

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 1, 2019

CLAIM NO. 201698773

JBS SWIFT & CO.

PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE**

ANA MABEL DUMOIS BUENO;
AND HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

RECHTER, Member. JBS Swift & Co. appeals from the May 10, 2019 Opinion, Order and Award and the June 10, 2019 Order on Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge (“ALJ”). The ALJ determined Ana Mabel Dumois Bueno suffered a work-related injury and awarded temporary total disability (“TTD”) benefits and enhanced permanent partial disability (“PPD”)

benefits. On appeal, JBS Swift argues the period of TTD benefits is not warranted, and Bueno is not entitled to enhanced PPD benefits. For the reasons set forth herein, we affirm.

Bueno worked at JBS Swift as an electric knife operator. On November 14, 2015, her left hand was accidentally struck by a tool being carried by a co-worker. She visited US Healthworks the same day for pain in her left index finger, knuckle and thumb. An x-ray of her left hand was normal, and Bueno was diagnosed with a left finger sprain with contusion. She was released to return to work the following day. On November 16, 2015, Bueno returned to US Healthworks with continued pain. Her diagnosis remained the same, but she was placed on lifting restrictions.

Bueno continued to follow up with US Healthworks through December 28, 2015, when she was referred to Kleinert Kutz & Associates Hand Care Center. A February 9, 2016 left hand MRI revealed distal disruption of the terminal tendon. On February 10, 2016, Dr. William Snearly reviewed these findings with Dr. Tuna Ozyurekoglul, who concluded no proximally retracted extensor tendon was identified.

Bueno next treated with Dr. William Moss on March 24, 2016. She reported left hand and wrist pain with decreased range of motion. Dr. Moss reviewed the February 9, 2016 MRI and diagnosed tendon disruption. He prescribed pain medications and continued Bueno's lifting restrictions. She returned on June 7, 2016 for a follow-up and was referred to Dr. Amit Gupta for a surgical consultation.

On May 26, 2016, shortly before her final appointment with Dr. Moss, a rack of ribs fell on Bueno's left hand at work, which worsened her symptoms.

Dr. Gupta first evaluated Bueno on June 13, 2016. He initially recommended a finger release procedure, which was performed on June 24, 2016. Bueno went to physical therapy following the procedure and remained on restricted duty. However, her pain continued and she was unhappy with the function of her left hand. On May 27, 2017, Dr. Gupta performed a left index finger flexor tenolysis and capsulectomy. Following this second surgery, Bueno reported her pain persisted. On June 8, 2017, Dr. Gupta noted her reported symptoms were out of proportion to the objective indications. He imposed permanent restrictions against lifting over ten pounds, working in cold conditions, and frequent lifting or carrying with both hands. On June 22, 2017, Dr. Gupta assessed an 11% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Bueno was off work and underwent physical therapy following the second surgery. She returned briefly but has not worked since July 27, 2017. According to Bueno, JBS Swift informed her it no longer had work within her restrictions. However, Lisa Nikki Brown, an occupational health manager, testified there are at least fifteen positions available at JBS Swift which involve primarily one-handed work with no lifting over ten pounds. Brown also testified a letter was sent to Bueno's home offering a position within her restrictions, but Bueno never responded.

During the course of her treatment for the left hand injury, Bueno also sought care for psychological symptoms. On September 27, 2016, she visited Internal Medicine Consultants and reported depression. On October 25, 2016, she returned with reports of anxiety and insomnia. She was referred to Seven Counties Services on November 1, 2016 and complained of anxiety and depression since the injury. Bueno reported her life had been fine prior to the November 14, 2015 work incident. She was diagnosed with adjustment disorder with mixed anxiety, depressed mood and emotional features. Bueno continued to treat at Seven Counties through August 30, 2018, visiting on 27 occasions for individual counseling. She also visited Our Lady of Peace on February 8, 2018 with suicidal ideations, and was admitted for four days.

Dr. Warren Bilkey conducted an independent medical evaluation (“IME”) on October 24, 2016. Dr. Bilkey diagnosed left hand contusion, extensor tendon injury, and flexion contracture of the second digit. He also diagnosed secondary cubital tunnel syndrome, RSD, and muscle spasm. Dr. Bilkey assessed a 27% impairment rating pursuant to the AMA Guides. He opined Bueno is not capable of performing her pre-injury work.

Dr. Thomas Gabriel conducted an IME on January 10, 2017. Dr. Gabriel diagnosed left finger extension contracture and resolved left hand contusion. He assigned a 9% impairment rating pursuant to the AMA Guides, but recommended no permanent restrictions. Dr. Gabriel opined Bueno could work with her left hand but may experience precision pinch difficulty.

Dr. Gabriel performed a second IME on November 20, 2017 after Bueno's second surgery. Following this examination, he assigned a 15% impairment rating related to the work injury. Dr. Gabriel agreed with Dr. Gupta's permanent lifting restrictions.

Dr. Jules Barefoot conducted an IME on November 29, 2017. Dr. Barefoot diagnosed distal disruption of the terminal tendon of the index extensor mechanism. He also diagnosed persistent pain, anxiety and depression. He related all of these diagnoses to the work accident. Dr. Barefoot assessed a 22% impairment rating pursuant to the AMA Guides. He opined Bueno would have difficulty using her left hand for grasping, lifting and carrying, and concluded she could not return to her pre-injury work.

Dr. Steven Simon conducted an independent psychological evaluation on December 2, 2017. Dr. Simon conducted a battery of testing, but Bueno showed indications of feigning and symptom magnification on portions of the examination. He diagnosed major depressive disorder, generalized anxiety disorder, and post-traumatic stress disorder. Dr. Simon assessed a 20% impairment rating.

Dr. Timothy Allen conducted an independent psychological evaluation on May 27, 2018. The testing which Dr. Allen administered showed markers for poor and inconsistent effort, thereby invalidating the results. Dr. Allen diagnosed somatic symptom disorder and depressive disorder. He expressly attributed the somatic symptom disorder to Bueno's work injury, but concluded her depression was pre-existing. He assigned a 10% impairment rating, half of which is attributable to Bueno's work injury.

In the May 10, 2019 Opinion, the ALJ concluded Bueno suffered a work-related injury to her left index finger and psychological injury. She determined Bueno is entitled to TTD benefits from June 24, 2016, the date of her first surgery, to July 27, 2017, the date she reached maximum medical improvement (“MMI”), with credit applied for periods already paid by JBS Swift. The ALJ further concluded Bueno suffers a 26% impairment rating. Relying on the permanent restrictions placed by Dr. Gupta, the ALJ concluded Bueno is unable to perform her pre-injury work. She provided the following analysis concerning enhanced benefits pursuant to KRS 342.730(1)(c):

The parties preserved capacity to perform pre-injury work as a contested issue. This issue boils down to whether Plaintiff can perform her pre-injury work. This ALJ concludes Plaintiff lacks the physical capacity to perform her pre-injury job duties, relying primarily upon Dr. Gupta’s permanent work restrictions. Plaintiff did not return to her pre-injury job duties following the work injury. Plaintiff returned to work, but with light duty restrictions and Plaintiff was later restricted from working in frigid conditions. Eventually, Defendant ceased accommodating Plaintiff’s light duty work restrictions and Plaintiff was sent home with no work available. As such, Plaintiff is entitled to the three multiplier.

JBS Swift petitioned for reconsideration, challenging the award of TTD benefits and Bueno’s entitlement to enhanced benefits. The ALJ provided additional discussion:

Defendant requests further findings addressing the period of temporary total disability benefits awarded. Specifically, Defendant argues Plaintiff is not entitled to temporary total disability benefits following Dr. Gupta’s release to return to work, with restrictions, on December 15, 2016. Additionally, Defendant notes on June 8,

2017, Dr. Gupta felt Plaintiff's symptoms were out of proportion.

Plaintiff underwent surgery on June 24, 2016. Prior to that time, Plaintiff continued to perform work consistent with her previous training and experience. Plaintiff underwent additional surgery on May 27, 2017. Thus, following Dr. Gupta's release to return to restricted work on December 15, 2016 additional surgery was recommended and performed. This supports Plaintiff's claim of additional symptoms which prevented her from returning to light duty work with Defendant during this time period. As such, this ALJ finds Plaintiff is entitled to temporary total disability benefits because she felt physically incapable of performing light duty work offered by Defendant.

This ALJ further notes Plaintiff sought treatment with Seven Counties on November 1, 2016 for symptoms related to anxiety and depression. Considering Plaintiff's psychological symptoms in tandem with her physical symptoms prior to and after the May 27, 2017 surgery, this ALJ is not convinced Plaintiff retained the capacity to perform light duty work. Thus, this ALJ finds Plaintiff is entitled to temporary total disability benefits from June 4, 2016 through July 11, 2016 and from July 19, 2016 through July 27, 2017.

Defendant requests further finds of fact addressing the applicable multiplier. Defendant argues there are many job[s] available with Defendant, which are similar to her pre-injury job duties. Defendant asserts there is no credible evidence that Plaintiff is unable to perform her regular work duties. However, this ALJ disagrees and bases her disagreement upon Dr. Gupta's permanent work restrictions. Dr. Gupta issued permanent light duty work restrictions, which included no lifting over ten pounds and no work in cold environment. Based upon these restrictions and Plaintiff's description of her job duties, this ALJ finds Plaintiff is entitled to benefits enhanced by the three multiplier.

On appeal, JBS Swift first contests the enhancement of Bueno's PPD award. KRS 342.730(1)(c)1 provides for application of the three multiplier if the

injured worked “does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury.” To determine if an injured employee is capable of returning to the type of work performed at the time of injury, an ALJ must consider whether the employee is capable of performing “the actual jobs that the individual performed.” Ford Motor Co. v. Forman, 142 S.W.3d 141, 145 (Ky.2004). JBS Swift relies on the fact that other positions existed within Bueno’s restrictions to argue she is capable of performing her pre-injury work.

Because Bueno successfully bore the burden of establishing her entitlement to enhanced benefits, the question on appeal is whether substantial evidence supports the ALJ’s decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Substantial evidence” is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party’s total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney’s Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such 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).

In making its argument, JBS Swift essentially concedes that Dr. Gupta's restrictions would prevent Bueno's return to work as an electric knife operator. Instead, it emphasizes Brown's testimony that at least fifteen positions exist within Bueno's permanent restrictions. However, KRS 342.730(1)(c)1 does not direct the ALJ to consider whether positions exist that the employee could perform. The plain language of the statute and the pertinent case law requires the ALJ to analyze the actual tasks the employee performed prior to the injury. Voith Industrial Services, Inc. v. Gray, 516 S.W.3d 817 (Ky. App. 2017). Dr. Gupta's medical opinion, as well as Bueno's testimony regarding her ability to perform her pre-injury position, constitute the requisite substantial evidence to support the ALJ's conclusion she lacks the physical capacity to return to her pre-injury employment. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

JBS Swift next argues Bueno is not entitled to TTD benefits from July 18, 2016 through July 31, 2017. Dr. Gupta performed surgery on June 24, 2016. From July 12, 2016 to July 18, 2016, Bueno returned to work briefly following the procedure. She testified JBS Swift then informed her no work was available within her restrictions. She has not returned to work since that time. Following the second surgical procedure, in 2017, Dr. Gupta placed Bueno at MMI on July 27, 2017. In challenging the ALJ's award of TTD benefits for this period, JBS Swift argues Dr. Gupta released Bueno to one-handed work on December 15, 2016. Again, it also

emphasizes Brown's testimony that jobs existed within Bueno's restrictions during this time.

“ ‘Temporary total disability’ means 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.” KRS 342.0011(11)(a). “Absent extraordinary circumstances, an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, *i.e.* work within her physical restrictions and for which she has the experience, training, and education; *and* the employee has actually returned to employment.” Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016).

JBS Swift argues jobs existed during this period which accommodated Bueno's lifting limitations and one-handed restrictions. However, we note Brown's testimony did not specifically address whether positions existed which accommodated Dr. Gupta's restriction against working in a cold environment. Bueno testified she did not feel physically capable of performing even the light duty work, and also that she was informed no work within her restrictions was available at the time. As pointed out by the ALJ, Bueno's testimony in this regard is supported by the fact that a second surgery was ultimately performed. Additionally, the ALJ considered Bueno's psychological condition during this time period, which JBS Swift does not acknowledge in making this argument. Bueno was being actively treated for her psychological condition during this time frame.

JBS Swift's argument relies exclusively on the physical restrictions placed by Dr. Gupta. However, the ALJ is entitled to consider these circumstances

in totality when determining a claimant's ability to "return to employment." This includes the claimant's own assessment of her ability to work, and the impact of any concurrent psychological condition. We conclude the ALJ identified sufficient proof to substantiate the conclusion that Bueno had not reached a level of improvement of both her physical and psychological injury to permit a return to employment prior to the point at which she reached MMI.

For the foregoing reasons the May 10, 2019 Opinion, Order and Award and the June 10, 2019 Order on Reconsideration rendered by Hon. Stephanie L. Kinney are hereby **AFFIRMED**.

ALL CONCUR.

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