

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: June 3, 2022

CLAIM NO. 201962500

P&P CONSTRUCTION

PETITIONER

VS. APPEAL FROM HON. AMANDA M. PERKINS,  
ADMINISTRATIVE LAW JUDGE

DAVID LUCAS and  
HON. AMANDA M. PERKINS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING IN PART,  
VACATING IN PART AND REMANDING

\* \* \* \* \*

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

**ALVEY, Chairman.** P&P Construction (“P&P”) appeals from the Opinion, Award and Order rendered January 16, 2022 by Hon. Amanda M. Perkins, Administrative Law Judge (“ALJ”) awarding permanent partial disability (“PPD”) benefits to David Lucas (“Lucas”) stemming from a work-related injury to the extensor tendon in his left ring finger. The ALJ determined Lucas is not physically capable of returning to

his previous work and found he is entitled to the application of the three-multiplier contained in KRS 342.730(1)(c)1. The ALJ also awarded medical benefits reasonably required for the cure and relief of his injury in accordance with KRS 342.020. P&P also appeals from the February 8, 2022 Order overruling its Petition for Reconsideration.

On appeal, P&P argues the ALJ erred in determining Lucas is unable to return to work since neither medical expert imposed any specific restrictions. P&P maintains the ALJ erred in her reliance on Lucas's testimony related to the extent of his ability to work. Because we determine the ALJ properly exercised her discretion regarding the application of KRS 342.730(1)(c)1, her decision is supported by substantial evidence, and a contrary result is not compelled, we affirm her determination, in part. However, we vacate, in part, and remand for a determination regarding the inconsistent findings regarding the rate of the PPD benefits, and for the correction of the award of medical benefits in accordance with KRS 342.020 to reflect the correct injured body part.

Lucas filed a Form 101 on June 24, 2021 alleging he sustained a hand injury when he was "struck by a falling or flying object." The Form 104 filed in support of Lucas's claim denotes a work history beginning in 2013 of jobs as a mechanical repairman in underground mines, an electrical lineman, a scoop operator, and an auto body mechanic.

Lucas testified by deposition on August 19, 2021 and at the hearing held on November 23, 2021. Lucas was born on September 17, 1982 and resides in Mayking, Kentucky. He completed the 10<sup>th</sup> grade, later obtained a GED, and

attended some college courses through EKC, a division of Eastern Kentucky University. Lucas testified he began masonry classes there but did not complete the program. Lucas testified at the hearing he went to lineman school in case he needed a backup career. He also obtained his Class A CDL, which has since lapsed. He testified all his lineman certificates remain current.

Despite listing his work history beginning in 2013, Lucas testified at his deposition he obtained his mining card when he was 18 when he began working in underground mines. Lucas bounced between jobs at Hurley Electric and P&P during 2015, then worked consistently at P&P from 2016 until he was injured on September 24, 2019. He testified his work experience as a lineman for the power company consisted of working in bucket trucks, and climbing ladders and poles running fiber optic cable. He stated he left the power company because “they made some promises to [him] they did not keep.”

Lucas was working as a repair helper at P&P when he was injured. He described those duties as third-shift work repairing lines and equipment needed for underground mining. He worked on “shuttle cars, scoops, miners, roof bolters, all the way down to man trips. I mean, just whatever they need fixed on a daily basis. And also, I would service those pieces of equipment on a daily basis.” This entailed topping off oil on machine heads and gears, and ensuring they were cleaned out for inspections. Lucas stated the tools he used daily included “grease guns and battery-powered impacts, battery-powered grinders. I’d use welders, channel locks, screwdrivers, wrenches, sockets, ratchets. You know, pretty much every kind of hand tool.” He indicated these were all tools requiring the use of both hands. Lucas

never performed any work that was considered light duty or desk work, and all required consistent overtime working more than 40 hours per week.

Lucas testified he was working on the roof of a continuous miner on September 24, 2019 “busting rock off of the water sprays . . . . And I had a little four-pound hammer, I had my safety glasses and gloves on, and I just hit the rock with a hammer, a shard of it shot through my hand and I guess it exploded in my hand and severed my tendons.” He stated the type of rock he was clearing that day was slate, also called soap stone because it is so shiny. Lucas described clearing rocks as a common task in that role. He described the injury as “just the freakiest accident ever.” He stated he has been doing this type of work “for years the same way, and it hit through my glove just perfect.” Lucas described his work-issued gloves as having rubber bottoms with nylon tops. The rock shard went through the outside of the glove and into his left ring finger, “right overtop the knuckle and shot straight back across the top of my hand.” Lucas testified he routinely worked 6-day weeks, between 60-70 hours per week, and was earning \$23.25 per hour when he was injured.

When the injury occurred, Lucas immediately notified his section supervisor, Alex Blankenship, and together they completed an accident report. He testified he went home to pick up his wife and they drove to ARH-Whitesburg emergency room for treatment. He testified ARH-Whitesburg was unable to treat him and he was sent to the ARH-Hazard emergency room where Dr. Mukut Sharma performed extensor tendon repair surgery. Following surgery, Dr. Sharma referred Lucas to physical therapy where he treated for “several visits.”

Lucas testified he had no history of prior surgeries, nor has he had any additional injuries or surgeries since his work-related injury. He sees his general practitioner, Dr. Joseph Banks, monthly for ongoing stomach and mental health prescriptions, but nothing related to this injury. Lucas testified he believes his last appointment with Dr. Sharma was in January 2021, and he was advised no additional physical therapy is necessary. However, Lucas testified even two years later, he still cannot make a fist, has continued stiffness and pain, and has lost grip strength in his left hand. Lucas stated after he had surgery, he worked with the physical therapist to physically try to bend his ring finger down, to no avail; he eventually reached a plateau in the healing process. "It's just like these two fingers is about all I have to work with, is my pointer and my thumb, you know, with it ... I don't know what the deal is with it. It's just, it's just not right." He testified he has tried everything suggested by his physical therapist for pain and takes Ibuprofen, but some days are better than others. He quantified the level of pain associated with attempting to make a fist as a five or six out of 10. He testified he had an unrelated accidental cut to the "meaty part" of his left hand six to seven years earlier, but that injury was well healed prior to this event.

Lucas testified at both his deposition and at the hearing that he has been asked several times to return to work with both the power company and P&P in his prior positions, but he does not believe he can keep up with the work required. He stated he was called "a few times" to return to the job he was working at the time of his injury, but due to the heavy nature of the work, "there's just no way [he] could do that now." He stated there is no type of light duty job available in the industry or

area, and he could not earn enough “flipping burgers” to support his family. Regarding his prior work as a lineman, he stated he was honest with them in declining. “Climbing power poles, things of that nature. I don’t have, I just can’t – it takes two hands to do it.” He testified he would have difficulty holding onto the pole to climb it. “It takes both hands and you have to, you have to have extreme, you know, good grip in both hands to do it or it can’t be done.”

Lucas testified he has no future appointments for treatment with anyone nor have any medications been prescribed relative to his injury; however, he never returned to work following September 24, 2019. Lucas testified he has not filed a claim for Social Security disability benefits.

Lucas filed Dr. Theodore Gerstle’s February 26, 2021 report in support of his Form 101. Dr. Gerstle evaluated Lucas at his attorney’s request. Dr. Gerstle noted Lucas is a right-hand dominant male who injured his left-hand ring finger at work, causing a transverse complete transection of the extensor tendon in Zone II. He noted the extensor repair surgery by Dr. Sharma and Lucas’s continued complaints of pain, lack of range of motion and weakness in the left hand. Though Lucas never testified to this, Dr. Gerstle’s report indicated a past medical history of degenerative joint disease and disc herniation. The report did not list any medications.

On musculoskeletal exam, Dr. Gerstle noted left-hand weakness exacerbated after any type of weighted lifting. Neurological exam indicated no paresthesias, numbness, nor tingling. The focused musculoskeletal exam demonstrated normal shoulder and elbow range of motion bilaterally, but left wrist

extension and flexion was limited to 50 degrees. Grip strength on left was 4/5. He had normal thumb range of motion throughout IP and MP joints and normal opposition. Dr. Gerstle noted an MP range of motion of 15 to 70 degrees for the long finger with PIP range of motion of 0 to 100 degrees and DIP range of motion of 0 to 70 degrees. The left ring finger, MP joint showed 0 to 40 degrees; PIP joint was 0 to 40 degrees; and DIP joint was 0 to 30 degrees. On the small finger, MP joint was positive 15 to 80 degrees; PIP and DIP joints were both 0 to 70 degrees.

Dr. Gerstle diagnosed Lucas with extensor quadriga following the extensor tendon transection of the left ring finger. He opined Lucas reached maximum medical improvement (“MMI”) on April 27, 2020. Using the AMA Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition (“AMA Guides”), Dr. Gerstle assessed Lucas with a 14% whole person impairment rating. Dr. Gerstle opined Lucas has exhausted the benefits of therapy and is “certainly affected by his loss of range of motion and grip strength” in his left hand. He stated Lucas “has no specific limitations, although it is difficult for him to resume his prior work.”

Dr. Thomas Gabriel evaluated Lucas at P&P’s request. In his May 26, 2020 report, Dr. Gabriel noted Lucas is a right-hand dominant laborer who injured his left hand while busting a piece of rock at work. He noted Dr. Sharma performed irrigation/debridement of the soft tissue wound and a direct primary repair of the left ring finger extensor communis tendon at the level of the MCP joint. Dr. Gabriel noted, “Despite therapy, Mr. Lucas has had persistent complaints of left-hand pain, varying degrees of motion loss and residual hand weakness.” He indicated the

“therapy notes have identified continued functional deficits with nonspecific pain complaints.” He noted Lucas had not returned to work.

Dr. Gabriel’s report indicates Lucas’s past medical history is remarkable for no prior surgeries, but he noted chronic pain and possible past drug abuse. He stated, “Mr. Lucas does relate ‘18 years ago, I drank a lot and took medications’ and is currently taking medications for drug addiction,” though it does not appear Lucas disclosed this information previously or during his testimony. Additionally, Dr. Gabriel noted Lucas “identified a positive review of symptoms for anxiety, headaches/migraines, back pain/arthritis, GERD, and sinus problems.” He listed current medications as Buprenorphine, Gabapentin, Celexa, and Protonix. On social history, Lucas denied drinking any alcohol but stated he smokes one pack of cigarettes per day over the past eight years.

On physical exam, Dr. Gabriel noted Lucas’ right hand and wrist were unremarkable. Regarding the left wrist, he noted some slight decrease in active wrist extension measuring 50 degrees; wrist flexion 60 degrees. While assessing active range of motion measurements, he detected “definite guarding” and “co-contraction” of antagonistic muscles, especially when attempting composite digital flexion. He stated, “As a result, active digital ROM measurements are inconsistent, secondary to these pain complaints and palpable antagonistic muscle ‘co-contractions.’” Dr. Gabriel noted, “losses in range of motion in the middle, ring and small fingers with notably well-healed incision over the left ring finger MCP joint and distal metacarpal area.” Dr. Gabriel noted the MCP range was motion of 15 to 70 degrees actively for the long finger with MCP joint passive flexion to 90 degrees.



PIP range of motion of 0 to 100 degrees and DIP range of motion of 0 to 70 degrees. The left ring finger, MP joint showed 0 to 60 degrees; PIP joint was 0 to 40 degrees; and DIP joint was 0 to 30 degrees. On the small finger, MP joint was positive 15 to 80 degrees actively, 90 degrees passively; PIP and DIP joints were both 0 to 70 degrees. Dr. Gabriel obtained a 3-view x-ray of the left hand which was unremarkable with no degenerative changes, abnormal calcifications, or joint subluxations.

Dr. Gabriel diagnosed Lucas with a traumatic laceration to the left hand with a complete laceration to the left ring finger extensor communis tendon proximal to the ring finger MCP joint. He opined Lucas had reached MMI effective the date of the exam, May 26, 2020. He stated Lucas “has had an appropriate course of functional rehabilitation and has reached an overall plateau.” He did not note specific scar tissue or overt malingering, but stated, “perceived dysfunction is greater than expected based on the injury, its subsequent treatment, and today’s clinical exam.” He assessed a 7% whole person impairment pursuant to the AMA Guides. Dr. Gabriel found Lucas does not require any temporary or permanent restrictions and he can return to his pre-injury work.

A Benefit Review Conference was held on November 2, 2021. The parties noted P&P contested whether Lucas retains the physical capacity to return to the type of work performed on the date of injury. The contested issues included benefits pursuant to KRS 342.730, proper use of the AMA Guides, and future medical benefits.

The ALJ rendered the Opinion, Award and Order on January 16, 2022. She determined Lucas is entitled to permanent partial disability (“PPD”) benefits enhanced by the three-multiplier in accordance with KRS 342.730(1)(c)1. The ALJ compared the medical evidence and found Dr. Gabriel’s opinion regarding hand injuries more persuasive since he “specializes in treating and operating on hands and upper extremities.” She also found Lucas’s testimony is not in conflict with the medical evidence since Dr. Gerstle opined Lucas would have difficulties resuming his prior work. The ALJ agreed with the 7% impairment rating Dr. Gabriel assessed. In her calculations reflected on page three of her decision, the ALJ found Lucas is entitled to PPD benefits at the rate of \$127.89 per week. However, in paragraph one of the Award and Order, also located on page three, the ALJ awarded PPD benefits at the rate of \$126.89 per week for 425 weeks beginning September 24, 2019, with 6% interest, giving P&P credit for any past due compensation for benefits. On page four of her decision, the ALJ found Lucas is entitled to future medical benefits in accordance with KRS 342.020; however, she awarded those benefits, “for the cure and relief from the effects of the injury to his low back”, with no mention of his finger injury.

P&P filed a Petition for Reconsideration, arguing the ALJ erred in finding Lucas is entitled to the three-multiplier, citing as its basis the fact neither medical expert assigned specific restrictions to Lucas. P&P also argued Dr. Gerstle’s statement “it is difficult for him to resume his previous work” conflicts with his opinion related to restrictions. The ALJ denied P&P’s Petition for Reconsideration in an Order issued February 8, 2022. She found Lucas provided credible testimony

that he could not perform his pre-injury work because the position required him to frequently use his left hand to operate necessary tools and carry certain items. Relying on Hush v. Abrams, 584 S.W.2d 48, 49 (Ky. 1979), she found Lucas's testimony regarding his ability to return to work was descriptive and did not conflict with the medical evidence. The ALJ also stated she found no patent errors.

As noted above, on appeal, P&P argues the ALJ erred in finding Lucas was entitled to PPD benefits with the application of the three-multiplier. It argues the ALJ improperly relied on Lucas's testimony and the application of Hush v. Abrams, *supra*, to the present case in making her determination that he is unable to return to work, despite the lack of specific restrictions given by either medical expert. We disagree.

As the claimant in a workers' compensation proceeding, Lucas bore the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Lucas was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting 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 the ALJ, as fact-finder, the sole authority to determine the weight, credibility, and substance of the evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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). 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 not adequate 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 her 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 that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling on an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

Substantial evidence supports the ALJ's determination that Lucas is unable to return to his pre-injury work. The ALJ found Lucas's testimony regarding his physical limitations and inabilities credible pertaining to the difficulties he would confront in working in the mines. The ALJ properly found Lucas's testimony did not conflict with Dr. Gerstle's opinion in that regard. Kentucky courts have

consistently held when the issue is the claimant's ability to labor and the application of the three-multiplier, it is within the province of 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, 34 S.W.3d 48 (Ky. 2000); Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000), and Hush v. Abrams, *supra*. The ALJ's decision to apply the three-multiplier pursuant to KRS 342.730(1)(c)1 is based in part on Lucas's testimony that he does not have the capacity to return to the type of work performed at the time of injury. His testimony sufficiently supports the ALJ's decision; therefore, it may not be disturbed on appeal. Special Fund v. Francis, *supra*.

The ALJ applied the case law to the evidence and properly exercised her discretion in determining Lucas is entitled to application of the three-multiplier. She enumerated the reasons why she believed Lucas's testimony regarding his physical limitations and inability to return to his pre-injury work. Because we determine the ALJ properly exercised her discretion, and a contrary result is not compelled, we affirm the ALJ's determination regarding application of the three-multiplier contained in KRS 342.730(1)(c)1.

That said, this Board is permitted to *sua sponte* address issues even if unpreserved and not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). As noted above, the ALJ's Opinion, Award, and Order contains two errors not addressed in the Petition for Reconsideration nor raised on appeal. First, we note the inconsistencies on page three of the ALJ's decision regarding the weekly rate of the

PPD benefits awarded. The ALJ noted two different rates on page three of her decision. She first listed \$127.89, and then listed \$126.89. The ALJ's calculations likewise do not reflect whether the maximum PPD rate is applicable to the award. On remand, the ALJ is directed to recalculate the award of PPD benefits, and to render an award of such benefits based upon the appropriate calculation.

Likewise, as noted above, the ALJ awarded medical benefits in accordance with KRS 342.020 for Lucas's "low back". His injury, and this claim, concern Lucas' left ring finger, not his low back. We therefore vacate that portion of the ALJ's decision, and remand for a determination regarding medical benefits for the appropriate injured body part.

Accordingly, the Opinion, Award and Order rendered on January 16, 2022, and the Order denying both parties' Petition for Reconsideration issued February 8, 2022 by Hon. Amanda M. Perkins, ALJ, are hereby **AFFIRMED IN PART and VACATED IN PART**. This claim is **REMANDED** for entry of an amended decision based upon the appropriate determinations as reflected above.

ALL CONCUR.

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