

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 29, 2022

CLAIM NO. 202001320 & 201954871

KENDALL HENRY

PETITIONER

VS. APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

PASCHALL TRUCK LINES, INC.
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

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

STIVERS, Member. Kendall Henry (“Henry”), *pro se*, appeals from the October 25, 2021, Opinion and Order and the November 29, 2021, Order of Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ dismissed Henry’s claims against Paschall Truck Lines (“Paschall”) for alleged work-related injuries to his

shoulders for failure to prove an injury in each claim as defined by the Workers' Compensation Act.

On appeal, Henry asserts the ALJ's determination is not supported by substantial evidence.

BACKGROUND

The Form 101 filed in Claim No. 2019-54871 alleges Henry sustained work-related injuries to multiple body parts on October 31, 2019, while in the employ of Paschall in the following manner: "Lowering landing gear on trailer and shoulder popped and sent pain to neck; injuries to right shoulder and neck."

The Form 101 filed in Claim No. 2020-01320 alleges Henry sustained work-related injuries to multiple body parts on May 30, 2020, in the following manner: "Was making a delivery and went to pull the 5th wheel pin with the left arm and felt a stinging pain in the left shoulder and neck. Injuries to left shoulder and neck." By order dated October 19, 2020, the ALJ consolidated the claims.

Henry testified by deposition on October 19, 2020. Concerning the events of October 31, 2019, his testimony, in pertinent part, is as follows:

Q: And why were you lowering the landing gear?

A: They told – see, what we could do was drop the trailer at this place. And the, you know, I was dropping the trailer so I could, you know, just chill out for the day, you know, dropping the trailer. And I was going to actually ride somewhere and get me something to eat or whatever. So when I was dropping the trailer, I was lowering the gear, that's when I felt the pinch. And I was like, oh, man.

And then I went and – I went and laid down, I went and laid down. But then, I started thinking because my right side of my forehead – my side of my forehead starting

like pulsing, jumping, like beating like a heartbeat. And I – my neck started stiffening, stiffening up and I was like – and my chest, my chest, I guess came for me when – when I was winding it and it tightened up.

So I was sitting there and I was – I stood there about 15 minutes, I was getting a little scared because I was like you don't want to be found dead in this truck. So I jumped up and I called an Uber. I called me an Uber and the Uber took my to the hospital because I was leaning on my right shoulder. The pain was getting greater and greater, I was leaning over like I hurt, you know, my right shoulder and my head was pulsing. The guy in Uber is like you all right, Dude? You all right?

And I was like, man, something going on. I don't know what's going on. Actually, to be honest with you, I thought that I was having a stroke or something. I actually thought I was having a stroke.

Q: Where did you feel – you mentioned feeling a pinch. Where did you feel the pinch at?

A: The pinch, the pinch was like – it was like quick. It was quick like, sudden like but it felt like it was in my neck really, to be honest with you. But now, I know it was my shoulder the whole time. That's when – I guess when I pulled, I tore it. That's when I tore the trapezius or whatever it was, what she was explaining to me. That's when I felt the pinch.

Henry ultimately underwent right shoulder surgery on July 26, 2020.

Henry testified, in part, regarding the events of May 30, 2020:

A: On the second claim, I was in some part of Kansas. I think I was at a Home Depot, yeah, Home Depot and I was in Topeka, Kansas. Topeka, Kansas I remember because I remember they said something about Evel Knievel and I loved Evel Knievel since I was little. And I think they said that was his home or that's where he started, I don't know.

But I was at a Home Depot and I was dropping a load there. I was supposed to drop a load there and I always – well, I never really use my right shoulder because I

was hurting. So I never would ever use my right shoulder. I stayed out there for awhile and just kept using my left one, and I think my left one just gave out that day. And I pulled the fifth wheel pin to drop that trailer, you know, to drop that trailer, that's when – that's when I felt that one. I felt that one. It just pulled it.

And I was like – actually, I was just in tears and everybody came out and just – people just, you know, it was – they was helpful, they would help me out and I was just crying. And they was like – the ambulance came and picked me up and they was like we see you clutching your right arm. I said, man – they said, 'What's wrong with your right arm?' I was like, 'Man, I tore it up some months ago too.' And they was like, 'Wow.'

And they rushed me to the hospital, they gave me some injections, knocked the pain out, you know. And I called the job and they got right on it. They really – they really got right on it and sent me off the – I drove. They asked me could I drive? I was like – I was like I'm going home. I'm tired of this. I really was just fed up. I was just mad, I was angry, I was like I'm going home, I'm done.

And I was – I was going down the highway wide open headed towards Columbia. And they told me, 'Kendall, pull over. We're going to get somebody to help you.' And they pulled – I pulled over and they sent some guys out. I – I rode a long ways, a long ways. I was just in tears. I was just – I was just hurt. I was just like – it was just like a bomb –

Henry also testified at the August 25, 2021, hearing. Concerning the events of October 31, 2019, he testified as follows:

Well, on October 31, 2019, I was in New York; and while I was there, I was taking a load. While I was winding my landing gear, I felt a pop. When I felt a pop, the pain just shot up my neck, and my head started pulsing. Then when that happened, I was actually thinking I was having a stroke or something like that, even though I never had one. It just felt – I know I never felt that pain before.

So what I did was I got back in my truck. After that, I laid down for a little – a couple of minutes, and the pain was just getting worse, and I was just trying to calm myself down. I was like, ‘What am I going to do?’ So what I did was called an Uber, and an Uber took me to the hospital. So an Uber got me there.

I got there, and they kind of, like, rushed me to the back because they thought also I was having a stroke too because I told them that I’m having pain up the side, and I can’t move my shoulder or my neck.

And they took me to the back and did EKGs, all kinds of different things. They put things on my chest. So, you know, that’s what ended up happening....

Henry denied informing the emergency room that he had been experiencing these symptoms for two days. Henry ultimately underwent right shoulder surgery.

Henry recounted the events of May 30, 2020, as follows:

Well, I was in Topeka, Kansas – somewhere out there – and I was dropping a load, but I wasn’t able to drop it because the fifth wheel pin got stuck.

Normally, we have a button on the inside that releases it. It always has released it – just pull it; it will unlease [sic] it – but this day it was stuck.

So by then, to stop it from being stuck, you can push – pull your truck backwards into it, and it will release, but it didn’t. And so I got out, was trying to pull it; jumped back in, tried to release it again. It didn’t – and tried to pull it.

But what happened was, like, when I pulled it, it unleased [sic], but I was pulling so hard because it was so hard to pull, not knowing it had done released. And that’s when I pulled it. And, man, pain shot everywhere – because my right was already hurt – and I just fell down, man. I was just – I just broke down crying.

But, you know, to be honest with you, you know, it happened because I was using my left over and over and over for all them months because I couldn't use my right. And being that I was repeatedly – repetitively overrusing my shoulder, my left –

Paschall introduced Orange Regional Medical Center's October 31, 2019, medical record indicating, in pertinent part, as follows: "Pt c/o 'throbbing headache' to right side of head and right side neck tightness x2 days – reports [sic] is a long distance truck driver. Hx HTN, on lisinopril but non compliant per pt."

Paschall also introduced Dr. Robert A. Jacob's December 9, 2020, Independent Medical Examination report. After performing a physical examination and medical records review, Dr. Jacob opined, in part, as follows regarding the alleged October 31, 2019, right shoulder injury: "I do not believe he sustained a harmful change to the human organism as a result of his 10/31/2019 injury. I do not believe that the condition for which he was treated for the right shoulder was related to his work activities." He assessed a 7% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, for Henry's right upper extremity condition and further opined as follows:

It is my opinion that 0% of this is related to an alleged work-related injury and as stated it is my opinion that is not a true representation of his actual motion. All of the discordant facts as documented and detailed above lead [sic] to believe this examinee lacks credibility.

Regarding the alleged May 30, 2020, left shoulder injury, Dr. Jacob opined as follows:

In reference to his left shoulder, **he sustained a work-related injury on 05/30/2020 where he alleged [sic]**

felt a pop in the shoulder with associated pain. He sought medical attention at multiple providers for complaints of marked left shoulder pain. The records would indicate he was demanding, antagonistic and uncooperative with several of his providers. He eventually underwent a MRI of the left shoulder complaints as detailed above.

The findings, again, note a near normal MRI without any objective evidence of a surgical problem, normal age related changes, in his left shoulder. The findings were exceedingly minimal, and his pain complaints are completely out of proportion to his **mechanism of injury** and the objective findings. I found him to be over verbalizing with symptom magnification and not compliant with physical examination with voluntary override. Based on his history, his objective physical findings and his diagnostic studies, it is my opinion that with him being now 5-1/2 months status post reported left shoulder injury, I do not find his objective findings corroborate with his subjective complaints. On his range of motion measurements, the discordance on multiple repeated attempts and his passive range of motion indicate a lack of effort and voluntary override. I do not find evidence in either shoulder of a pathology which would prohibit him from returning to work doing the same job he was doing prior to these alleged incidences and he could work without restrictions. I do not believe he is in need of any surgical procedure on his left shoulder or any additional medical management. (emphasis added).

Dr. Jacob assessed a 3% impairment rating for the left shoulder condition calculated as follows:

According to the Fifth Edition and utilizing these same methodologies as detailed above, his left shoulder flexion loss would be 3% minus the 1% as noted in the left shoulder on 01/20/2020. Abduction is 4% minus the 1% from January equals a 2% for flexion. Abduction is 4% minus the 1% from January with no impairment for adduction or internal and external rotation. A 5% upper extremity equals a 3% whole person utilizing Table 13-6, page 439. My opinion concerning his effort and the true accuracy are the same as his right shoulder.

Dr. Jacob recommended Henry not undergo left shoulder surgery. He further opined as follows:

My opinion in regard to his left shoulder I also disagree with Dr. Burke in that he has a MRI which revealed very minimal age-related changes of no clinical consequence in the left shoulder and do not correlate or explain any of his symptoms. **It is my opinion that he has achieved maximum medical improvement from his left shoulder, and it is certainly no later than the date of this examination.** As stated above, I do not believe that he requires any additional medical management or treatment for either shoulder, and although I believe he no longer needs any additional medical management for his shoulder complaints it would be in his best interest if he complies with home rehabilitation exercise's [sic] as already instructed. (emphasis added).

Paschall filed the July 14, 2021, report of Dr. Ronald Burgess. After performing a physical examination and medical records review, Dr. Burgess set forth the following assessment:

Mr. Henry's initial right shoulder injury was not approved by workers' compensation due to the fact that his initial presentation was for neck and headache pain rather than shoulder pain and that, at the time of his injury, he actually was not unloading the truck. He subsequently had a surgical procedure where the humeral ligament over the biceps was felt to be torn and had a biceps tenodesis. I feel that within medical probability the task of lower the landing gear would not cause a humeral ligament injury and the injury is not felt to be related to his work duties.

Using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, regardless of the etiology, Mr. Henry is felt to have a 4% impairment of the right upper extremity secondary to decreased range of motion, which translates to 2% impairment of the whole person. On the left side, Mr. Henry shows significant variation of range of motion measurements of greater than 100% variance. His MRI showed only age-related changes in the supraspinatus and is otherwise within normal limits.

Within medical probability, there was no acute change to his left shoulder as a result of the reported injury on 05/30/20, when he was pulling a pin. I feel that the maximum numbers obtained for the range of motion should be considered a minimal range of motion in his left shoulder and his true range of motion is not objectively determined. It should also be noted that the patient had reversal of a bell-shaped curve with grip strength testing with significant elevation with rapid exchange grip, and this would be indicative of symptom magnification. Using the maximal numbers available to me, I feel he has a 6% impairment of the left upper extremity, which translates to 4% of the whole person. Bilaterally, these would combine to a 6% impairment of the whole person. On an objective basis, I feel the patient could return to his previous job duties without restrictions. I feel he requires no further treatment and specifically does not require any surgical treatment for his left shoulder.

The August 24, 2021, Benefit Review Conference Order and Memorandum lists the following contested issues: “benefits per KRS 342.730, work-relatedness/causation, notice, unpaid or contested medical expenses, injury as defined by the ACT, and TTD.” Under “Other” is the following: “Unreasonable failure to follow medical advice, Temporary v. Permanent injury; MMI date; Compensability of recommended surgery.”

In the October 24, 2021, Opinion and Order, the ALJ provided the following findings of fact and conclusions of law which are set forth *verbatim*:

...

21. The Defendant Employer representative Mr. Rasmussen testified at the Formal Hearing and admitted that the Plaintiff provided notice on November 4, 2019.

22. The ALJ finds that this delay of four days did not prejudice the Defendant Employer and constitutes the giving of notice as soon as practicable in accordance with the statute.

Benefits per KRS 342.730/Work-Relatedness and Causation Injury as Defined by the Act October 31, 2019

23. Injury is defined as “any work-related traumatic event or series of traumatic events, including cumulative trauma, 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).

24. KRS 342.0011(33) defines “objective medical findings” as “information gained through direct observation and testing of the patient applying objective or standardized methods.” See also, Gibbs v. Premiere Scale Company, 50 SW3d 754 (Ky.2001).

25. An employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his worker’s compensation claim. Snawder v. Stice, 576 SW2d 276 (Ky. App. 1979).

26. The Plaintiff presented to Orange Regional Medical Center in Columbia South Carolina on October 31, 2019, with complaints of throbbing headache and right-sided neck tightness of two days’ duration. These records do not reference a shoulder injury.

27. Dr. Jacob opined that the Plaintiff’s reported symptoms did not correlate with the objective medical findings and that his range of motion measurements were significantly disparate from those recorded one month prior.

28. Dr. Jacob concluded that the inconsistencies in the Plaintiff’s presentation for the right shoulder injury and the disconnect between his reported symptoms and the objective medical findings raise questions about the credibility of this Plaintiff.

29. The ALJ is persuaded by the opinion of Dr. Jacob based upon the medical records and therefore finds that the Plaintiff has failed to satisfy his burden to establish the occurrence of a work-related harmful change to the human organism. Accordingly, the Plaintiff’s claim for benefits due to an alleged right shoulder injury occurring on October 31, 2019, is DISMISSED.

May 30, 2020-Left Shoulder Injury

30. Dr. Jacob remarked and the medical records confirm that the Plaintiff was uncooperative and antagonistic with several medical providers. Dr. Jacob also found was not compliant with his physical examination that was characterized by symptom magnification.

31. Dr. Jacob noted that the Plaintiff's MRI findings were minimal and consistent with normal age-related changes and declined to attribute any of the Plaintiff's left shoulder condition to his work duties for this Defendant.

32. Again Dr. Jacob noted inconsistent range of motion measurements and found that the Plaintiff did not suffer a harmful change to the human organism due to a work-related injury. Accordingly, the Plaintiff's claim for benefits due to an alleged left shoulder injury occurring on May 30, 2020 is DISMISSED.

33. All remaining contested issues have been rendered Moot by the foregoing.

Henry filed a Petition for Reconsideration requesting the ALJ to find he sustained work-related injuries on October 31, 2019, and May 30, 2020, asserting, in part, that "Dr. Jacob explicitly concluded that Plaintiff 'sustained a work-related injury on 05/30/2020 where he alleged [sic] felt a pop in the shoulder with associated pain.' Dr. Jacob at 14." In the alternative, Henry requested the ALJ to review the lay and medical evidence and set forth additional findings.

In the November 29, 2021, Order, without setting forth additional findings, the ALJ overruled Henry's Petition for Reconsideration.

On appeal, Henry asserts the evidence supports an award of benefits for his alleged work-related shoulder injuries and requests this Board reverse the ALJ's decision and remand for entry of an award of benefits.

ANALYSIS

As the claimant in a workers' compensation proceeding, Henry had the burden of proving each of the essential elements of his claim, including sustaining work-related injuries on October 31, 2019, and May 30, 2020. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Henry was unsuccessful in satisfying that burden, 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). Consequently, the function of this Board's review on appeal is to make a determination as to whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

In dismissing Henry's claim for an alleged work-related right shoulder injury occurring on October 31, 2019, the ALJ relied upon Dr. Jacob's opinions as set forth in the December 9, 2020, report. The language Dr. Jacob uses regarding Henry's alleged work-related right shoulder injury is unequivocal - "I do not believe he sustained a harmful change to the human organism as a result of his 10/31/2019 injury. I do not believe that the condition for which he was treated for the right shoulder was related to his work activities." Even though there is medical evidence in the record supporting Henry's claim for an alleged work-related right shoulder injury, the ALJ is not obligated to rely upon this evidence.

In rendering a decision, Kentucky's Workers' Compensation Act grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *See* KRS 342.275; KRS 342.285; AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting an outcome other than that reached by the ALJ, this is not an adequate basis to support a reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). This means that when physicians in a case genuinely express medically sound but differing opinions as to the severity of a claimant's injury, the ALJ has the sole discretion to choose which physician's opinion to believe. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). Further, this Board, as an appellate tribunal, may not replace the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility of the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). Since Dr. Jacob's opinions, set forth in his December 9, 2020, report, regarding Henry's alleged work-related October 31, 2019, right shoulder injury support the ALJ's findings and dismissal of his claim for this alleged injury, we must affirm.

The ALJ also relied upon Dr. Jacob's opinions as support for the dismissal of Henry's claim for the alleged work-related May 30, 2020, left shoulder injury. In the October 25, 2021, Opinion and Order, the ALJ concluded Dr. Jacob

“found that the Plaintiff did not suffer a harmful change to the human organism due to a work-related injury.” However, in his December 9, 2020, report, Dr. Jacob, in pertinent part, stated as follows: “In reference to his left shoulder, he sustained a work-related injury on 05/30/2020 where he alleged [sic] felt a pop in the shoulder with associated pain.” *Importantly, at no point in his report does Dr. Jacob retreat from his opinion that Henry sustained a work-related injury to his left shoulder.* Dr. Jacob’s subsequent language referencing a “near normal MRI” and “findings [that] were exceedingly minimal” lend support to a finding of a left shoulder injury. Consequently, we vacate the ALJ’s dismissal of Henry’s claim for an alleged May 30, 2020, work-related left shoulder injury and remand for additional findings.

On remand, the ALJ cannot rely upon Dr. Jacob’s opinions in support of a dismissal of Henry’s alleged left shoulder injury claim. If the ALJ is unable to identify any evidence supporting dismissal, he must conclude Henry sustained a work-related left shoulder injury on May 30, 2020, and enter an appropriate award. We express no opinions as to the outcome on remand.

Accordingly, those portions of the October 25, 2021, Opinion and Order and the November 29, 2021, Order relating to the ALJ’s dismissal of Henry’s claim for an alleged work-related right shoulder injury are **AFFIRMED**. Those portions of the October 25, 2021, Opinion and Order and the November 29, 2021, Order relating to the dismissal of Henry’s claim for an alleged work-related left shoulder injury occurring on May 30, 2020, are **VACATED**. This claim is **REMANDED** to the ALJ for additional findings in accordance with the views set forth herein and entry of an amended decision.

ALL CONCUR.

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