

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 7, 2020

CLAIM NO. 201882125

NHK SPRING PRECISION

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

ANTONY HINES
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
& REMANDING

* * * * *

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

STIVERS, Member. NHK Spring Precision (“NHK”) seeks review of the September 16, 2019, Opinion, Order, and Award of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”) awarding Antony Hines (“Hines”) income and medical benefits. In his September 16, 2019, decision, the ALJ determined Hines sustained a right shoulder injury on April 27, 2018, and awarded temporary total disability (“TTD”) benefits,

permanent partial disability (“PPD”) benefits enhanced by the three multiplier contained in KRS 342.730(1)(c)1, and medical benefits. NHK also appeals from the October 21, 2019, Order overruling its petition for reconsideration but finding based on Hines’ testimony the right shoulder injury occurred on April 18, 2018. NHK also appeals from the November 19, 2019, Order ruling on its second petition for reconsideration in which the ALJ refused to change his finding in the October 21, 2019, Order that the work injury occurred on April 18, 2018, but sustaining that portion of the petition for reconsideration seeking to have the award of an attorney’s fee set aside. The ALJ vacated that portion of the October 30, 2019, Order awarding an attorney’s fee to Hines’ attorney.

On appeal, NHK challenges the award on four grounds. First, it asserts the ALJ committed reversible error in finding Hines sustained his burden of proving an injury on either April 18, 2018, or April 27, 2018. NHK argues the ALJ was not authorized to ignore the alleged injury date of April 27, 2018, which is inconsistent with Hines’ testimony the injury occurred between April 14 and April 18. It points out Robert Burkhead (“Burkhead”) testified Hines did not report the work incident or right shoulder pain prior to April 30, 2018, one day after the bowling tournament which NHK contends caused the shoulder injury. NHK notes Dr. Jeffrey Fadel did not address the specific injury date in his report and merely noted the injury occurred on April 27, 2018, without explanation. Thus, it argues there is no medical evidence the alleged injury occurred on April 27, 2018. NHK submits the same argument applies to the ALJ’s October 21, 2019, Order changing his finding of the date of injury to April 18, 2018. NHK submits in doing so the ALJ exceeded his authority without

justification or support from the evidence. It argues Hines alleged an April 27, 2018, injury which is inconsistent with his testimony that the injury occurred between April 14, 2018, and April 18, 2018. NHK argues since there is no medical evidence to support the finding the injury occurred sometime between April 14 and April 18, Hines' claim must be dismissed.

NHK also takes issue with the following statement in the October 21, 2019, Order: “[Hines’] injury date was not truly a contested issue at the time of the hearing. It was not listed as a contested issue on the BRC form or added as a contested issue when the ALJ read the list of contested issues at the beginning of the hearing.” NHK observes the Benefit Review Conference (“BRC”) Order reflects the ALJ wrote, “disputed” out from the April 27, 2018, injury date. It argues the injury date was preserved as a contested issue because the ALJ also wrote, “alleged” before the phrase “work-related injury” on the BRC Order. As a result, NHK seeks dismissal of the claim.

In its second argument, NHK argues the ALJ committed reversible error in finding Hines is entitled to enhanced income benefits via the three multiplier, as there is no medical evidence establishing Hines does not retain the physical capacity to return to his pre-injury work. It notes Hines returned to his pre-injury work without restrictions or accommodations as reflected by Burkhead’s testimony. It asserts this is in accordance with the opinion of Hines’ treating physician, Dr. Stacie Grossfeld, who released him to work at full-duty since he retained the physical capacity to return to work at his regular job without restrictions. NHK posits Dr. Fadel agreed with Dr. Grossfeld that Hines did not require permanent work restrictions. NHK notes the ALJ

found Dr. Fadel's opinions credible concerning an impairment rating and the work-relatedness of Hines' right shoulder condition, but without explanation rejected Dr. Fadel's opinion concerning Hines' capacity to continue his prior work. NHK also argues the ALJ committed patent error by failing to identify why Burkhead's testimony and the medical opinions addressing Hines' physical capacity to return to work were not found credible.

NHK complains that since Hines demonstrated a lack of credibility because he could not identify when the alleged incident occurred, the ALJ erroneously relied upon his testimony concerning his ability to perform his previous work. NHK submits the totality of the proof cannot be disregarded without justifiable reason which the ALJ failed to provide in his decision. Therefore, the Board must determine Hines retains the physical capacity to continue performing his regular job and is not entitled to the three multiplier.

Thirdly, NHK asserts the ALJ committed reversible error in finding Dr. Grossfeld's 9% impairment rating for Hines' right shoulder was less explained or supported than that of Dr. Fadel's. It contends Dr. Grossfeld, as Hines' treating physician, examined Hines over many months in reaching her conclusions. Conversely, it characterizes Dr. Fadel as a one-time evaluator. It maintains Dr. Grossfeld specifically addressed which portions of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, were utilized in assessing an impairment rating. Therefore, the ALJ's finding Dr. Grossfeld provided an insufficient explanation of her rating constitutes a legal or factual error. That being the case, the ALJ did not provide a sufficient basis for the parties to

understand his decision to follow Dr. Fadel's rating over that of Dr. Grossfeld's. NHK seeks remand with instructions to enter a ruling further explaining the reason the ALJ determined Dr. Fadel's rating was more persuasive than Dr. Grossfeld's.

Finally, NHK asserts the ALJ erred in his calculation of Hines' PPD benefits to be paid at a rate of \$229.80 per week. It notes the maximum PPD rate for 2018 is \$636.32. Therefore, remand is necessary to correct the calculation error which it contends should be calculated as follows: $\$636.62 \times 11\% \times 3 = \210.08 per week.

BACKGROUND

Hines' Form 101 alleges a right shoulder injury occurring on April 27, 2018, while in the employ of NHK. In the June 11, 2019, BRC Order, the parties stipulated his average weekly wage ("AWW") was \$1,044.53.

Hines introduced Dr. Fadel's independent medical evaluation report which was generated as a result of a February 8, 2019, examination. Hines also submitted the medical records of Hardin Orthopedics & Sports Medicine. NHK submitted Dr. Grossfeld's May 29, 2019, medical report generated as a result of an examination on the same date. NHK also introduced the July 15, 2019, deposition of Burkhead, a supervisor in coiling and grinding. Both parties introduced Dr. Grossfeld's treatment records.

Hines testified at an April 23, 2019, deposition and at the July 18, 2019, hearing. At his deposition, Hines testified he began working for NHK in April 2013 as a coiler and has worked at that position the entire time of his employment with NHK. He provided the following job description:

A: A coiler we make springs for NHK. We make different types of springs for different car models, Nissan, Honda, et cetera.

In our job we take a straight spool of wire, maybe three thousand pounds of wire. We feed it through a machine. And then we calibrate that machine to meet the specifications of the different customers that we have depending on how the spring has to react under different circumstances.

Q: Okay.

A: After we make the spring, we monitor the quality of the spring constantly as they're coming out. As those springs are coming out, they're going through a machine and as they go through a machine, an oven, they temper the spring and they come out of the back of it. We pack them and stack them and tote them and do a lot.

Q: And so you kind of described the process there for me.

Tell me about what, either at the beginning or end, what kind of lifting or physical responsibilities do you have in that job.

A: Well, of course there is the packing and stacking of the springs which are maybe 40 or 50 pounds a piece, constantly. One pallet it could hold 30 – it does hold 36 different containers of springs.

In the beginning there is, of course, the physicalness [sic] of unwrapping the wrappers, you know. They get like picture a spool and then they're wrapped in like tarp, kind of tarp to keep them weather safe because they get delivered maybe 20 at a time on a truck. So they're wrapped in tarps and we have to get those off before we can actually feed the wire through the machine.

Q: Okay.

A: And then, of course, there's mechanical sides, you know. There's nuts and bolts that have to be twisted, pulled and turned and other than that, there is ---

Q: Okay. So I understand you know, that's a physical process with lots of different aspects of it?

A: Correct.

Q: But as far as the heaviest lifting that you do, would that be when you're pulling the 40 to 50 pound spring off the end of the process?

A: I would say the most physical thing that I have to do, which I haven't had to do since my injury, but is once these pallets get stacked up 36 high, we have to move them.

And before we move them, we have to weigh them. So we push this on a pallet jack, which probably weighs a thousand pounds, up a ramp which is physically impossible for me to do at that moment. But up a ramp to be weighed to pretty much weight count on accuracy but this is a new process they're trying to implement within the system.

Hines testified Bruce Patterson is in charge of production and Burkhead is the area supervisor. At the time of his deposition, he earned in excess of \$21.00 an hour working more than 40 hours a week. Hines works Monday through Friday from 6:00 a.m. to 2:30 p.m.

Hines denied having problems with either shoulder prior to April 27, 2018. He provided the following regarding his injury:

Q: Can you tell me what date that happened in April?

A: April maybe 14th.

Q: I will tell you that your application says – and I had down a date of April 27, 2018. Do you have any reason to think that's incorrect?

A: No. The reason it being – so around April 18, April 14, somewhere around that general area I got hurt. And I remember I was hurt pretty bad but I thought maybe it was just like a muscle pulled or something. I didn't know it was to the extent that it was at.

So of course I figured, okay, let's give it a day or two to see if it heals. It didn't heal after awhile. I

eventually and that was just approximated the other date was when I actually had reported it, but I had let them know when it actually happened.

Q: You say it “actually happened,” was – and I know maybe you’re not sure of the specific date – but was there a specific incident that occurred?

A: Correct.

Q: What happened?

A: I was pulling wrapping off of one of those big spools that I explained to you earlier. They have those tarp things. And typically when you pull them off, they’re pretty easy but sometimes I guess they can get jammed down into the metal parts that’s actually holding the coil or sometimes the coil can be on top of them and you’ll never know. You might pull three of them and you get to the fourth one and it’s impossible to pull. Now that doesn’t really happen very often and if it does, normally you just cut it out.

This spool was way over my head because they had stacked it higher than normal. And when it did, when I came around to the one that wouldn’t pull out, I went to give it a jerk. And when I did it, it didn’t go. And I felt it, but then I thought – you know, I didn’t think of – it’s not like when I initially got hurt, that I hit the ground falling and ribbing in pain or was, you know, unable to continue my day.

I mean, even with it tore a hundred percent, I was still able to do everything. Everything just hurt.

Q: Okay. So after whatever date it was that that initially happened, then you continued working at regular duty until April 27, and you said that was the day that you reported it?

A: Correct.

Hines believed he told Burkhead and Brad Thomas (“Thomas”) that he hurt himself. Because he was not aware he was “hurt to that extent,” Hines did not

report the event for a day or so after the accident. He offered the following explanation for reporting the injury on April 27, 2018:

Q: Okay. So tell me about what happened or why it got to the point that you reported something or took some sort of action on April 27.

A: By that time I realized that it wasn't healing. And stuff that I was required to do was getting a lot harder. Like at that time even just picking up totes and stuff was getting – you know, every movement that I was making was noticeable that something was very wrong.

Q: And at that point when you reported it on the 27th, were you having pain in your right shoulder at all times?

A: Yeah. It was constant pain. I couldn't sleep, everything.

On April 27, 2018, he told Thomas what had happened, and Thomas sent him that same day for medical care. A doctor placed him on light duty. Thereafter, someone helped him with the physical aspects of his job which entailed turning, twisting, and lifting. Hines testified he bowled in a VFW tournament on April 29, 2018, during which he was in constant pain. He bowled three games on that day. He believes he bowled in the VFW tournament before he saw a doctor. He described his pain as slight but not extreme. He tried to bowl again after the VFW tournament and decided he “was not going to do it anymore.” Hines was 100% positive he did not injure his shoulder while bowling.

Hines saw Dr. Grossfeld in June 2018. At that time, he was able to work with some assistance. Dr. Michael Krueger performed surgery on August 27, 2018. Hines believes he was off work after the surgery for approximately a month and a half. Dr. Krueger provided no permanent restrictions. He last saw Dr. Krueger in February

2019, and has no future appointments. Hines takes no medication for his right shoulder.

Even though the surgery fixed his shoulder and he is no longer in constant pain, Hines believes he has permanent limitations. Regarding his ability to perform the tasks associated with the job he was performing at the time of the injury, he offered the following:

Q: Are you able to do your full scope of work duties?

A: Not to the same extent as far as certain things that I can't lift. Like that pallet I can't push. My hands don't really go up higher than so high on my right side. But other than that as far as the technical sides of my work, which is the important part, I do all of that, yeah.

Q: So for the parts that are more physically difficult, does somebody else do that –

A: Yeah.

Q: --- for you?

A: Yeah.

Q: Outside of work do you feel like your right shoulder is limiting you in any way outside of work?

A: Well, I went back to trying to bowl after I got the okay from Dr. Krueger and I – I don't bowl the same. Like I don't shoot the tournaments like I used to. At least I haven't. I don't physically believe I could actually bowl more than three games now.

You know, I have kids. Sometimes picking them up or moving them around or any of the things that may come with that, I seem limited to at times but other than that, I don't know.

...

Q: And can you – as long as you keep your hands at waist level or lower, are you okay with working down there?

A: Yeah, I can do all of the lifting and picking up from floor to waist but from waist to a little over shoulder it --

Q: You can't work overhead?

A: Right.

Q: And that's how you got hurt?

A: Yeah, overhead, lifting or pulling.

At the hearing, Hines testified he reported the injury to Thomas prior to April 27, 2018. Thomas then sent him to a doctor. He told Burkhead about his injury after he had seen the doctor. He again explained how he got hurt. Hines explained he now works from the waist down pulling the coils. He recounted the difference between his job tasks before and after the injury.

A: And as far as the overhead work or anything, things were implemented to change the process to where that wouldn't have to be necessary. Like coils weren't able to be stacked so high or they would put them all on the ground to where you could pull them from the ground up versus overhead pulling.

Q: So you now work down -- from the waist down pulling those coils -- pulling the coils?

A: Absolutely, yes.

Q: Okay. Are there other aspects of your job that you do not now do or cannot do that you did before?

A: Yes. The whole shipping and packing of the springs, ever since my injury I was on light duty and after I was off light duty they changed the process to where I'm not responsible for clearing out the ovens or shipping and packing and picking and toting and moving of the springs. I'm just pretty much before all that now.

Q: So was that a significant part of your job previously?

A: Yes, it was.

Q: Okay.

A: It was, yeah, a requirement, I guess.

Hines reiterated he had reported the injury and gone to a doctor before the April 28, 2018, and April 29, 2018, bowling tournament. At the time of the bowling tournament, he believed his injury was not as serious as he later learned. He emphasized he was constantly told he had a “strain or a stress.” However, a week later he learned the injury was more serious than he thought when he attempted to bowl in another tournament and was unable to finish the tournament. During the VFW tournament, he bowled three games on April 28, 2018, and six games on April 29, 2018. He explained he bowled three games and, a few hours later, bowled another three games. During the tournament, he was in pain. When Hines underwent an MRI, he learned his shoulder was “torn 100%.” He sought out Dr. Krueger after he was informed “they no longer felt like this was a workers’ comp situation.” Prior to his August 27, 2018, surgery, Hines was on light duty which consisted of standing and overseeing the coiling process. After the surgery, he returned to work on October 4, 2018, but did not perform his pre-injury job tasks. He characterized his post-surgery work as extreme light duty in which he oversaw the processes of spring making. Hines continued to believe he is unable to perform the same activities his pre-injury job entailed. He acknowledged he has no work restrictions, however, he has not been scheduled to work extra hours and does not volunteer to work extra hours. Although he is still performing the same type of job, his job has changed to where he is now primarily overseeing. Hines last bowled in April 2019. He reiterated he did not hurt his shoulder bowling. Rather, he believed his injury occurred “sometime around April 14 or 18th of 2018.”

In determining Hines sustained a work injury, the ALJ entered the following analysis, findings of fact, and conclusions of law:

As a threshold issue, the defendant disputes plaintiff suffered any shoulder injury at work in April, 2018 as he alleges. It points out plaintiff's testimony is not clear on what day he claims he suffered his injury. Moreover, it argues that the bowling tournament in which plaintiff competed the weekend of April 28-29, 2018 was the actual cause of plaintiff's labral tear and need for surgery, per the opinion of Dr. Grossfeld. The defendant further notes plaintiff's supervisor, Mr. Burkhead, testified plaintiff did not report any shoulder injury until April 30, 2018 – the day after completion of the bowling tournament. It therefore argues plaintiff's ambiguity as to his injury date along with Dr. Grossfeld's opinion that the bowling tournament caused the labrum tear combine to establish that plaintiff did not injure his shoulder at work as he alleges.

Having reviewed the evidence of record, the Administrative Law Judge is persuaded plaintiff has carried his burden of proving his shoulder injury is causally related to the April 27, 2018 work injury he alleges. In reaching this conclusion several factors were found persuasive. First, plaintiff presented at the final hearing as a credible witness, and the ALJ believes he injured his shoulder reaching overhead removing plastic as he testified. The ALJ for [sic] the [sic] credits plaintiff's testimony that he reported his injury to the employer before the bowling tournament on April 28 and 29, 2018. Next, there is no dispute plaintiff was sent by the employer to US HealthWorks for treatment after he reported his injury, yet neither party has been able to obtain any treatment records from US Healthworks. While one might conjecture the absence of any such treatment records proves plaintiff was not injured when he alleges or that he was sent for such treatment, Dr. Grossfeld acknowledged she first saw plaintiff upon referral from US Healthworks. The absence of these records does not support the defendant's position that plaintiff did not report any shoulder injury until after the bowling tournament.

Moreover, regardless when or how plaintiff came to be seen at US Healthworks, the ALJ does not believe plaintiff injured his shoulder during the bowling tournament on April 28 and 29, 2018. Dr. Grossfeld speculated that plaintiff could not have been able to bowl with the torn labrum for which he underwent surgery and, as such, he could not have suffered the torn labrum prior to the bowling tournament. The obvious problem with Dr. Grossfeld's theory is that, if true, plaintiff must have torn his labrum on the very last ball he bowled, else he could not have a bold any balls before the last one. The ALJ finds it difficult to believe plaintiff just happened to tear his labrum on the last ball of a tournament during which, according to Facebook posts filed by the defendant, plaintiff averaged a score of 240 per game for the whole weekend. Further support for this conclusion comes from plaintiff's expert, Dr. Fadel. He concluded, in his experience treating athletes in various sports, and [sic] athlete is often able to continue in activities with a torn labrum until the pain becomes too significant. He also explained that the act of bowling is primarily performed below the shoulder, not subjecting the labrum to significant force. He therefore determined plaintiff suffered his labrum injury on April 27, 2018 as he reported, and not while bowling during the tournament on April 28 and 29, 2018. His explanation in this regard is found persuasive.

Also, the ALJ is not especially persuaded by Burkhead's testimony that plaintiff first reported an injury to him on April 30, 2018. It may be that plaintiff first reported an injury to Burkhead on April 30, but he also testified in his April 23, 2019 deposition that he notified the company safety director, Brad Thomas, on the day of his injury, April 27, 2018. Burkhead's deposition was not taken until July 15, 2019. Burkhead can have no firsthand knowledge whether plaintiff reported his shoulder injury to Thomas on April 27, 2018 as plaintiff testified. The defendant knew of plaintiff's testimony in this regard months before it took Burkhead's deposition. However, Thomas offered no testimony to contradict plaintiff's version of events. Regardless, even if plaintiff first provided notice on April 30 two [sic] Burkhead as the defendant suggests, the ALJ remains persuaded plaintiff did not injure his shoulder bowling and the weekend delay of providing notice is not considered significant in

this particular instance as it bears on the issue of causation. For these reasons, it is determined plaintiff's shoulder injury is work-related and compensable.

The ALJ found Hines sustained an 11% impairment rating and was unable to perform the work he was performing at the time of the injury reasoning as follows:

Benefits per KRS 342.730/RTW Dates and Wages/Prior Active Impairment

The next issue becomes the extent of plaintiff's impairment. Dr. Fadel assigned an 11% impairment while Dr. Grossfeld assigned a 9% impairment. However, although Dr. Grossfeld was, initially, a treating physician, she provided very little information to explain how she arrived at her 9% impairment rating. Given her lack of explanation or support for her impairment rating, the ALJ is, in this instance, more persuaded by Dr. Fadel's 11% rating. Dr. Fadel provided his range of motion testing results and explain how his findings corresponded to the corresponding impairment rating he assigned. For these reasons, it is determined plaintiff has an 11% impairment rating.

With respect to multipliers, plaintiff argues he is entitled to application of the 3x multiplier and KRS 342.730(1) because he does not retain the physical ability to return to the job he held the time of his injury. Conversely, the defendant argues plaintiff has returned to his same job and is making more money and, therefore, is not entitled to any multiplier.

As an initial matter, the ALJ is not persuaded plaintiff has returned to work making the same or greater wages. Although plaintiff testified he recently received a raise in his hourly rate of pay, he testified fairly clearly at the final hearing that he works far fewer hours since returning to work after his injury that [sic] he did prior to the injury and at his actual check each week is less than before his injury. Furthermore, the post injury which [sic] calculation filed by the defendant further establishes plaintiff is not making the same or greater average weekly wage as he did before his injury.

The ALJ is also persuaded by plaintiff's testimony that he is not capable of performing all the duties of his job as he did before his injury. In particular, plaintiff testified he no longer performs overhead work or heavy work and that he is more of an overseer now as compared to his job duties before the injury, which is an accommodation made by the employer. Despite the fact that no physician has assigned specific restrictions preventing plaintiff from returning to the same job duties he held prior to the injury, the ALJ relies on plaintiff's credible testimony to conclude plaintiff does not retain the physical ability to perform the job he held prior to his injury. As such, he is entitled to application of the 3x multiplier. His award of benefits is, therefore, calculated as follows:

$\$1044.53 \times 2/3 = \$696.35 \times .11 \times 1 \times 3 = \229.80 per week.

Although listed as a contested issue, nothing in the record indicates plaintiff had a pre-existing, active impairment rating prior to April 27, 2018. As such, there is no basis for any carveout of plaintiff's award for a pre-existing, active condition.

NHK filed a petition for reconsideration taking issue with the ALJ's determination Hines sustained a work-related injury on April 27, 2018. NHK also argued the ALJ failed to provide sufficient findings of fact and erred in finding the three multiplier was applicable. It also took issue with the ALJ's statement that Dr. Grossfeld provided an insufficient explanation of her impairment rating. Finally, NHK requested the ALJ to alter the period TTD benefits were awarded. In his October 21, 2019, Order, the ALJ amended his previous decision by finding the injury occurred on April 18, 2018, and overruled the remainder of the petition for reconsideration. The Order reads, in relevant part, as follows:

As an initial matter, the ALJ agrees with plaintiff's response that plaintiff's injury date was not truly a contested issue at the time of the hearing. It was not listed

as a contested issue on the BRC form or added as a contested issue when the ALJ read the list of contested issues at the beginning of the hearing. However, to the extent a change in the date of injury is necessary to conform with the evidence of record, it is determined plaintiff's date of injury was April 18, 2018, consistent with plaintiff's testimony.

This prompted NHK's second petition for reconsideration taking issue with the ALJ's amended finding the injury occurred on April 18, 2018. It requested additional findings identifying the evidence the ALJ relied upon in making that finding. It also took issue with the ALJ's characterization that the injury date was not a "truly contested issue." NHK also requested the ALJ to set aside that portion of the order approving an attorney's fee. The ALJ's November 19, 2019, Order overruling in part and denying in part the petition for reconsideration reads, in relevant part, as follows:

With respect to the defendant's petition regarding the injury date determined in the October 21, 2019 Order, the ALJ finds this to be another reargument of an issue which has already been decided. As plaintiff pointed out in his response to the defendant's first petition, the parties discussed the injury date listed on the BRC order immediately prior to going on the record at the final hearing. Counsel for the defendant acknowledged he had no problem with the date listed on the BRC form (April 27, 2018), and there was understanding that plaintiff was not sure the date of his alleged injury. This is consistent with plaintiff's testimony. On pages 19-20 of his deposition, plaintiff explained that he was injured sometime in April, though he was not sure of the date, but he believed it was maybe the 14th or 18th:

...

Again, nothing was listed as a contested issue which suggested that the injury date itself was being challenged and, as such, and despite plaintiff's deposition testimony that April 27, 2018 was only the date he reported his injury, the parties agreed they could leave April 27, 2018

as the date of alleged injury. From the actual contested issues and from the arguments set forth in the defendant's brief, it was clear the actual dispute was whether plaintiff suffered any work-related shoulder injury sometime in April, 2018. The actual date was not considered germane to the broader argument the defendant made. It is only in these petitions for reconsideration that the defendant is attempting to make the lack of a specific date of known injury the lynch-pin of its defense.

In the October 21, 2019 Order, the ALJ chose the April 18, 2018 date of injury based on plaintiff's deposition testimony as referenced above. The fact that such testimony may be in conflict with other evidence is not found significant, especially because the specific date of injury alleged was not considered an issue at the time of the final hearing. In this regard, the defendant's second petition for reconsideration is overruled.

ANALYSIS

Hines, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action, including causation. *See* KRS 342.0011(1); Snowder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Hines was successful in that burden, the question on appeal is whether there was substantial evidence of record to support 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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We are unconvinced by NHK's first argument the ALJ erred in finding Hines sustained an injury on either April 27, 2018, or April 18, 2018. Although Hines' Form 101 alleged an April 27, 2018, injury, throughout the proceedings he consistently testified he believed the injury occurred between April 14, 2018, and April 18, 2018. Hines explained why he believed he was injured between April 14, 2018, and April 18,

2018. Although his testimony concerning the mechanism of the injury is not in conflict, the date of the alleged injury is different from the date Hines testified he sustained his work injury. Regardless of whether the date of the injury was a contested issue, the ALJ, within his discretion, has the authority to determine whether a work injury occurred as well as the date it occurred. Burkhead's testimony does not refute Hines' testimony as to the date of the injury. Burkhead merely testified he was first notified on April 30, 2018. As pointed out by the ALJ, NHK did not dispute Hines' testimony concerning the earlier injury and when and what he advised Thomas by proffering Thomas' testimony. Rather, Hines' testimony as to when he believed the injury occurred between April 14, 2018, and April 18, 2018, stands uncontradicted.

In resolving a contested issue, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, supra. Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Id. at 16; Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

NHK's sole argument rests upon the fact Hines alleged an injury date of April 27, 2018, but testified the injury occurred approximately a week to ten days prior to April 27, 2018. Significantly, NHK does not assert it was prejudiced by Hines' testimony that his injury occurred between April 14, 2018, and April 18, 2018. Rather, NHK's position throughout the proceedings was that Hines was not injured at work but at a bowling tournament. Concerning the issue of causation, the ALJ, as fact-finder, has broad authority to utilize his discretion and pick and choose amongst the

opinions in the record. See Dravo Lime Company v. Eakins, *supra*. While medical causation usually requires proof from a medical expert, the ALJ may properly infer causation from the totality of the circumstances as evidenced by the lay and expert testimony of record. See Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Reasonable inferences regarding causation are fundamental to an ALJ's role as fact-finder. Jackson v. General Refractories Co., *supra*. The ALJ's ultimate determination Hines sustained a work-related injury on April 18, 2018, is supported by substantial evidence and will not be disturbed.

Similarly, we find no merit in NHK's second argument asserting the ALJ erred in finding Hines is entitled to enhanced benefits via the three multiplier. We agree with NHK's statement that Dr. Grossfeld concluded Hines retained the physical capacity to return to the work he was performing without restrictions. However, we disagree that Dr. Fadel offered such an opinion. Although the ALJ did not expressly rely upon Dr. Fadel's opinions in resolving the issue of Hines' entitlement to the three multiplier, we note Dr. Fadel offered the following regarding Hines' physical capacity to return to his previous position:

Mr. Hines has reached maximum medical improvement as of February 2019, once discharged from his operative physician. Permanent restrictions were not placed on Mr. Hines by his physician either and I would not contradict his assessment. Given he is a highly skilled laborer, his company has worked with him and his injury to his right shoulder to lessen the demands placed on his right upper extremity altogether. Therefore, he can return to his employment responsibilities and now with added assistance, which his employer has given him, seems to fill the requirements necessary to lessen pressure across his rotator cuff and glenoid labrum.

A reasonable interpretation of the above is that Dr. Fadel firmly believed Hines was not returning to his job performing the exact tasks he was performing at the time of the injury, as he was not capable of performing many of his previous work tasks.

Hines' testimony constitutes substantial evidence supporting the ALJ's determination to enhance his benefits by the three multiplier pursuant to KRS 342.730(1)(c)1. When the issue is the claimant's ability to labor and the application of the three multiplier, it is within his province for the ALJ to rely on the claimant's self-assessment of his ability to perform his prior work. *See Ira A. Watson Department Store v. Hamilton*, *supra*; *Carte v. Loretto Motherhouse Infirmary*, 19 S.W.3d 122 (Ky. App. 2000). This Board and the Courts have consistently held that the ALJ enjoys the discretion to rely on a claimant's self-assessment of his/her ability to labor based on his/her physical condition. *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). The ALJ's decision to apply the three multiplier pursuant to KRS 342.730(1)(c)1, is based on a determination that Hines did not have the capacity to return to the type of work performed at the time of injury and is supported by substantial evidence in the record.

Moreover, we believe the ALJ could have relied upon the above-cited statements of Dr. Fadel in support of a finding that Hines lacked the physical capacity to return to the same type of work he performed at the time of the injury. As noted by the Kentucky Supreme Court in *Ford Motor Co. v. Forman*, 142 S.W.3d 141, 145 (Ky. 2004):

For that reason, proof of the claimant's present ability to perform some jobs within the classification does not necessarily indicate that she retains the physical capacity to perform the same type of work that she performed at

the time of injury. On remand, the ALJ must analyze the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether she retains the physical capacity to return to those jobs.

Hines' uncontradicted testimony establishes he was unable to perform the same type of work he performed at the time of the injury. Hines indicated he now is more involved in overseeing, and he is limited to lifting from the floor to his knees, and did not engage in overhead work. His testimony firmly demonstrates his physical activities were significantly curtailed in returning to his previous job. As substantial evidence in the form of Hines' testimony and the statements of Dr. Fadel support the ALJ's determination to enhance the award by the three multiplier, that determination will be affirmed. We emphasize the ALJ did not reject Dr. Fadel's assessment of Hines' restrictions as Dr. Fadel's report reveals Hines returned to work "with added assistance" in order to "fill the requirements necessary to lessen pressure" on the areas of the shoulder affected by the work injury.

Similarly, we find no merit in NHK's third argument that the ALJ erred in finding Dr. Grossfeld's 9% impairment rating was less explained than that of Dr. Fadel's. In her May 29, 2019, report, Dr. Grossfeld set forth the records she reviewed and the results of her physical examination. In assessing an impairment rating, Dr. Grossfeld stated as follows:

What degree of whole person functional impairment (if any) would you currently assess of the patient's right shoulder?

15% Upper extremity, 9% Whole Person per the AMA Guides, 5th Edition, page 439, table 16-3.

Dr. Grossfeld offered nothing else in support of her calculation of the impairment rating. On the other hand, in his report, Dr. Fadel provided the following concerning his impairment rating:

Mr. Hines has a ratable injury according to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 5th Edition. On uses the range of motion method, which is found on Pages 474 through 479, Figures 16-38 through 16-46. Taking the range of motion values from the physical examination within the report, a 10% upper extremity value is then found. In addition to the range of motion values because a distal clavicular resection was completed as part of the surgical procedure, one then must refer to Page 506, Table 16-27. Therefore, an additional 10% impairment of the upper extremity is awarded.

One needs to combine these values through the Combined Value Chart on Page 604, reflecting a 19% upper extremity impairment. The conversion to whole person then is completed by referring to Table 16-3 on Page 439, giving us a whole body permanent partial impairment of 11%, all due to the injury Mr. Hines sustained at work on April 27, 2018.

Dr. Fadel also addressed the issue of whether Hines sustained an injury while bowling stating:

It is my opinion that the injury at work was the sole cause for the torn rotator cuff and the glenoid labral injury. I have through the years treated a number of athletes, who have had both torn glenoid labrums similar to the one outlined by the operative note, along with a partial tear of the rotator cuff, who had been able to continue competing through the injury. There was some reference in the medical record that an individual would not be able to bowl with a torn rotator cuff and glenoid labrum. This is a misguided statement and I respectfully disagree. The motion required to bowl is all below shoulder level, except for the follow through, which is completed obviously without the ball.

A comparison of Dr. Grossfeld's explanation of her impairment rating with that of Dr. Fadel's and his explanation why he believed the injury did not occur while bowling supports the ALJ's assertion Dr. Grossfeld provided an insufficient explanation of her impairment rating. Apparently, the ALJ compared Dr. Grossfeld's explanation for her 9% impairment rating with Dr. Fadel's impairment rating, rationale, and his opinion as to whether Hines' bowling activity caused the injury, and concluded Dr. Fadel's analysis and explanation was much more in depth. We are unable to disagree with his analysis. Consequently, we find no error in the ALJ's analysis.

Further, we do not believe the ALJ failed to provide the basis for his acceptance of Dr. Fadel's impairment rating over that of Dr. Grossfeld's. The ALJ's findings regarding Hines' credibility are sufficient to apprise the parties of the basis for his decision. While authority generally establishes an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision, he is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). The ALJ has provided sufficient findings to apprise the parties and this Board of the basis for his decision. The fact-finder is not required to set out the minute details of his reasoning in reaching a conclusion. Big Sandy Community Action Program v. Chaffins, *supra*; Shields v. Pittsburgh & Midway Coal Mining Co., *supra*. Simply put, the ALJ does not have to set forth detailed reasoning or his thought

processes in weighing the opinions of the doctors and the rationale for their impairment ratings. Nor is the ALJ required to attribute greater weight to the treating physician's opinions. Wells v. Morris, 698 S.W.2d 321 (Ky. App. 1985). The ALJ's determination Hines sustained an 11% impairment rating as a result of the work-related shoulder injury will be affirmed.

Finally, we agree with NHK that the amount of PPD benefits awarded must be vacated. Significantly, Hines agrees the PPD benefit must be calculated based on the statute in effect at the time of the April 27, 2018, injury. Hines' AWW multiplied by 66 2/3% exceeded the statutory maximum. Thus, the cap by which the ALJ must multiply the impairment rating and then triple the benefit is \$636.32, which pursuant to KRS 342.730(1)(b) is 66 2/3% of \$848.41, the state AWW for 2018. Although the statute was changed to reflect the ceiling amount for calculating PPD benefits increased from 75% to 82.5% of the state AWW, the amendment or change did not take effect until July 14, 2018. Hines was injured prior to the effective date of change in the calculation of the PPD rate. *See* Maggard v. International Harvester Co., 508 S.W.2d 777 (Ky. 1974); Wells v. Craddock, 683 S.W.3d 639, 640 (Ky. App. 1985). Therefore, $\$636.32 \times 11\% = \$.70 \times 3 = \$210.00$. Thus, the ALJ erred in awarding PPD benefits at the rate of \$229.80 per week. The claim will be remanded to the ALJ for a correction in the amount of PPD benefits to which Hines is entitled for 425 weeks.

Accordingly, the decision of the ALJ on all issues raised except the amount of the PPD benefits awarded is **AFFIRMED**. The award of \$229.80 per week for 425 weeks is **VACATED**. This claim is **REMANDED** for an award of PPD benefits in conformity with the views expressed herein.

ALVEY, CHARIMAN, CONCURS.

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