

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 15, 2019

CLAIM NO. 201466805

PACKERS SANITATION SERVICES

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

JORGE MARTELL CABRERA and  
HON. JOHN B. COLEMAN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Packers Sanitation Services (“PSS”) appeals from the August 2, 2019 Opinion and Award rendered by Hon. John B. Coleman, Administrative Law Judge (“ALJ”), awarding temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits to Jorge Louis Martell Cabrera (“Cabrera”). The ALJ determined Cabrera sustained work-related injuries to his right shoulder and both upper extremities, as well as a psychological

condition, when he fell into a machine at work on September 27, 2014. PSS also appeals from the August 23, 2019 order denying its petition for reconsideration.

On appeal, PSS argues the ALJ erred in awarding PPD benefits based upon the impairment ratings assessed by Dr. Jules Barefoot and Dr. Douglas Ruth resulting in a combined 42% impairment rating. PSS argues the ALJ's determinations are arbitrary, capricious, and constitute an abuse of discretion. PSS argues the ALJ's decision is unreasonable and unfair, and is erroneous as a matter of law. We determine that substantial evidence supports the ALJ's decision. We likewise determine the ALJ's decision was not arbitrary, capricious, or an abuse of discretion, and therefore, we affirm.

Cabrera filed a Form 101 on December 3, 2014, alleging he injured both upper extremities and his right shoulder when his right upper extremity was caught in a conveyor belt at work on September 27, 2014. At the time of the accident, he was cleaning a piece of equipment in the scope of his duties for a janitorial company, when his right arm got caught and was lacerated. Cabrera is a high school graduate with no vocational training. He indicated his job required repetitive lifting, bending, reaching, grasping, pushing, pulling, above shoulder work, and below waist work. Cabrera's Form 104 indicates his work history consists of working for PSS, and as a salesman/cashier at a market in Cuba. The Form 101 was later amended to include a claim for a psychological injury.

Cabrera testified by deposition on May 22, 2015, and at the hearing held June 25, 2019. Cabrera is a resident of Louisville, Kentucky. He was born on February 16, 1976. As noted above, he worked as a salesman/cashier at a grocery in

Cuba until 2013 when he moved to the United States. He testified his previous job did not require unloading trucks or stocking shelves.

Cabrera began working for PSS in 2014. His job involved cleaning/ janitorial work at a meat packing plant. He was assigned to specific cleaning locations in the facility. He used a high-pressure water hose to clean equipment. He also had to pick up “meat trash” from the floor. He testified he had to lift up to one hundred and fifty pounds, and his job required him to crawl under equipment. He testified he also cleaned equipment, floors, walls, and everything in the kill area.

On September 27, 2014, Cabrera was assisting his supervisor with washing and degreasing some equipment. As part of the process, a conveyor had to be started/engaged. As he was climbing a step, he fell into the machine. His right arm got caught, and he was dragged into the machine. His right arm was cut, and when he was finally able to disengage, he noticed his left arm was cut as well.

Cabrera was taken to the University of Louisville Hospital for treatment. Although he was primarily treated by Dr. Elkin Galvis, he initially underwent surgery by Dr. Huey Tien. Cabrera underwent a total of six surgeries for his upper extremities. He missed a period of work until late November 2014, and received TTD benefits while he was off. He returned to lighter duty work, consisting of cleaning pathways, cafeteria tables, locker rooms, bathrooms, and stairwells, along with picking up paper and emptying wastebaskets. Cabrera received two pay increases after returning to work. He was eventually promoted to assistant manager, earning \$27.75 per hour, but left that job due to problems with his manager. He

subsequently operated equipment for a cable/internet installation company, but no longer works there due to his right upper extremity pain.

At his deposition, Cabrera testified he continued to experience problems with muscles and tendons, as well as emotional problems. He testified he was unable to move his right thumb, index, and middle fingers. He continued to complain of pain extending from his right shoulder to his right hand. He wore a glove due to problems with right hand sensation. He testified that skin grafts were taken from his upper arm for his lower arm. He also complained that he occasionally experienced left arm pain with activity.

Cabrera testified that in addition to his surgeries, he has taken medication, had mental counseling, and treated at the University of Louisville Pain Clinic. He stated he continues to take Ibuprofen or Advil. He testified he is unable to obtain other medications because his treatment was denied by the workers' compensation insurer. At the hearing, Cabrera testified he continues to experience right arm pain, and he has poor sensation. He had to learn to write with his left hand because he can no longer hold a pen with his right hand.

Subsequent to the hearing, PSS filed a printout indicating it paid \$127,650.37 in medical bills on Cabrera's behalf.

In support of his claim, Cabrera filed records from the University of Louisville Hospital for treatment received on September 27, 2014. Those records reflect he sustained bilateral forearm lacerations while working on a conveyor belt at work. The notes reflect Cabrera is right hand dominant. He underwent surgical repair of the right wrist by Dr. Tien, and a dorsal blocking splint was applied to the

right arm. Postoperatively, Cabrera developed pain, swelling, and continued bleeding. He followed up with Dr. Galvis, who performed additional surgical procedures. On October 13, 2014, Cabrera was discharged with restrictions against bearing any weight with his right upper extremity. He was encouraged to move his fingers, wrist, and elbow several times per day. On November 12, 2014, Dr. Galvis reiterated Cabrera should not use his right arm. Records from July 14, 2016 to February 13, 2017 indicate Cabrera underwent right stellate ganglion blocks from Dr. Brian Derhake and Dr. Lachlan Smith.

Cabrera next filed Dr. Galvis' treatment notes covering nine occasions between October 1, 2014 and March 1, 2015. Those records outline the treatment administered, and Cabrera's recovery. Dr. Galvis noted Cabrera's infections were eventually controlled, but he developed Complex Regional Pain Syndrome ("CRPS"), frozen right shoulder, and carpal tunnel syndrome in the right wrist. Cabrera also saw Dr. Galvis on March 11, 2015. At that time, it was noted that his pain was improving, but he had a stiff shoulder. Cabrera later filed office notes for visits with Dr. Galvis on five occasions between April 27, 2015 and December 7, 2015. Dr. Galvis documented Cabrera's ongoing pain complaints along with right hand stiffness. He noted a September 6, 2015 EMG demonstrated right media/ulnar neuropathy. On September 9, 2015, he diagnosed Cabrera with axillary neuropathy, CRPS-1, forearm laceration involving a tendon, a radial nerve injury, a median nerve injury, right carpal tunnel syndrome, interosseous nerve injury, and a right shoulder injury/strain.

Cabrera also filed the July 7, 2015 note from the Louisville Pain Management Center. The record reflects Cabrera's complaints of right shoulder and arm pain. The record notes Cabrera developed CRPS-1 after sustaining a complex right upper extremity laceration. It was additionally noted Cabrera was a good candidate for behavioral health pain coping, and a ganglion block was scheduled. Cabrera additionally filed physical therapy records for treatment on multiple occasions from November 4, 2014 through January 23, 2015, reflecting increased mobility, but increased pain with exercise.

Dr. Warren Bilkey evaluated Cabrera on March 7, 2016. He noted Cabrera did not exhibit undue pain behaviors during the interview. He additionally noted Cabrera had mild distress with pain. Dr. Bilkey diagnosed Cabrera with work-related injuries to both arms on September 27, 2014, right forearm postoperative wound infection, status post forearm surgery with grafting, right shoulder strain/adhesive capsulitis with scapular myofascial pain, multiple never injuries affecting the right forearm/shoulder, CRPS, right carpal tunnel syndrome, lumbar strain/chronic back pain, and psychological conditions due to chronic pain/impairment. He determined all of those conditions were caused by the work injury. Dr. Bilkey found Cabrera had reached maximum medical improvement ("MMI"), and assessed a 63% impairment rating pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Bilkey recommended restrictions of no lifting greater than twenty pounds with the left arm, and less than ten pounds with the right. He also indicated Cabrera

should limit pushing and pulling to less than ten pounds frequently. Dr. Bilkey also advised Cabrera to never climb, balance, or crawl.

Dr. Jules Barefoot evaluated Cabrera on February 13, 2019. He noted Cabrera's injuries to both upper extremities, for which he underwent multiple surgical procedures. He noted Cabrera's persistent complaints of pain, markedly poor grip strength, poor ability to manipulate objects, and diminished right wrist mobility. He noted Cabrera complained of pain radiating to the shoulder. Dr. Barefoot determined Cabrera had reached MMI and he assessed a 37% impairment rating pursuant to the AMA Guides due to the work injuries. He restricted Cabrera from lifting, grasping, or carrying on a repetitive basis with the right upper extremity. On March 12, 2019, Dr. Barefoot noted he had reviewed the video surveillance report and photographs, and his opinions remain unchanged.

Dr. Walther J. Butler performed a psychiatric evaluation on November 28, 2016. He noted Cabrera was depressed and tearful during the examination. Cabrera reported he experienced nightmares and dreams related to his work injury. Dr. Butler diagnosed major depressive disorder and post-traumatic distress disorder ("PTSD") due to the work injury. He determined Cabrera had not reached MMI, but assessed a 16% impairment rating pursuant to the AMA Guides.

Cabrera also filed records from Graven and Associates for his treatment with Dr. Rafael Veroslavsky. Dr. Veroslavsky saw Cabrera on three occasions between August 8, 2017 and October 19, 2017 for coping and biofeedback therapy.

Dr. Ellen Ballard evaluated Cabrera at the request of PSS on January 23, 2015. She noted the history of the industrial accident with lacerations of both arms. She noted the left arm had healed. Regarding the right arm, she noted Cabrera sustained complete lacerations of the flexor tendons and developed postoperative infections. She stated his scars correlated with the injuries, and supported a legitimate reason for muscle weakness. She noted Cabrera had give-away weakness in areas that should not have been affected. She also noted his complaints of low back and leg symptoms. She found Cabrera had reached MMI, and may need injections and therapy.

Dr. Ballard prepared a report on August 22, 2018, after she had reviewed additional medical records and a surveillance video. She opined Cabrera had reached MMI in November 2016, and has a 3% impairment rating pursuant to the AMA Guides. Dr. Ballard stated Cabrera was not truthful, and the video demonstrates a greater range of motion than he exhibited on examination.

Dr. Ballard testified by deposition on March 27, 2019. She testified she evaluated Cabrera on three occasions. She first saw him on September 23, 2015. She noted the September 27, 2014 injuries to the right and left arms when he fell into a machine and freed himself. She determined Cabrera had reached MMI when she first saw him if he chose to not undergo injections.

Dr. Ballard next saw Cabrera on June 29, 2016. At that time, he reported he had returned to work. He complained he could not use his right arm. She noted he had limited mobility with his right shoulder, arm, and wrist. She noted skin grafts were present, but he had no signs of atrophy. Dr. Ballard believed at that

time that surveillance should be undertaken because she did not believe his presentation or bizarre reported of loss of sensation. She noted Cabrera actively resisted attempts to measure his range of motion.

She next saw Cabrera on March 26, 2018. He complained of right arm numbness, and the inability to close his hand. She noted he exhibited inconsistent range of motion. She reviewed the surveillance video which she stated showed Cabrera using his right upper extremity without difficulty. After reviewing the video, Dr. Ballard concluded Cabrera could work without restrictions, had an excellent prognosis, exhibited inconsistent behavior/ability, and the injuries did not affect his function. She reiterated the 3% impairment rating, and stated he needs no additional medical treatment. She specifically disagreed with Dr. Barefoot's assessments.

Dr. Douglas Ruth, a psychiatrist, evaluated Cabrera on June 14, 2016. He diagnosed Cabrera with a major depressive disorder and PTSD, both of which were caused by Cabrera's work injuries. He stated Cabrera had no pre-existing active psychological condition. He found Cabrera exhibited no symptom magnification or somatization. Dr. Ruth determined Cabrera had not reached MMI, but could be considered to have reached that state if he did not undergo psychological treatment. If he was to be considered at MMI, Dr. Ruth assessed an 8% impairment rating pursuant to the AMA Guides, 2<sup>nd</sup> Edition.

PPS filed Dr. Ruth's subsequent report dated July 18, 2019. Dr. Ruth noted he had reviewed the surveillance video, Dr. Ballard's deposition, and additional medical records. He diagnosed Cabrera with malingering, and found he did not have PTSD or a major depressive disorder which he had previously

diagnosed. He found Cabrera had reached MMI either at the end of 2015, or at the latest, in March 2018. Dr. Ruth stated Cabrera does not qualify for an impairment rating, nor should any restrictions be imposed.

A telephonic Benefit Review Conference (“BRC”) was held on June 13, 2019. The contested issues listed in the BRC Order include benefits per KRS 342.730, liability for medical expenses, and physical capacity to return to the type of work performed at time of injury.

The ALJ rendered a decision on August 2, 2019 finding Cabrera sustained work-related injuries on September 27, 2014. In addition to physical injuries, the ALJ determined Cabrera had developed a work-related psychological condition. The ALJ discussed the evidence he reviewed, and in particular outlined what he found pertinent from the video surveillance recording introduced at the hearing. The ALJ awarded TTD benefits from September 28, 2014 through November 19, 2014. He also awarded PPD benefits based upon a 71.4% permanent partial disability based upon the 37% impairment rating assessed by Dr. Barefoot, combined with the 8% impairment rating assessed by Dr. Ruth. The ALJ enhanced the award of PPD benefits by two pursuant to KRS 342.730(1)(c)2 beginning December 1, 2018 when Cabrera was no longer employed by PSS. The ALJ additionally awarded medical benefits pursuant to KRS 342.020.

PSS filed a petition for reconsideration, arguing the ALJ erred in relying upon the 37% impairment rating assessed by Dr. Barefoot. It argued the basis for the assessment of the impairment rating is refuted by the surveillance video. PSS argues the ALJ’s review of the video, as outlined in his decision, was inaccurate.

PSS also argues the ALJ erred in relying upon the impairment rating initially assessed, but later rescinded by Dr. Ruth. PSS also argued the ALJ erred in determining the number of weeks of PPD owed before the enhancement pursuant to KRS 342.730(1)(c)2. Cabrera also filed a petition for reconsideration, arguing the ALJ incorrectly determined the combined impairment rating was 47%, instead of 42%.

The ALJ entered an order on August 23, 2019. He found that although he incorrectly found the combined rating was 47% instead of 42%, he correctly awarded PPD benefits based upon 71.4% after calculating the appropriate impairment rating by the grid factor of 1.7. The ALJ also amended the award to correct the number of weeks between the onset of PPD benefits and the application of the two multiplier contained in KRS 342.730(1)(c)2. He also determined Cabrera was not entitled to enhanced benefits until May 1, 2019, rather than December 1, 2018. The ALJ denied all other issues raised by PSS in its petition for reconsideration.

On appeal, PSS essentially argues the ALJ's findings do not comport with applicable law, and are not supported by substantial evidence. It argues the ALJ's decision is arbitrary, capricious, and amounts to an abuse of discretion. PSS specifically argues:

The unusual thing about this case is that Martell returned to full-time work very soon after a serious injury, which is commendable, and he openly maintained a normal, active life, yet he felt compelled to try to milk this claim and his suit against the third party by lying to every doctor he saw. The ALJ said that Packer's petition for reconsideration "overlooks the fact that the person labeled as a 'malingerer' was working on

a full-time basis at the same time.” That is an absurd statement. The ALJ’s primary and most glaring error was in his apparent belief that those two things are mutually exclusive. The fact that Martell was working full-time, and earning a lot of money, does not exclude the possibility that, whenever he went to a doctor to be examined in connection with his workers’ compensation claim, he faked his symptoms so as to maximize the award he hoped to receive. In fact, the surveillance evidence irrefutably shows that this is exactly what he was doing. Are we really to ignore the evidence our own eyes show us because, doggone it, he went back to work? Can that possibly be considered rational? No. In fact, the proposition is such an affront to reason that it must be considered arbitrary and capricious, an abuse of discretion, an unreasonable and unfair decision, and so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.

PSS additionally argues the ALJ erred in basing the award of PPD benefits on the 37% impairment rating, which it argues is not supported by the AMA Guides. It additionally argues the ALJ erred in relying upon the 8% impairment rating initially assessed by Dr. Ruth.

We initially note that as the claimant in a workers’ compensation proceeding, Cabrera had the burden of proving each of the essential elements of his claim. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was successful in his burden, the question on appeal is whether substantial evidence of record supports the ALJ’s decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Substantial evidence” is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ is vested with broad authority in determining causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence supporting a different outcome than reached by an ALJ, this 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).

An ALJ's discretion is not unlimited. In reaching a determination, the ALJ must provide findings sufficient to inform the parties of the basis for the

decision to allow for meaningful review, and as noted above the determination must be based upon substantial evidence. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

The fact Cabrera sustained traumatic injuries on September 27, 2014 is unquestioned as noted by all of the medical evidence of record. The issue lies with the ALJ's determinations regarding the extent of his injuries, and whether the determination of a psychological injury is supported by the record. In reviewing the evidence, we perceive no reversible error. The ALJ outlined the evidence he reviewed, and acted within the scope of his discretion in awarding benefits.

Regarding the reliance on the 8% impairment rating assessed by Dr. Ruth, we find no error. The ALJ's determination falls squarely within the direction afforded by the Kentucky Supreme Court in Amerigas Partners, LB v. Nivison, 2012-SC-000675-WC (not reported) (rendered September 26, 2013)(unpublished). There, the Court determined the ALJ had the right to rely upon the report of a psychiatrist, rather than his deposition testimony contradicting his previous findings. The Court specifically noted, "the ALJ had the right to do so because he has the sole discretion to determine the quality, character, and substance of the evidence and to draw reasonable inferences from that evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985)." Id. The Court additionally noted that where testimony is contradictory, the ALJ has the discretion to "reject any testimony and believe or

disbelieve various parts of the evidence. Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000).” Id.

We find the issues raised by PSS on appeal are nothing more than a re-argument of the case before the ALJ. PSS impermissibly requests this Board to engage in fact-finding and substitute its judgment, as to the weight and credibility of the evidence, for that of the ALJ. That is not the Board’s function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, *supra*. Because substantial evidence supports the ALJ’s determinations, and he properly exercised his discretion, we affirm.

Regarding the allegations that the ALJ’s decision is arbitrary, capricious, and constitutes an abuse of discretion, we again disagree. Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which “implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). We find the ALJ clearly outlined the evidence he relied upon, and exercised the discretion afforded to him in reaching his determination. Therefore, again, we must affirm.

Accordingly, the August 2, 2019 Opinion and Award, and the August 23, 2019 Order on petition for reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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