, for dizziness and headaches in 2015. Dr. Wilson eventually referred her to Dr. Jimmy Couch, a neurologist, for her problems stemming from the accident.

Gourley testified she had experienced some headaches and dizziness in the past, but not to the extent she had after the accident. She also developed significant light sensitivity after the accident, and stated she could no longer drive at night. She additionally developed severe ringing in her ears, hallucinations, dizziness, and incontinence. She has also become confused, forgetful, and

impulsive. She has difficulty understanding what people try to tell her. Hobby Lobby accommodated her inability to drive at night by only scheduling her for day shifts.

At the hearing, Gourley testified she continued to experience dizziness, persistent headaches, and head pressure. She treats with over-the-counter Ibuprofen and Scopolamine patches. She stated she is also fearful and anxious. She testified she no longer has the ability to work, sing in the church choir, take care of finances, or drive due to residuals from her accident.

Gourley supported her claim with Dr. Couch's treatment records from July 10, 2017 through January 14, 2019. On July 10, 2017, he diagnosed Gourley with post-concussive syndrome. On July 25, 2017, Dr. Couch noted Gourley's EEG was normal, but that did not preclude her from having epileptiform abnormalities. Throughout his course of treatment, Dr. Couch noted Gourley's problems with headaches, anxiety, depression, memory loss, dizziness, unsteadiness, and agitation, all of which developed shortly after her February 8, 2017 work accident. On November 21, 2018, he assessed restrictions of no lifting over forty pounds on a maximum basis, ladder climbing while carrying in excess of twenty pounds, or lifting merchandise overhead.

Gourley subsequently filed Dr. Couch's May 21, 2019 office note. He diagnosed her with post-concussive syndrome caused by her work-related injury. He noted she had fallen multiple times, and her speech is affected. He also noted she has memory loss, paranoia, dizziness, and intractable headaches along with difficulty of concentration and performance of complex tasks. Dr. Couch indicated he does

not provide impairment ratings pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He noted she does not retain the capacity to return to the type of work performed on the date of the injury. On November 5, 2019, Dr. Couch stated he had reviewed and agreed with the impairment rating assessed by Dr. Michael A. Nicholas.

Dr. Lisa King, Psy.D, evaluated Gourley on June 3, 2019 in conjunction with her claim for Social Security disability benefits. IQ testing demonstrated Gourley functioned at the low average range. She diagnosed Gourley with Axis I - unspecified anxiety disorder; Axis II - no diagnosis; Axis III - post-concussive syndrome, dizziness, headaches, memory loss, hallucinations, light sensitivity, arthritis, and glaucoma. She noted those conditions affect Gourley's ability to understand, remember and carry out instructions toward performing simple tasks. She also noted Gourley has problems with concentration and attention. She opined Gourley would have difficulty responding to supervisors and co-workers.

Dr. Nicholas, a clinical psychologist, evaluated Gourley on August 6, 2019. He diagnosed Gourley with a mild cognitive disorder due to a traumatic brain injury. He assessed a 20% impairment rating pursuant to the AMA Guides, all caused by her February 2017 work-related accident.

Hobby Lobby filed Dr. Zerga's March 29, 2018 report. Gourley complained of headaches and light sensitivity. He noted she had some history of previous migraines. He also noted her history of head trauma, but opined she did not sustain a concussion. He found her complaints were consistent with migraines.

He believed Gourley should increase her activities, and he advised that she should not drive at night.

In a supplemental report dated October 28, 2019, Dr. Zerga noted he had reviewed Dr. Nicholas's report. He noted Gourley had experienced a soft tissue injury with no loss of consciousness. He stated there is no reason or basis for her cognitive issues. He disagreed with the 20% impairment rating Dr. Nicholas assessed.

Dr. Zerga testified by deposition on July 22, 2019. He had previously evaluated Gourley for her allegations of a closed head trauma, concussions, and post-concussive syndrome. He noted she had not experienced amnesia, and was able to recall the details of her accident. He also noted she sought no treatment until ten days after the accident. He noted her complaints when she first sought treatment were more consistent with migraines than with a concussion. He did not believe Gourley experienced a concussion. He noted she had previously experienced problems with headaches, and her problems could have been caused by fatigue or anxiety. He noted females are more susceptible to developing migraines. Dr. Zerga stated Gourley reached maximum medical improvement ("MMI") in March 2018, more than a year after the accident, and her condition had returned to baseline. He stated her memory loss is unrelated to her work injury. Dr. Zerga assessed a 5% impairment rating pursuant to the AMA Guides, of which he found 3.5% is due to her work injury, and 1.5% is due to her previous conditions. Dr. Zerga opined Gourley could return to work without restrictions. He noted various objective

studies including CT scans and MRIs were negative. He also stated the medications she is taking are unnecessary to treat her work injury.

At Benefit Review Conference held on October 27, 2019, the issues preserved for determination included whether Gourley retains the physical capacity to return to the type of work performed on the date of injury, medical expenses unpaid or contested, and permanent income benefits per KRS 342.730 with multipliers. Hobby Lobby also raised numerous issues by Special Answer that are not relevant to this appeal. Gourley alleged Hobby Lobby committed a safety violation pursuant to KRS 342.165(1).

The ALJ rendered the Opinion, Award, and Order on January 21, 2020. He determined Gourley sustained a compensable work-related injury on February 8, 2017. The ALJ indicated he considered Gourley's age, education, and work experience, along with the medical opinions, in particular the restrictions outlined by Dr. King, in reaching his determinations that she is not totally disabled. The ALJ determined she has significant restrictions, "but even with those restrictions she should be able to perform work. The ALJ therefore finds the plaintiff is not totally disabled." The ALJ found Gourley is not entitled to TTD benefits since she continued to work until September 2018, long after Dr. Zerga determined she had reached MMI. The ALJ awarded PPD benefits based on the 20% impairment rating assessed by Dr. Nicholas, enhanced by the 3.4 multiplier contained in KRS 342.730(1)(c)1. The ALJ also found Gourley is entitled to medical benefits pursuant to KRS 342.020. The ALJ denied Gourley's allegation that Hobby Lobby had committed a safety violation.

Both Gourley and Hobby Lobby filed Petitions for Reconsideration. Gourley argued, as she does on appeal, the ALJ failed to perform the appropriate analysis in determining she is not permanently totally disabled. Gourley also argued the ALJ failed to determine the specific injury or injuries she sustained in her work accident. Hobby Lobby argued the ALJ erred in awarding PPD benefits based upon the 20% impairment rating assessed by Dr. Nicholas, rather than based upon the 3.5% impairment rating Dr. Zerga determined stemmed from her work injury. The ALJ issued orders denying both of the petitions on February 18, 2020. He found Hobby Lobby's petition was no more than a re-argument of the merits of the claim. He also denied Gourley's petition, in part, explaining the basis for his determination. The ALJ clarified that he found Gourley sustained work-related injuries in the form of post-concussive syndrome including headaches and memory loss, and Hobby Lobby is responsible for treatment of those conditions.

On cross-appeal, Gourley argues the ALJ erred in failing to find her permanently totally disabled. She argues, as she did in her Petition for Reconsideration, the ALJ failed to perform the appropriate analysis in finding she has a permanent partial rather than a permanent total disability. Hobby Lobby argues the ALJ erred in awarding PPD benefits based upon a 20% impairment rating enhanced by the three-multiplier contained in KRS 342.730(1)(c)1.

As the claimant in a workers' compensation proceeding, Gourley 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 Gourley was unsuccessful in convincing the ALJ she is permanently totally disabled, the question on appeal is whether the

evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). 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 with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Gourley requests this Board to re-weigh the evidence and substitute its judgement for that of the ALJ. This we cannot do. The ALJ acted squarely within his discretion in finding Gourley is not permanently totally disabled. Although he did not specifically cite to the cases, the ALJ appropriately considered the factors set forth in Ira A. Watson Department Store v. Hamilton, supra, and City of Ashland v. Stumbo, supra. The ALJ is required to undertake a five-step analysis to determine whether a claimant is totally disabled. The ALJ must determine: 1) if the claimant suffered a work-related injury; 2) what, if any impairment rating the claimant has; 3) what permanent disability rating the claimant has; 4) that the claimant is unable to perform any type of work; and, 5) that the total disability is the result of the work injury. The ALJ outlined his analysis in determining Gourley is permanently partially disabled. Likewise, the ALJ discussed the impairment ratings, and noted why he relied upon Dr. Nicholas' impairment assessment. Based upon this analysis, we do not find the ALJ's determination that Gourley is permanently partially disabled is flawed, and therefore we affirm.

Regarding Hobby Lobby's on appeal, we find the ALJ's determination that Gourley is entitled to an award of PPD benefits based upon the 20% impairment rating enhanced by the 3.4 multiplier contained in KRS 342.730(1)(c)1 is supported by substantial evidence. Therefore his decision will not be disturbed.

"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, supra. 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., supra; and 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).

Dr. Nicholas' opinions and assessment of impairment constitute substantial evidence upon which the ALJ could reasonably rely in arriving at his decision. Dr. Zerga's disagreement with the impairment rating assessed by Dr. Nicholas, is merely a contrary opinion upon which the ALJ could have relied, but chose not to. Dr. Nicholas asserted the impairment rating he assessed was in accordance with the AMA Guides. Dr. Nicholas was not cross-examined on that point. It clearly fell within the ALJ's discretion to rely upon that assessment. Likewise, the ALJ outlined why he believed Gourley does not retain the physical capacity to return to the work performed at the time of her injury, although she

continued to do so for a year and a half after the accident. He appropriately exercised his discretion in determining the 3.4 multiplier is applicable in this instance. Therefore, his determination will not be disturbed.

Accordingly, January 21, 2020 Opinion, Award, and Order, and the February 18, 2020 Orders on Petitions for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER/CROSS-RESPONDENT: **LMS**

HON MARK R BUSH
250 GRANDVIEW DRIVE, STE 550
FT MITCHELL, KY 41017

COUNSEL FOR RESPONDENT/CROSS-PETITIONER: **LMS**

HON JEFFERY A ROBERTS
509 MAIN STREET
MURRAY, KY 42071

ADMINISTRATIVE LAW JUDGE: **LMS**

HON R ROLAND CASE
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601